Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

MOTION FOR SUMMARY RELIEF DENIED: April 14, 2005

GSBCA 16321-COM

INTEGRAL SYSTEMS, INC.,

Appellant,

v.

DEPARTMENT OF COMMERCE,

Respondent.

Richard D. Lieberman and Karen R. O'Brien of McCarthy, Sweeney & Harkaway, P.C., Washington, DC, counsel for Appellant.

Mark Langstein and Terry Hart Lee, Contract Law Division, Office of the General Counsel, Department of Commerce, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **NEILL**, and **DeGRAFF**.

DeGRAFF, Board Judge.

Pending is appellant's motion for summary relief. Due to the rapidly approaching hearing date and the conclusion we reach here, there is no need to delay our ruling on the motion until after respondent files its response. Because there are material facts in dispute and because appellant has not established it is entitled to relief as a matter of law, we deny the motion.

Background[1]

On March 19, 1998, the Department of Commerce awarded a contract for the Geostationary Operation Environmental Satellite Backup Acquisition, Command, and Control Station (GBACCS) to Integral Systems, Inc. (ISI). The contract contained thirty contract line item numbers (CLINs), including CLINs 29 and 30, which were for two option years of station on-call support. Exhibit 1. The contract price, as shown on the first page of the contract, was $3,199,084, which included the price of the two option CLINs, and Commerce obligated this amount for the performance of the contract. Exhibit 1; Appellant's Motion for Summary Relief, Exhibits 1, 2. After award, Commerce amended the contract price twice and each time the total contract price included the amount of the two option CLINs. Exhibits 3, 5.

On December 8, 2000, ISI's project manager and Commerce's contracting officer's technical representative signed a document acknowledging final acceptance testing had been completed and Commerce accepted the systems required by the GBACCS contract. Exhibit 30. For the first year after acceptance, station on-call support was to be provided by CLIN 28, which was not an option CLIN. The period of performance of option CLIN 29 was to be the year following the performance of CLIN 28, and the period of performance of option CLIN 30 was to be the year following the performance of option CLIN 29. Exhibit 1.

Discussion

In its motion for summary relief, ISI contends Commerce exercised the two option CLINs when it awarded the contract. ISI argues that, according to statute and regulation, Commerce exercised the options at the time of award by including the amount of the two option CLINs in the contract price and obligating an amount of funds which included the amount of the two option CLINs. Next, ISI argues Commerce's actions after the contract was awarded show it exercised the options at the time of award. Finally, ISI argues if the terms of the contract are ambiguous, we can use trade meaning, usage, and custom to interpret the contract and determine Commerce exercised the options at the time of award.

Summary relief is appropriately granted when there is no genuine issue of material fact and the moving party is clearly entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *US Ecology, Inc. v. United States*, 245 F.3d 1352, 1355 (Fed. Cir. 2001); *Olympus Corp. v. United States*, 98 F.3d 1314, 1316 (Fed. Cir. 1996). A fact is material if it will affect our decision, and an issue is genuine if enough evidence exists so the fact could reasonably be decided in favor of the non-movant at a hearing. *John A. Glasure v. General Services Administration*, GSBCA 16046, 03-2 BCA ¶ 32,284 (citing *Celotex Corp.*; *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)). Because there are material facts in dispute and ISI has not convinced us it is entitled to relief as a matter of law, we deny the motion for summary relief.

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[1] The following facts are contained in appellant's proposed findings of uncontested facts and are supported by the documents cited. Cited exhibits are contained in the appeal file unless otherwise noted.

First, ISI argues that, according to statute and regulation, Commerce exercised the options at the time of award by including the amount of the two option CLINs in the contract price and by obligating an amount of funds that included the amount of the two option CLINs. The regulation ISI relies upon is 48 CFR 32.703-1(a) (1998), which says if a contract is fully funded, funds are obligated to cover the price of a fixed price contract. The statute ISI relies upon is 31 U.S.C. § 1501 (2000), which says an amount shall be recorded as an obligation of the United States only when supported by documentary evidence of a binding agreement between an agency and another person. Because an unexercised option is not a binding agreement, ISI says Commerce would not have included the amount of the two option CLINs in the contract price and could not have obligated funds for the two CLINs unless a liability existed due to the CLINs having been exercised.

ISI's argument is not persuasive because according to neither statute nor regulation is a binding agreement created simply because an obligation is recorded. Our view is supported by a decision of the Comptroller General and the Government Accountability Office's Redbook, which our appellate authority recognizes as providing expert opinions. *Thompson v. Cherokee Nation*, 334 F.3d 1075 (Fed. Cir. 2003), *aff'd*, *Cherokee Nation of Oklahoma v. Leavitt*, 125 S. Ct. 1172 (2005).

As the Comptroller General explained:

> Section [1501] is intended for internal bookkeeping and fiscal control purposes. It does not govern the relationships between the government and any outside parties with which it deals. A contract which is improperly not recorded as an obligation under 31 U.S.C. sec. [1501] remains a valid contractual obligation of the United States and, similarly, a contract which is not otherwise valid does not gain greater status simply because it is recorded as an obligation under that section.

Comp. Gen. Dec. B-197274 (Feb. 16, 1982). Consistent with this decision, the Government Accountability Office's Redbook says:

> Recording evidences the obligation but does not create it. If a given transaction is not sufficient to constitute a valid obligation, recording will not make it one.

2 General Accounting Office, Principles of Federal Appropriations Law 7-6 (2d ed. 1992).[2] Because the recording of an obligation does not create an obligation where none exists, ISI's argument does not entitle it to relief as a matter of law.

Next, ISI argues Commerce's actions after the contract was awarded show it exercised the options at the time of award. ISI points out Commerce amended the contract price twice and each time the total contract price included the amount of the two option CLINs. The amended contract prices are no more significant than the initial price of the

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[2] Pub. L. No. 108-271, § 8, 118 Stat. 811, 814 (2004) changed the name of the office from General Accounting Office to Government Accountability Office.

contract, as discussed above. The remainder of ISI's argument is supported by facts not put forward by ISI as uncontested facts which is, in itself, enough to warrant denying the motion to the extent it depends upon the success of this argument. One of the "facts," regarding a Commerce employee's request for a meeting, is contradicted by an exhibit provided by ISI in support of its motion for summary relief.[3] The remainder of the "facts" refer to actions taken by Commerce employees in 2002, which ISI says show they thought the option CLINs had been exercised. Assuming this is what the employees thought, it does not show they were correct and does not show the employees thought the option CLINs had been exercised when the contract was awarded in 1998. ISI has neither put forward uncontested facts nor established that Commerce's post-award actions entitle it to summary relief as a matter of law.

Finally, ISI argues if the terms of the contract are ambiguous, we can use trade meaning, usage, and custom to interpret the contract and determine Commerce exercised the options at the time of award. ISI, however, never explains which contract terms are ambiguous and in need of interpretation. ISI says Commerce knew how to reserve obligated funds in order not to permit a contractor to proceed with specific work, and could have reserved funds obligated for the two option CLINs if it had wanted ISI not to proceed with the option work. Commerce's ability to reserve funds, however, does not show the GBACCS contract contained any ambiguous terms regarding the exercise of the two option CLINs. In its motion, ISI never says what the terms of the contract required Commerce to do in order to exercise the two CLINs. This contract requirement is important because in order "[f]or an option order to be effective, the Government must exercise the option in exact accord with the terms of the contract," *Freightliner Corp. v. Caldera*, 225 F.3d 1361, 1366 (Fed.Cir. 2000), and "the Government, at its discretion, ha[s] a broad, unilateral right" to exercise an option. *Aspen Helicopters, Inc. v. Department of Commerce*, GSBCA 13258-COM, 99-2 BCA ¶ 30,581, at 151,024. We cannot determine ISI is entitled to relief as a matter of law without knowing what the contract required Commerce to do in order to exercise the option CLINs.

Decision

Appellant's motion for summary relief is **DENIED**.

MARTHA H. DeGRAFF
Board Judge

We concur:

[3] Appellant's Motion for Summary Relief, Exhibit 4 at 128-29.

STEPHEN M. DANIELS
Board Judge

EDWIN B. NEILL
Board Judge