

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

DENIED: August 2, 2002

GSBCA 15412

MARUT TESTING & INSPECTION SERVICES, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Joseph E. Marut II, President of Marut Testing & Inspection Services, Inc., Penndel, PA, appearing for Appellant.

Gerald L. Schrader, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **HYATT**, **DeGRAFF**, and **GOODMAN**.

DeGRAFF, Board Judge.

The parties entered into a contract that required appellant to provide construction inspection specialist services. Appellant contends that the contract was in force for five years and that respondent breached the contract when it did not fulfill all of its requirements by utilizing appellant's services exclusively during those five years. We conclude that the contract had a three-year term and did not require respondent to fulfill all of its requirements by using appellant's services. Consequently, we deny the appeal.

Findings of Fact

The Contract

In December 1992, the Design and Construction Contracts Branch of the Contracts Division, a part of GSA's Public Buildings Service, Region 2, issued a request for proposals to provide construction inspection services. Exhibit 1.

Section B of the solicitation read, in part, as follows:

SUBJECT: Supplemental Construction Inspection Specialist Services (CIS) on an as-needed basis for a term of one (1) year under a firm fixed price indefinite quantity contract for projects located in the State of New York, except the boroughs of Manhattan, Brooklyn, Queens, Bronx and Staten Island and the counties of Nassau, Suffolk, Rockland and Westchester.

1. The following Bid Schedule is for CIS personnel to perform all the services as required under the Scope of Work

. . . .

4. The CIS shall furnish construction inspection services at various construction sites throughout the life of this contract.

The amount of time by discipline required for each project will be specified later by work order. The hours estimated for all projects are as follows

Exhibit 1 at 35.

The remainder of Section B consisted of five offeror sheets, one for the base year and one for each of four option years. Each sheet listed six disciplines of inspectors (general construction, mechanical, electrical, structural, asbestos abatement, and elevator inspectors). For each discipline, the offeror sheets specified a number of regular work hours and a number of overtime work hours. Offerors were to complete the sheets by inserting an hourly rate for each discipline, multiplying the hourly rate by the specified number of hours, and arriving at a "total evaluated offer price" for the base contract year and four "total evaluated offer price[s]" for each of the four option years. Exhibit 1 at 36-40. The solicitation explained that, for the purpose of evaluating offers and awarding a contract, GSA would add the total price for all options to the total price for the base contract year. Exhibit 1 at 11F. The solicitation stated that the number of hours required for each construction project would be specified later by work orders issued by the contracting officer, and that GSA would pay the contractor for the actual hours worked. Exhibit 1 at 35, 46, 49.

The solicitation's scope of work explained that CIS services included standard services, special services, and shop drawing, submittal review and drafting services. Exhibit 1 at 57-64. The CIS contractor was to "[p]erform all Standard Services covered in the contract and as specified in each Work Order issued by the Contracting Officer." Exhibit 1 at 57. GSA could request the CIS contractor to perform special services and to perform shop

drawing, submittal review, and drafting services, and the contractor could either perform those services or hire someone else to perform them. Exhibit 1 at 61-64.

The solicitation contained several special conditions. Special Condition I, "General Purpose and Intent," read, in part, as follows:

A. This Solicitation, which requires a firm-fixed-price indefinite delivery contract, sets forth the criteria for obtaining a Construction Inspection Specialist (CIS) who shall provide the professional and technical expertise and services described in the enclosed Scope of Work, incident to construction inspection for alteration and construction projects. Services requested under the contract shall be limited by the order limitation provision of this solicitation. Under the contract, the CIS shall provide and perform such construction inspection services as are appropriate, adequate and necessary to monitor and ensure timely progress and quality of work performed by the construction contractor and its subcontractors and ensure that said contractors perform in full compliance with all the terms and conditions of the construction contract.

. . . .

C. The Construction Inspection Services shall be performed for projects in the designated areas.

Exhibit 1 at 43.

Special Condition III, "Contract Term," read, in part, as follows:

A. Work Orders under this contract may be issued by the contracting officer at any time during the one-year period of this contract, provided that the total ordering limitation for the one-year period if [sic] not exceeded. Actual performance of work may extend beyond the one-year period.

B. In accordance with the clause entitled, "OPTION(S)", the term of this contract may be extended for four (4) additional 1-year periods.

Exhibit 1 at 45.

Special Condition IV, "Option(s)," gave the Government the option to extend the contract term, one year at a time, for four years. Exhibit 1 at 45. If GSA wanted to extend the term of the contract, it had to provide the contractor with written notice of its intent to extend the contract term, before the contract term expired. Exhibit 1 at 120. The solicitation explained that GSA was not obligated to exercise the options, and that five years was the maximum duration of the contract. Exhibit 1 at 11F, 45, 120. The contract contained a clause regarding continuity of service, which provided that when the contract's term expired, the contractor would assist GSA in achieving a smooth transition to the following contractor. Exhibit 1 at 125.

Special Condition V, "Work Orders," read, in part, as follows:

A. The sole ordering activity for this contract shall be the Contracting Officer within the General Services Administration, Region 2, Design and Construction Contracts Branch, 2PPC.

Exhibit 1 at 46. Special Condition IV explained that funds were not presently available for the award of work orders beyond the base contract year, and that GSA's ability to award new work orders was contingent upon the availability of appropriated funds. Exhibit 1 at 45.

Special Condition VI, "Minimum/Maximum Contract and Order Limitation," read, in part, as follows:

A. The Government's intended order(s) and the CIS's obligation to furnish services under the contract as a whole shall not exceed 125 percent of the total evaluated bid price; the minimum orders shall be at least ten (10) percent of the evaluated bid price.

. . . .

D. The total estimated hours for each year of this contract are shown elsewhere in this contract. No guarantee is given that any specific quantity will be purchased except as noted in paragraph (A) above.

Exhibit 1 at 47.

Special Condition IX, "Fee, Payment and Unit Prices," read, in part, as follows:

A. Fee

1. The Government shall pay the CIS a cumulative fixed fee for all services and materials outlined in this contract within the limitations of Paragraph VI above. The actual fee will be established by subsequently issued Work Orders.

Exhibit 1 at 49.

The solicitation also provided that GSA would owe interest to the contractor if it did not make an invoice payment within a certain time. Interest was not owed, however, if a delay in payment was due to a "disagreement between the Government and the Contractor over the payment amount" Exhibit 1 at 106. In addition, if GSA received an improper invoice, it was supposed to notify the contractor of the defect within seven days after receipt. If GSA did not do so and the contractor later submitted a corrected invoice, the payment due date on the corrected invoice would be adjusted by subtracting the number of days in excess of seven that GSA took to notify the contractor that the original invoice was improper, and any interest penalty owed would be based upon the adjusted due date. Exhibit 1 at 103-06.

The solicitation explained that GSA would evaluate each offeror's experience and past performance. In order to be considered for award, each offeror had to demonstrate that it had

experience performing construction inspection services on at least five "comparable projects of comparable size and complexity (generally, repair and alteration type projects, approximately \$25,000 to \$5,000,000 in construction cost)." Exhibit 1 at 11C.

In March 1993, Marut Testing & Inspection Services, Inc. submitted a proposal in response to the solicitation. Its total evaluated offer price for the base year and for each of the four option years was \$310,232 per year. Exhibit 1 at 4-9. Marut added its prices for all five years and arrived at a total of \$1,551,160 for five years. Exhibit 1 at 9. According to the information that Marut provided to GSA as part of its proposal, for the calendar year immediately preceding the year in which the contract was awarded, Marut made a pre-tax profit of slightly less than eleven percent. Exhibit 1 at 26. Marut used a profit factor of ten percent when it prepared its proposal. Transcript at 530-31.

In October 1993, before awarding a contract, GSA prepared two forms determining that Marut's proposed price was reasonable and recommending Marut for award of the contract. The forms listed Marut's proposed prices for the base contract year and for each of the four option years. One form, headed "Determination of Price Reasonableness," added these amounts together to show a "Tot. Eval." of \$1,551,160. Exhibit 325. On the second form, headed "Recommendation for Award(s)," Marut's proposed prices for the base contract year and for each of the four option years were added together to show a "Total Evaluated Price" of \$1,551,160. In addition, the second form contained a certification of funds that said, "Funds in the amount of \$155,116.00 are available for award of the contract under this procurement." Exhibit 320. The person who was the contracting officer when the contract was awarded to Marut and under whose supervision the solicitation was prepared initially testified that the \$155,116 figure pertained to the base year of the contract. After answering several more questions about the form containing that figure, he said that the \$155,116 figure was ten percent of the total of the base year plus the option years and that the certification of funds was for five years, which meant that GSA would not have to obtain any additional certifications in subsequent years. Transcript at 72, 93, 98-100. So far as our record shows, GSA never obtained another certification.

Also in October 1993, GSA sent a letter to the Department of Labor stating that it was considering awarding a contract to Marut. GSA asked Labor to perform an Equal Employment Opportunity compliance review of Marut, because "the contract, including options, is expected to exceed \$1,000,000." Exhibit 321.

On October 28, 1993, GSA awarded the contract to Marut. Exhibit 1. After award, GSA prepared an award synopsis that listed the "dollar amount" as \$1,551,160. Exhibit 319. The person who was the contract specialist at the time of award explained that the award synopsis was published in the Commerce Business Daily and anyone who received a solicitation or who submitted a bid in response to the solicitation would have expected the award synopsis to state the price of the base year plus four option years because the solicitation required prices to be submitted for a base year plus four option years and said that the award would be based upon the sum of the prices for those five years. Transcript at 275, 320-21, 381.

When Marut's contract took effect, the design and construction division of the Public Buildings Service, Region 2 was responsible for overseeing construction work for projects

in excess of \$25,000. Transcript at 165-66, 177, 208. Although the design and construction division employees were not aware of the specifics of any individual CIS contract, they knew that such contractor services were available to them. Transcript at 247-50. When the design and construction division needed CIS services, its policy was to notify the contracts division so that the contracting officer could issue a task order to a CIS contractor. Transcript at 140. The design and construction division included architects, engineers, and other people with technical knowledge who worked in the construction area. Transcript at 201. Within the design and construction division, contractor-provided CIS services were viewed as supplementing the primary resource for inspection services, which was GSA employees. Transcript at 249, 252-58. The director of the contracts division when Marut's contract was awarded explained that the solicitation said that it was for "supplemental" CIS services because as GSA's work force grew smaller, it began using contractors to supplement its own work force. Transcript at 166-67.

When Marut's contract took effect, the property management and safety division of the Public Buildings Service, Region 2 was responsible for operating buildings in GSA's Region 2. Building managers in upstate New York, who were part of the property management and safety division, had contracting authority up to \$25,000 (subsequently increased to \$100,000) for repairs and alterations to their buildings. Transcript at 138, 164, 207-09, 437. Although GSA did not have any construction inspection positions in its property management and safety division, it had building managers and other employees on its staff who were capable of performing construction inspection services. Transcript at 219-20; Exhibits 346 at 20, 347. While the building manager employees might not have been aware of the specifics of any individual CIS contract, they knew that such contractor services were available to them. If a building manager needed CIS services, he would notify the design and construction division or the contracts division. Transcript at 165, 208-09. The contract between Marut and GSA did not provide that GSA's building managers could issue work orders under the contract. Exhibit 1 at 46; Transcript at 165.¹

The Base Year and the Option Years

On November 30, 1993, GSA issued Work Order Number 1 to Marut, to provide a general construction inspector for CIS services at the federal building in Syracuse, New York. The dollar amount of the work order was \$7779.20. Exhibit 4. GSA paid Marut \$7779.20 in connection with this work order. Exhibits 5, 6, 7.

On October 19, 1994, GSA exercised its option to extend the contract for one year by issuing a contract modification that said the contract period was extended to October 27, 1995. Exhibit 2.

¹ In January 1995, the Public Buildings Service, Region 2 reorganized. The design and construction division became the property development division. Transcript at 182, 417-18. The building managers in upstate New York became part of the upstate property management center. Transcript at 215. The contracts division became the property management division, and the contracting officer for Marut's contract was in this division. Transcript at 137, 417.

On December 9, 1994, GSA issued Work Order Number 2 to Marut, to provide a general construction inspector for CIS services at the federal building in Rochester, New York. The dollar amount of the work order was \$23,337.60. Exhibit 8. GSA paid Marut \$17,381.66 in connection with this work order, which was the amount for which Marut submitted invoices. Exhibits 9-13.

On May 23, 1995, GSA issued a third work order to Marut, to provide a general construction inspector for CIS services at the border station in Champlain, New York. The dollar amount of the work order was \$26,643.76. Exhibit 14. GSA paid Marut \$25,282.40 in connection with this work order. Although Marut submitted invoices for the entire dollar amount of the work order, Marut agreed that it was appropriate for GSA to withhold \$1361.36. Exhibits 15-22.

On October 25, 1995, GSA exercised its option to extend the contract for one year by issuing a contract modification that said the contract period was extended to October 27, 1996. Exhibit 3. GSA never issued any work orders to Marut during this option year, and did not exercise any other options.

As far as our record shows, GSA did not contract with anyone other than Marut to provide CIS services in the area where the contract with Marut was in effect during the base year or the first option year of Marut's contract. In September of the second option year, GSA contracted with a firm to provide architect/engineer design services for the construction of a new courtroom. The contract included approximately \$8000 of CIS services that were performed in 1997 and 1998. Exhibit 30, Set 1A at 13-14.

Marut's Payment Requests

In July 2000, Marut's president, Joseph E. Marut II, met with the contracting officer. In the course of that meeting, the contracting officer conferred for approximately five minutes with a GSA attorney regarding the minimum amount of orders that were guaranteed to Marut by the CIS contract. The attorney advised the contracting officer that the guaranteed minimum was based upon the combined prices of the base year and all four option years (\$1,551,160). Mr. Marut told the contracting officer that Marut intended to submit a claim based upon this advice. Later, when the contracting officer attended a class and learned that unexercised options do not become part of a contract, she again spoke with the GSA attorney about Marut's contract. They agreed that Marut was entitled to be paid the minimum amount guaranteed by the contract based upon the three years that the contract was in effect. Exhibit 212; Transcript at 10, 612-13.

On August 13, 2000, Marut sent the contracting officer a document labeled "Payment Request." The request contained an invoice number, 2000-0013, and asked for \$1,888,506.74. Marut arrived at this amount as follows:

\$1,551,160 x 125%	\$ 1,938,950.00
Amount paid by GSA	50,443.26
Balance due	1,888,506.74

Marut derived the 125% multiplier from special condition VI of the contract, which provided that GSA's intended orders and Marut's obligation to furnish services under the contract as a whole would not exceed 125% of the total evaluated bid price. Exhibit 23.

On September 15, Marut sent the contracting officer a document labeled "Claim for Unpaid Amount." The claim included a statement/payment request that contained the same invoice number as the August 13 payment request. The statement asked for payment of \$1,888,506.74, plus interest "calculated [and] paid in accordance with established GSA guidelines Exp. [sic] Prompt Payment Act." The claim also contained a certification and a request for a final decision by the contracting officer. Exhibit 24.

On September 25, the contracting officer replied to Marut's August 13 invoice and its September 15 claim. The contracting officer rejected the invoice because it exceeded the amount that GSA owed to Marut. The contracting officer read special condition VI of the contract as providing that Marut was entitled to receive minimum orders worth ten percent of each year's contract price for each year that the contract was in effect. Marut's price per year was \$310,232.20. The contracting officer determined that the minimum orders placed against Marut's contract should have been \$31,023.20 for each of the three years that the contract was in effect, for total minimum orders of \$93,069.60. During those three years, GSA placed orders worth \$57,760.56. The contracting officer decided that Marut was entitled to an additional \$35,309.04 in order to fulfill the minimum guaranteed order provision of the contract, and advised Marut to submit an invoice for that amount. Exhibit 25.

On September 28, Marut sent the contracting officer a document labeled "Statement/Payment Request" that contained the same invoice number as the August 13 payment request. The statement asked GSA to pay the \$35,309.04 that the contracting officer decided was due, and Marut said it would consider that amount to be a partial payment of the total past due balance of \$1,888,506.74 plus interest. The statement also said that the entire \$1,888,506.74 plus interest was the "amount due this payment request." Exhibit 210.

On September 29, 2000, Marut filed this appeal. Exhibit 26.

On October 1 or 2, Marut submitted another statement/payment request to the contracting officer. This statement contained the same invoice number as the August 13 payment request and asked GSA to pay \$35,309.04 plus \$62,046.40, both of which Marut characterized as uncontested by GSA, as a partial payment of the total past due balance of \$1,888,506.74 plus interest. Marut characterized the \$35,309.04 as uncontested, based upon the contracting officer's September 25 response to Marut's claim. Marut characterized the \$62,046.40 as uncontested, reasoning that because GSA agreed that Marut was due minimum orders of \$31,023.20 per year, it should also agree that Marut was due this amount per year for the two unexercised option years. The statement also said that the entire \$1,888,506.74 plus interest was the "amount due this payment request." Exhibit 213.

On October 2, the contracting officer wrote to Marut and said that she had received its most recent payment requests via telefax. She explained that GSA would not make payments based upon telefaxed copies of invoices, and asked Marut to submit an original

invoice to her. She also noted that both of the payment requests said that Marut was asking to be paid \$1,888,506.74, and explained that Marut needed to submit an invoice that clearly showed that the amount being requested was \$35,309.04. Exhibit 214.

On October 13, Marut sent two letters to the contracting officer, asking to be paid two different amounts as a partial payment of the total amount it claimed was due. Both letters contained the same invoice number as the August 13 payment request. Both letters said that the entire \$1,888,506.74 plus interest was the "amount due this payment request." One of the October 13 letters asked to be paid \$35,309.04 plus \$62,046.40, the same amounts requested in Marut's previous statement. Exhibit 223. The second October 13 letter asked for \$407,719.44, which Marut said was ten percent of the contract price (\$1,551,160, according to Marut) for each of three years, minus the total orders placed by GSA (\$57,760.56). Marut characterized this amount as uncontested by GSA. Exhibit 222.

On November 6 and 10, in brief telefaxed messages, Marut asked the contracting officer to pay \$35,309.04, pursuant to Marut's September 28 statement. Exhibits 227, 228. On November 13, the contracting officer contacted Mr. Marut regarding these payment requests. Mr. Marut understood that the contracting officer would process the paperwork needed in order to pay Marut \$35,309.04. Exhibit 230. On November 16, the contracting officer issued a purchase order to Marut for \$35,309.04, based upon her determination that Marut was owed \$35,309.04 to fulfill the minimum guarantee contained in the contract. The purchase order said that GSA would pay Marut upon receipt of a proper invoice. Exhibit 231; Transcript at 291-92.

On November 20, Marut sent another statement/payment request to the contracting officer, containing the same invoice number as the August 13 payment request and asking to be paid the \$35,309.04 that the contracting officer decided was due, which Marut said it would consider to be a partial payment of the total past due balance of \$1,888,506.74 plus interest. The statement also said that the entire \$1,888,506.74 plus interest was the "amount due this payment request." Exhibit 233. The contracting officer received this statement on December 4. Although the contracting officer had earlier advised Mr. Marut to submit an invoice for only \$35,309.04 so as not to confuse GSA's Finance Office, and although she did not view Marut's statement as constituting an acceptable invoice, she forwarded the statement to the finance office on December 4, and advised that office to accept it and to pay Marut \$35,309.04. Exhibits 31, 294; Transcript at 618-22.

On December 18, Marut amended the second October 13 letter to request \$407,641.44, to correct what it called a typographical error. Exhibits 286, 304. Neither the figure in Marut's original October 13 letter nor the figure in its amended letter is accurate. Ten percent of \$1,551,160 multiplied by three ($\$155,116 \times 3 = \$465,348$) minus the total orders placed by GSA (\$57,760.56) amounts to \$407,587.44.

On December 20, Marut sent the contracting officer a statement/payment request containing the same information and requests as the November 20 statement. Exhibit 294.

On December 29, GSA paid \$35,309.04 to Marut. Exhibit 295.

On January 3, 2001, Marut sent the contracting officer another statement/payment request. In this statement, Marut asked to be paid \$372,278.40, which Marut characterized as ten percent of the contract price for three years ($\$155,116 \times 3 = \$465,348$) minus the total orders placed by GSA (\$57,760.56) minus the \$35,309.04 payment. The statement also said that \$1,853,197.70 plus interest was the "amount due this payment request." Exhibit 306. Marut sent the contracting officer a second January 3 statement/payment request that asked for \$1,853,197.70 plus interest. Marut explained that the amount requested was the \$1,888,506.74 it asked to be paid on August 13, minus the \$35,309.04 payment. Exhibit 307.

On January 4, Marut sent the contracting officer a statement/payment request asking for whatever interest was due on the \$35,309.04. Exhibit 295.

Discussion

Marut contends that its CIS services contract was in effect for five years and that GSA breached its contractual obligations when it did not fulfill all of its requirements for CIS services in upstate New York by utilizing Marut's contract exclusively to acquire those services during the five-year duration of the contract. Complaint ¶ 25; Appellant's Post-Hearing Brief at 1; Appellant's Damages Brief at 1. Marut also contends that it is due interest on its claim.²

We conclude that the contract had a three-year term and did not require GSA to utilize Marut's services to fulfill all of its needs for CIS services. Although GSA placed orders for less than the minimum amount guaranteed by the contract, the contracting officer's decision acknowledged this and paid Marut more than the amount to which Marut was entitled.

I. The Terms of the Contract

A. The contract's duration

Marut says that the contract was in effect for a total of five years, until October 27, 1998, because GSA never notified Marut that the contract ended at the conclusion of the

² Marut also asserts that the contracting officer failed to ensure that GSA complied with the directives contained in Office of Management and Budget Circular No. A-76. Appellant's Proposed Finding of Fact 110. This assertion fails to state a claim upon which relief can be granted because, according to its terms, the circular does not establish "any substantive or procedural basis for anyone to challenge any agency action or inaction on the basis that such action or inaction was not in accordance with this Circular," with certain exceptions not applicable here. OMB Circular No. A-16 (Revised Aug. 1983) at ¶ 7.c.(8); Dixon Pest Control, Inc., ASBCA 41042, 92-1 BCA ¶ 24,609 (1991). Even if Marut's assertion stated a claim, we would lack jurisdiction to consider it because Marut did not raise this issue in the claim that it submitted to the contracting officer. 41 U.S.C. § 605 (2000).

second option year on October 27, 1996.³ In support of its contention, Marut relies upon the contract's continuity of service clause and upon 48 CFR 517.207 and 552.217-71 (1994). Appellant's Proposed Findings of Fact 136, 137, 138, 190-94. The continuity of service clause provided that when the contract's term expired, the contractor would assist GSA in achieving a smooth transition to the following contractor. The first regulation, 48 CFR 517.207, contains factors that GSA could take into account when it decided whether to exercise an option. The second regulation, 48 CFR 552.217-71, is a contract clause that was not included in Marut's contract. The clause provided that GSA would consider the quality of a contractor's past performance when deciding whether to exercise an option.

We do not agree with Marut's position, for two reasons. First, neither the continuity of service clause nor the two regulatory provisions imposed any obligation upon GSA to notify Marut that the contract ended at the conclusion of the second option year on October 27, 1996. Second, the contract cannot be reasonably read as having been in effect after October 27, 1996. GSA awarded the contract on October 28, 1993. The contract had a one-year term and gave GSA the option to extend the term for four additional one-year periods. GSA modified the contract twice in order to exercise two of the options. The first modification clearly stated that the term of the contract was extended to October 27, 1995, and the second modification just as clearly stated that the term of the contract was extended to October 27, 1996. GSA never notified Marut that it would extend the term of the contract past October 27, 1996, as the contract required GSA to do if it wished to exercise an option and extend the contract's term. The contract, as modified, plainly provided that its term ended on October 27, 1996, and there is no language in the contract to support a contrary reading.

GSA had the right to extend the term of the contract to October 27, 1998, but did not do so. The contract modification that exercised the second option provided that the contract term was extended to October 27, 1996, and GSA had no obligation to notify Marut that the contract meant what it said. The contract had a term of three years, consisting of the base year plus two exercised option years, and it ended when GSA did not exercise its option to extend the term any further.

B. The nature of the contract

Marut says the contract required GSA to fulfill all of its needs for CIS services in upstate New York by utilizing Marut's contract, and that it contained a guarantee that GSA would order a minimum amount of services from Marut.⁴ Appellant's Post-Hearing Brief at

³ GSA was not obligated to exercise its options to extend the term of the contract beyond October 27, 1996. Aspen Helicopters, Inc. v. Department of Commerce, GSBCA 13258-COM, 99-2 BCA ¶ 30,581, aff'd, 243 F.3d 561 (Fed Cir. 2000) (table). Marut does not argue otherwise.

⁴ In its post-hearing briefs, Marut also says that this was a "schedule contract." Appellant's Post-Hearing Brief at 8; Appellant's Reply Brief at 7. Schedule contracts were awarded by GSA's Federal Supply Service, which established lists of standard commercial products and related services known as supply schedules that federal agencies could use to

1-3. GSA reads the contract as requiring it to order a minimum amount of services from Marut, but not as requiring it to fulfill all of its needs by utilizing Marut's contract. Respondent's Post-Hearing Brief at 1-2.

A contract that obligates an agency to fulfill all or a specified portion of its needs during a specified period of time from only one contractor is an indefinite delivery requirements contract. A contract that does not obligate an agency to fulfill any of its needs from one contractor and, instead, only obligates the agency to buy at least a stated minimum amount of goods or services from a contractor is an indefinite delivery indefinite quantity contract. Whether a contract is an indefinite delivery requirements contract or an indefinite delivery indefinite quantities contract is a matter of law. Travel Centre v. Barram, 236 F.3d 1316 (Fed. Cir. 2001).

In support of its position that the contract required GSA to fulfill all of its needs by utilizing Marut's contract, Marut calls our attention to Special Condition I.A of the contract, which reads, in part, "This Solicitation . . . sets forth the criteria for obtaining a Construction Inspection Specialist (CIS) who shall provide the professional and technical expertise and services described in the enclosed Scope of Work" Marut also points to Special Condition I.C, which reads, in part, "The Construction Inspection Services shall be performed for projects in the designated areas." Marut notes that the contract's scope of work said that the contractor was to "[p]erform all Standard Services covered in the contract and as specified in each Work Order issued by the Contracting Officer." In addition, Marut notes that Section B of the contract said that GSA was soliciting "personnel to perform all the services as required under the Scope of Work . . . " and provided that the contractor "shall furnish construction inspection services at various construction sites throughout the life of [the] contract." Marut reads these contract provisions, which said that it "shall" perform "all" of the services required by the scope of work, as imposing an obligation upon GSA to fulfill all of its requirements for CIS services in upstate New York by utilizing Marut's services. Appellant's Proposed Findings of Fact 63, 64, 128.

In addition to the provisions pointed out by Marut, there are other contract provisions that bear upon the nature of the contract.⁵ For example, section B of the contract says that it is an indefinite quantity contract. Although such labels do not conclusively determine the nature of a contract, they are part of the contract language and we should not ignore them. In addition to the language identifying the contract as one for an indefinite quantity, the contract obligated GSA to purchase a stated minimum amount of services from Marut. Also, the contract describes the services being purchased as "supplemental" CIS services, and says

order the listed supplies and services. 48 CFR 8.401 (1994). There is nothing to support Marut's contention that this contract, which was awarded by a GSA regional office and against which only the contracting officer in that regional office could place orders, was a schedule contract.

⁵ The contract does not contain either the requirements clause or the indefinite quantities clause as required by regulations in effect when the contract was awarded. 48 CFR 16.505 (1994).

that projects comparable to those for which the contractor's services would be utilized were repair and alteration projects that cost between \$25,000 and \$5,000,000.

Reading the contract's provisions harmoniously and giving meaning to them all, we conclude that the contract is an indefinite quantity contract. The contract is for supplemental CIS services, which means that the contractor would provide services in addition to other CIS services. In other words, the contractor would not be the exclusive source of CIS services. This is consistent with the contract's description of projects comparable to those for which the contractor's services would be utilized, which included only repair and alteration projects within a particular cost range. In addition, the contract contained a promise that GSA would place a minimum amount of orders for Marut's services. Such a promise is an essential ingredient of an indefinite quantity contract, but would be superfluous in a requirements contract. The contract did not contain the essential ingredient of a requirements contract, which is a promise that the agency would purchase services exclusively from the contractor. The contract provisions relied upon by Marut describe its own contractual obligations, not GSA's obligations. Although these provisions impose an obligation upon Marut to perform and to provide the services contained in the contract's statement of work, they do not impose an obligation upon GSA to fulfill all of its requirements by utilizing only Marut's contract to obtain CIS services in upstate New York. Coyle's Pest Control, Inc. v. Cuomo, 154 F.3d 1302, 1305-06 (Fed. Cir. 1998); Mason v. United States, 615 F.2d 1343 (Ct. Cl.), cert. denied, 449 U.S. 830 (1980). Because the contract obligates GSA to order a minimum quantity of services from Marut and does not obligate GSA to fulfill all of its needs by utilizing only Marut's services, we conclude that the contract is an indefinite delivery indefinite quantity contract.

C. Minimum quantity

Marut's total evaluated offer price for the base contract year and for each of the four option years was \$310,232 per year. The sum of the total evaluated offer prices for all five years is \$1,551,160 (\$310,232 x 5). Marut says the minimum quantity of services that GSA promised to order per year was \$155,116 (which is ten percent of \$1,551,160) and that GSA was obligated to order this amount per year for each of five years. Appellant's Proposed Findings of Fact 180-89; Appellant's Post-Hearing Brief at 3; Appellant's Damages Brief at 1-16. GSA says the minimum quantity of services it promised to order per year was \$31,023.20 (which is ten percent of \$310,232) and that it was obligated to order this amount per year for each year that the contract was in effect. Respondent's Post-Hearing Brief at 16.⁶

⁶ In its post-hearing brief, GSA suggests that another way to read the contract is to say that each individual delivery order had to be a minimum of ten percent of the evaluated bid price. Respondent's Post-Hearing Brief at 13-14. However, as GSA points out in its brief, such a reading is not in keeping with either the language of the contract or the conduct of the parties. Although neither party suggested it, there is one other way to read the contract, which is to say that the maximum and minimum order limitations applied to the sum of the total evaluated offer prices for all five years, no matter how long the contract was in existence. This would mean, however, that during the base contract year alone GSA could have ordered \$1,938,950 of work and was obligated to order \$155,160 of work. It is not reasonable to read the contract as allowing GSA to require Marut to perform \$1,938,950 of

Reading the contract to say that GSA was obligated to place a minimum amount of orders for five years conflicts with the contract's provisions regarding options, which did not require GSA to extend the contract's term past the base year. It also conflicts with the contract, as modified, which had a term of three years. The contract did not guarantee that any minimum amount of orders would be placed to cover a period of time, such as the two unexercised option years, when the contract was not in effect, and we will not read the contract's provisions to lead to such a result.

Reading the contract to say that GSA was obligated to order a minimum quantity of \$155,116 per year is inconsistent with special condition VI of the contract, which provided that GSA's orders under the contract as a whole would not exceed 125% of the total evaluated bid price, and that the minimum orders would be at least ten percent of the evaluated bid price. Although special condition VI did not define the "evaluated bid price," the contract's bid schedule referred to each individual year's total price as the "total evaluated offer price" for that year. The difference in wording between the bid schedule and special condition VI does not convince us that the special condition meant anything other than each individual year's price when it referred to the evaluated bid price. In order to read special condition VI to say that GSA was obligated to order a minimum quantity of \$155,116 per year, we would have to conclude that the term "evaluated bid price" means the sum of the total evaluated offer prices for the base contract year plus all four option years (\$1,551,160), and that GSA was obligated to order a minimum of ten percent of that sum (\$155,116) per year. Reading the contract in this way, however, an inevitable inconsistency would have resulted if GSA had exercised any of the option years. For example, if GSA had exercised all four option years, its minimum order obligation during the five year term of the contract would have been \$775,580 (\$155,116 x 5), which would have been fifty percent, not ten percent, of the "evaluated bid price." We will not read the contract in a way that creates an inconsistency between its terms.

Special condition IV of the contract provided that GSA was obligated to order ten percent of the evaluated bid price, and this meant ten percent of each year's total evaluated offer price for each year that the contract was in effect. If GSA had exercised all four option years and the contract had had a term of five years, the evaluated bid price for the five-year contract would have been \$1,551,160, and GSA's minimum order obligation for the contract as a whole would have been ten percent of that amount, or \$155,116. If GSA had exercised none of the options, the contract would have had a one-year term, the evaluated bid price for the one-year contract would have been \$310,232, and GSA's minimum order obligation for the contract as a whole would have been ten percent of that amount, or \$31,023.20. Because GSA exercised two options and extended the term to a total of three years, the evaluated bid price for the three-year contract was \$930,696 (\$310,232 x 3) and GSA's minimum order obligation for the contract as a whole was ten percent of that amount, or \$93,069.60.

Although the price reasonableness form and the recommendation for award form that GSA prepared shortly before it awarded the contract added the base contract year's price to

work during the base year, given that the total evaluated offer price for that year was only \$310,232, or as obligating GSA to order \$155,160 of work during the base year, which is fifty percent of the total evaluated offer price for that year.

the price of all four option years and called the sum (\$1,551,160) the "Tot. Eval." or the "Total Evaluated Price," these forms are not part of the contract and they do not contain any reference to the minimum orders that GSA was required to place against Marut's contract. They are consistent with GSA's statement that it would add the total price for all options to the total price for the base contract year for the purpose of evaluating offers and awarding a contract. We will not read the reference in the forms to "Tot. Eval." and "Total Evaluated Price" as conflicting with or supplanting the contract's express provisions regarding the minimum order guarantee.

Marut says that its reading of the contract's minimum guarantee provision is bolstered by three additional documents that were not included in the contract. Marut first looks to the recommendation for award's certification of funds, which said that \$155,116 was available for award of the contract. Marut reasons that because the contract said that funds were not available beyond the base year and because funds of \$155,116 were certified as available for award, then the entire \$155,116 must have been available during the base year of the contract, which must mean that \$155,116 was the minimum amount of orders guaranteed in one year. Second, Marut looks to the award synopsis, which listed the "dollar amount" of the contract as \$1,551,160. The third document upon which Marut relies is GSA's request for an Equal Employment Opportunity review, which said that the contract was expected to exceed \$1,000,000. Appellant's Post-Hearing Brief at 2-5. We do not conclude that any of these documents supports Marut's reading of the contract.

Regarding the certification of funds, we agree with Marut that the contract said that funds were not available beyond the base year and that funds of \$155,116 were certified as available for award. We do not conclude, however, either that the entire \$155,116 must have been available during the base year of the contract or that \$155,116 was the minimum amount of orders guaranteed in one year. There is no evidence to shed any light upon what the person who signed the certification of funds meant by the certification or what he knew about the terms of the contract. Perhaps he intended for his certification to set aside \$31,023.20 per year for five years, which would be consistent with GSA's reading of special condition VI and which would also be consistent with the fact that no additional certification was obtained in order to make funds available during the first and second option years.⁷ Perhaps he meant to set aside fifty percent of the total evaluated offer price for the base contract year. The certification says only that \$155,116 was available for award. It does not say that this amount was meant to cover the guaranteed minimum orders that GSA was obligated to place during any particular period of time, and it does not say what minimum amount of orders GSA guaranteed during each year of the contract.

Marut's position is not improved by the award synopsis. The regulations in effect when GSA awarded Marut's contract required agencies to publish synopses of proposed

⁷ A GSA Order suggests that funds for this contract could have been certified as available for more than one year. GSA Order 4251.1 COM P, vol. 3, ch. 1, pt. 2 (June 18, 1993), explains that the budget activity for Marut's contract (BA90) is subject to no-year budget authority. No-year budget authority allows obligations to be incurred for an indefinite time, usually until the objectives of the program have been achieved. In contrast, annual budget authority allows obligations to be incurred only during a specified fiscal year.

contract actions and contract awards in order to provide businesses with information about agency acquisitions. 48 CFR pt. 5 (1994). The person who was the contract specialist when the contract was awarded explained that anyone who received a solicitation or who submitted a bid in response to the solicitation would have expected the award synopsis to state the price of the option years plus the base year, because the solicitation said that, for the purpose of evaluating offers and awarding a contract, GSA would add the total price for all options to the total price for the base contract year. The contract specialist's explanation is logical because it means that the solicitation and the award synopsis provided businesses with consistent information about the proposed contract and the awarded contract. Although the award synopsis listed the "dollar amount" of the contract as \$1,551,160, the award synopsis did not purport to address, much less to affect, the contract's provisions regarding the minimum quantity of orders guaranteed by the contract.

Similarly, GSA's request for an Equal Employment Opportunity review by the Department of Labor does not support Marut's reading of the contract. According to the regulations in effect when Marut's contract was awarded, if the estimated amount of a contract was expected to aggregate \$1 million or more, the contracting officer was required to ask Labor for such a clearance. 48 CFR 22.805 (1994). The request that GSA made to Labor clearly said that the contract, including options, was expected to exceed \$1,000,000. There is no way to read GSA's request as stating or implying that the base contract year alone would exceed \$1,000,000. Like the certification of funds and the award synopsis, the request that GSA made to Labor did not affect the contract's provisions regarding the minimum quantity of orders guaranteed by the contract.

In summary, the evaluated bid price for this three-year contract was \$930,696 and GSA's minimum order obligation for the contract as a whole was ten percent of that amount, or \$93,069.60. In order to evaluate the offers that it received, GSA added the total price for the base year to the total prices of all four option years. The result of GSA's addition is shown on two internal forms prepared by GSA, on the award synopsis, and on the request for review that GSA made to Labor, none of which is a part of the contract. The forms did not purport to have any bearing upon the contract's provision regarding minimum guaranteed orders, and we will not read them as conflicting with the terms of the contract.

After Marut submitted its claim to the contracting officer and GSA realized that it had not ordered the minimum guaranteed amount, it paid Marut an additional \$35,309.04. As GSA recognizes in its post-hearing brief, however, the amount of this payment was not appropriate. Respondent's Post-Hearing Brief at 16-17. In White v. Delta Construction International, Inc., 285 F.3d 1040 (Fed. Cir. 2002), the Court held that when the Government breaches a contractual provision obligating it to order a minimum amount of work, the proper basis for damages is the loss the contractor suffered, not the full amount it would have received if the government had placed the minimum amount of orders. The Court explained that a contractor should not be placed in a better position than it would have occupied if it had received the minimum guaranteed amount of orders and incurred the costs associated with performing the work required by the orders.

Applying the holding in Delta Construction to our case leads to the conclusion that GSA has overpaid Marut. GSA guaranteed Marut minimum orders of \$93,069.60, and it ordered and paid for \$50,443.26 of services, leaving a net of \$42,626.34 worth of services

that it should have ordered. Marut earned nearly an eleven percent profit the year before the contract was awarded and based its proposal upon earning a ten percent profit. Assuming that Marut would have earned a ten percent profit if it had performed an added \$42,626.34 of work, it would have earned a profit of \$4262.63. Marut has not established that it incurred any damages other than lost profits due to GSA's failure to order the minimum amount guaranteed by the contract. We conclude, therefore, that Marut was damaged by approximately \$4262.63 due to GSA's failure to order the minimum amount guaranteed by the contract. When GSA paid \$35,309.04 to Marut on December 29, 2000, it put Marut in a better position than it would have occupied if it had performed the additional \$42,626.34 of work. Thus, although GSA did not order the minimum guaranteed amount of services, GSA owes Marut nothing more.

II. Interest

In its claim, Marut asked to be paid Prompt Payment Act (PPA) interest.⁸ Exhibit 24. In connection with this portion of its claim, Marut asserts that its August 13, 2000 invoice was proper and that the contracting officer should not have determined otherwise. Marut complains that the contracting officer did not comply with applicable regulations implementing the PPA by informing Marut that she considered the invoice to be improper. Appellant's Proposed Findings of Fact 142, 197-204, 230-34, 237, 251-52, 255; Appellant's Post-Hearing Brief at 17-18. In its complaint, Marut asked for the payment of Contract Disputes Act (CDA) interest. Complaint ¶ 40. In its post-hearing briefing, Marut also asks for CDA interest. Appellant's Post-Hearing Brief at 18; Appellant's Post-Hearing Damages Brief at 12-13.

A. PPA interest

PPA interest did not begin to run when GSA received Marut's August 13, 2000 payment request. The contract provided that GSA would owe PPA interest if it did not make an invoice payment to Marut within a certain time after it received a proper invoice. Interest was not owed, however, if a delay in payment was due to a disagreement between GSA and Marut over the payment amount. These contract provisions are the same as the provisions of the PPA. 31 U.S.C. §§ 3902(c), 3907(c). Marut's August 13, 2000 invoice asked for \$1,888,506.74, which was 125% of the total evaluated bid price for the base year plus all four option years, minus the \$50,443.26 that GSA had paid to Marut. The contracting officer said in her September 25, 2000 decision that the invoice requested more money than was due. In other words, the contracting officer disagreed with Marut about the payment amount. Because GSA disagreed that Marut was owed the amount it requested, PPA interest did not begin to run upon GSA's receipt of the August 13, 2000 payment request.

The contracting officer did not consider Marut's November 20, 2000 payment request to be an acceptable invoice. That payment request asked GSA to pay \$35,309.04, which Marut said it would consider to be a partial payment of the total past due balance of

⁸ The Prompt Payment Act is found at 31 U.S.C. § 3901, et seq. (2000). The sections of the Act cited herein read the same today as they did when the parties entered into the contract.

\$1,888,506.74 plus interest. The request also said that the entire \$1,888,506.74 plus interest was the amount due as of that payment request. Regardless of whether the payment request constituted a proper invoice, PPA interest did not begin to run when the contracting officer received the request because PPA interest does not run past the date that a claim is submitted to the contracting officer, 31 U.S.C. § 3907(a), and Marut submitted its claim in September 2000.

B. CDA interest

CDA interest runs from the time the contracting officer receives a claim until the time the agency pays the claim. 41 U.S.C. § 611 (2000). We know that GSA paid Marut \$35,309.04 on December 29, 2000. The record does not establish the date that the contracting officer received Marut's September 15, 2000 claim, so we are unable to say for certain when CDA interest began to accrue on the approximately \$4262.63 that Marut should have been paid on December 29, 2000. Although GSA owed Marut some amount of CDA interest on approximately \$4262.63 for approximately three months, the \$35,309.04 payment that GSA made to Marut on December 29 more than compensated Marut for whatever amount of interest was due.

Decision

The appeal is **DENIED**.

MARTHA H. DeGRAFF
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

ALLAN H. GOODMAN
Board Judge