Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

GSBCA 16504 GRANTED IN PART; GSBCA 16610 DENIED: July 21, 2005

GSBCA 16504, 16610

ADVANCED INJECTION MOLDING, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Douglas Lund, President of Advanced Injection Molding, Inc., Forest Grove, OR, appearing for Appellant.

Michael J. Noble, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

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

DANIELS, Board Judge.

The General Services Administration (GSA) and Advanced Injection Molding, Inc. (AIM), parties to a contract for the supply of plastic signs, have both made claims under the contract. GSA claims that it overpaid for many of the signs AIM supplied and is entitled to recover the amount of the overpayment. AIM claims that GSA wrongfully "auctioned off" its contract by issuing purchase orders to another firm, violated the minimum order limitation of the contract, and damaged AIM's ability to obtain bank loans. We hold for GSA on all issues, except that we limit the extent of the agency's recovery to a properly calculated amount.

Findings of Fact

1. On January 24, 2002, GSA's General Products Center in Fort Worth, Texas, issued a solicitation for bids to supply the Government with numerous stock items under indefinite delivery/indefinite quantity (ID/IQ) contracts. Appeal File, Exhibit 1. The solicitation contained several attachments. Among them was attachment 2. Listed on that attachment was item number 2-158, which was also identified as national stock number (NSN) 9905-00-559-2971, "sign, plastic." The stock number is associated with a sign which reads, "U.S. Property – No Trespassing." For this item, the minimum amount of any purchase order was specified to be $2500 and the maximum amount was specified to be $6500. *Id.*, Exhibits 1, 2, 8 at 3.

2. On March 4, 2002, GSA issued amendment 2 to the solicitation. Amendment 2 changed the minimum order for one of the items on attachment 1, NSN 9920-00-292-9946, to $8,000. This amendment did not make any changes to the minimum order for NSN 9905-00-559-2971 or any other items listed on attachment 2. Appeal File, Exhibit 4.

3. On March 15, 2002, in response to the solicitation, AIM submitted a bid of $3.50 per NSN 9905-00-559-2971 sign. AIM's bid reiterated the minimum and maximum order dollar figures stated in the solicitation. Appeal File, Exhibit 5.

4. After the solicitation's issuance, AIM twice agreed to extend the acceptance period for its offer. On November 12, 2002, it extended the acceptance period from November 13, 2002, to January 12, 2003. On February 18, 2003, recognizing that the acceptance period had expired on January 12, 2003, AIM extended the period until March 31, 2003. Appeal File, Exhibits 7, 10.

5. Two other actions involving GSA, AIM, and plastic signs with NSN 9905-00-559-2971 occurred between the issuance of the solicitation and the award of the contract which is the subject of the disputes between the parties. First, on April 3, 2002, GSA awarded to AIM a blanket purchase agreement (BPA) pursuant to a quotation AIM had submitted on January 11, 2002, in response to a request for quotations (RFQ). The BPA was in effect until August 31, 2002. Declaration of Douglas Lund (undated, but filed on June 7, 2005) ¶ 2; Appellant's Exhibit 1; Appeal File, Exhibit 26 at 1-2. Separately, on January 12, 2003, GSA issued a RFQ to supply these signs pursuant to four separate purchase orders. AIM responded with a quotation of $3.83 per sign for each of the orders. Appeal File, Exhibit 8. On February 4, 2003, GSA issued the purchase orders, which had a total value of $34,781, to Spencer Industries, Inc. (Spencer). Spencer's prices of $3.43 per sign (for two of the orders) and $3.56 per sign (for the other two orders) were lower than the prices quoted by AIM. *Id.*, Exhibit 9.

6. AIM was the low bidder on item 2-158, NSN 9905-00-559-2971, in response to the solicitation. On March 26, 2003, GSA awarded a contract to AIM in response to that firm's bid. The contract was an ID/IQ instrument with a guaranteed minimum purchase amount of $100. Minimum and maximum order limitations were as specified in the solicitation. Although the solicitation had envisioned that the contract would run for a period from June 1, 2002, through May 31, 2004, with three one-year option periods, the contract as awarded ran for a period from the date of award to May 31, 2004, with three one-year option periods.[1] Appeal File, Exhibits 1 at 2-3, 11 at 14-15, 20, 37, 44, 45, 62; Declaration of Linda K. Haffner (June 8, 2005) ¶ 3.

7. The contract included the sentence, "Changes in the terms and conditions of this contract may be made only by written agreement of the parties." Appeal File, Exhibit 11 at 18. The record does not contain any evidence that the parties ever agreed in writing to change the terms and conditions of the contract.

8. Linda Haffner was the GSA contract specialist assigned to this contract. While loading the contract data into GSA's automated data system, Ms. Haffner inserted, as the price per sign, $5.52. Appeal File, Exhibits 13 at 3, 16; Haffner Declaration ¶ 4; Appellant's Exhibit 10 at 1-2. This price was entered for twenty-three separate orders placed with AIM under the contract between April 24, 2003, and March 12, 2004. A different price, $5.25 per sign, was entered for the twenty-fourth order placed with AIM under the contract during this period. Appeal File, Exhibits 14, 19 at 3.

9. On May 27, 2004, AIM's president, Douglas Lund, sent to Ms. Haffner an electronic mail message offering a "one time sale" of NSN 9905-00-559-2971 signs at the price of $4 per sign. Appeal File, Exhibit 12. In conducting research to help her decide whether to accept this offer, Ms. Haffner discovered that the prices GSA had been paying for the signs ($5.52 and $5.25 per sign) were higher than the contract price ($3.50 per sign). Haffner Declaration ¶ 6. By telephone on June 9, Ms. Haffner notified Mr. Lund of this

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[1] One page of the contract shows a "'proposed' contract period" for each NSN for which a contract will be awarded. A different proposed period is listed for each of the three attachments to the solicitation, with the period for NSNs listed in attachment 2 (such as the NSN with which we are concerned) being from June 1, 2002, through May 31, 2004. Appeal File, Exhibit 11 at 21. Another page contains the actual contract period. It states, "This page is reserved for use at time of award as applicable. . . . Your offer . . . [is] hereby accepted for award for Item 2-158. The contract period is Date of Award through 5/31/2004." *Id.* at 15.

discovery and broached the subject of AIM's repayment to GSA of the consequent overpayments for the signs. Appeal File, Exhibit 16.

10. Ms. Haffner also changed the price per sign in GSA's automated data system, replacing $5.52 with the contract price of $3.50. Haffner Declaration ¶ 6. In addition, she exercised GSA's option to extend the contract for one year beyond May 31, 2004. Appellant's Exhibit 10 at 4. Orders placed with AIM under the contract subsequent to Ms. Haffner's changing of the price in the automated data system, including during the option year, were at the price of $3.50 per sign. Appeal File, Exhibit 23.

11. During June 2004, GSA contracting personnel and AIM discussed, through correspondence and telephone calls, the appropriateness of the prices paid to AIM for signs under the contract, whether the contract's minimum order limitation was $2500 (as contended by GSA) or $8,000 (as contended by AIM), and whether GSA had "auctioned off" part of the contract to another vendor (Spencer). Appeal File, Exhibits 16-18.

12. On June 24, a GSA contracting officer sent to AIM a claim in the amount of $61,502.14. This figure is the total GSA paid for the twenty-four purchase orders for which the price per sign was entered as $5.52 or $5.25 ($145,603.99) less the total the contracting officer believes GSA would have paid for those purchase orders if the price per sign had been $3.50 ($84,101.85). The contracting officer's decision also claims entitlement to interest on the amount due, penalty charges if payment is not made within ninety days, and administrative costs "associated with the carrying and collection of delinquent accounts." Appeal File, Exhibit 19 at 1-3. On September 23, 2004, AIM filed an appeal of this decision. The Board docketed the appeal as GSBCA 16504.

13. The contracting officer has submitted, in support of this claim, documentation of GSA computerized payment records regarding the purchase orders at issue. Appeal File, Exhibit 19 at 4-29. We note that the quantities and amounts paid, per these records, are different from the quantities and amounts shown on the purchase orders. The differences are shown below:

Number of purchase orders	Quantity per order	Invoice amount per order	Discount per order	Amount per order	Total amount
Per payment records					
22	1125	$6,210.00	$ 62.10	$6,147.90	$135,253.80
1	1125	5,906.25	59.06	5,847.19	5,847.19
1	824	4,548.48	45.48	4,503.00	4,503.00
Per purchase orders					
22	1100	$6,072.00	none	$6,072.00	$133,584.00
1	1100	5,775.00	none	5,775.00	$ 5,775.00
1	800	4,416.00	none	4,416.00	4,416.00

Compare id. with Appeal File, Exhibit 14. AIM has included in its exhibits a list of purchase orders, showing for each the number of signs shipped and the total dollar value. The quantities and dollar amounts on this list correspond with those on GSA's computerized payment records. *Compare* Appeal File, Exhibit 19 at 4-29 *with* Appellant's Exhibit 7; *see also* Appeal File, Exhibit 25 at 2 (AIM's claim submission, showing same amounts paid for each purchase order). We therefore accept those figures as correct.

14. We also note that the amounts paid for each purchase order include a one percent discount from the invoice amounts, and that the contracting officer's decision shows, as the "correct payment amount," a figure which includes a ten percent discount from the invoice amounts. *See* Appeal File, Exhibit 19 at 3. The exact figures as to "correct payment amount" are as follows:

Number of purchase orders	Quantity per order	Invoice amount at $3.50/sign	Discount per order	"Correct payment amount" per order	Total "correct payment amount"
23	1125	$3,937.50	$ 393.75	$3,543.75	$ 81,506.25
1	824	2,884.00	288.40	2,595.60	2,595.60

The contract includes, under the heading "Payment Terms," the following sentence: "'Notice to Bidders - Use Item 12 of the Standard Form 1449, Solicitation/Contract/Order for Commercial Items, to offer prompt payment discounts." *Id.*, Exhibit 11 at 21. Our record does not include a Standard Form 1449 or any other form which shows a prompt payment discount. AIM's bid does not include a discount. *Id.*, Exhibit 5.

15. On January 21, 2005, AIM submitted its own claims to the GSA contracting officer. The contractor sent the contracting officer a letter which makes three claims:

1) The GSA wrongfully auctioned off AIM's contract and wrongfully awarded Spencer Industries orders totaling $34,781.00.

2) The GSA violated cont[r]act number GS-07F-N0086 minimum order of $8,000. This was done 24 times and totals $46,350.53.

3) GSA's claim has damaged AIM's ability to obtain credit through our bank, resulting in $75,000 of funding being refused.

The total amount of the claims is $156,131.53. Appeal File, Exhibit 25.

16. The contracting officer denied AIM's claims by decision dated March 3, 2005. Appeal File, Exhibit 26. AIM filed an appeal of the decision on March 9, 2005. The Board docketed the appeal as GSBCA 16610.

Discussion

Government claim – GSBCA 16504

It is a venerable principle that after the Government pays money by mistake to someone having no right to keep the funds, the Government may recover that money. *United States v. Wurts*, 303 U.S. 414, 415-16 (1938) (citing *Wisconsin Central Railroad v. United States*, 164 U.S. 190, 212 (1896); *United States v. Burchard*, 125 U.S. 176, 180, 181 (1888)). The Court of Claims has explained that "no officer or agent of the Government is clothed with authority to disburse money belonging in the public treasury without authority so to do," and that "when a payment is erroneously or illegally made it is in direct violation of article IV, section 3, clause 2, of the Constitution." *Fansteel Metallurgical Corp. v. United States*, 172 F. Supp. 268, 270 (Ct. Cl. 1959) (case involving supply contract). "Under these circumstances it is not only lawful but the duty of the Government to sue for a refund." *Id.; see also USI Security Systems*, GSBCA 9990-COM (Nov. 1, 1989); *Drain-A-Way Systems*, GSBCA 7022, 84-1 BCA ¶ 16,929, at 84,217 (1983). The only limitation on the Government's right to seek and recover unauthorized payments it made is "compelling equitable arguments to the contrary." *Barrett Refining Corp. v. United States*, 242 F.3d 1055, 1064 (Fed. Cir. 2001); *see also id.* at 1062-64 (collecting cases); *USA Petroleum Corp. v. United States*, 821 F.2d 622, 625 (Fed. Cir. 1987).

As GSA maintains, each of the contested purchase orders it placed under AIM's contract states a price per sign which is higher than the contract price. The contract was never modified to increase the price. Thus, when the Government paid for the signs at the prices shown in the purchase orders, it was paying more than it was obligated – or even authorized – to pay. AIM's only defense to this conclusion is that billing and payments were in accordance with the prices stated in the purchase orders. Ironically, AIM separately acknowledges that billing and payment practices were not in accordance with the prices stated in the purchase orders. *See* Finding 13. But even if billing and payment were in accordance with the purchase order prices, that would not matter for the purpose of resolving this claim. The contracting officer was not authorized to pay more than the contract price, so inserting higher prices in the purchase orders was in error. That action cannot be deemed to have amended the contract.

We conclude, therefore, that AIM must refund to GSA the amount it was paid in excess of the amount it should have received. The amount AIM was paid for the twenty-four purchase orders with which we are concerned is the amount the contracting officer determined, $145,603.99. The amount AIM should have received is different from the amount the contracting officer calculated, however. The contracting officer's figures include a ten percent discount from the contract price. We have not found any provision in the contract which would entitle GSA to this or any other discount, however, and the agency has called no such authority to our attention. We find that AIM should have received $3.50 for each sign it supplied to GSA under the purchase orders. At the quantities for which payment of $145,603.99 was made, the contractor should have received a total of $93,446.50. The

difference between these two amounts is $52,157.48. The claim is valid as to this amount. In reaching this conclusion, we are simply enforcing the bargain the parties made.

In addition to seeking a refund for overpayments made, GSA also asks the Board to award it interest on the amount of the refund. The agency has cited no authority which would empower us to make this award, however. We have found no contract provision which requires the contractor to pay to the agency interest on a refund of an overpayment. The Federal Acquisition Regulation (FAR) now contains a standard clause part of which deals with overpayments by the Government on contracts for commercial items, but that part does not mention interest, and in any event, it is not included in this contract. 48 CFR 52-212-4(i)(5) (2004); Appeal File, Exhibit 11 at 18-19. The Contract Disputes Act of 1978, under which we decide these cases, requires the Government to pay interest "on amounts found due contractors on claims," but does not require a contractor to pay interest on amounts found due the Government. *See* 41 U.S.C. § 611 (2000). The FAR provides for the payment by a contractor of interest on overpayments, as well as repayment of the overpayments themselves, but only in cases involving submission by the contractor of defective cost or pricing data. 48 CFR 15.407-1(b)(7). This is not such a case. Because GSA has not been able to demonstrate that we have authority to award interest on the amount owed by AIM, we do not award any interest on the principal amount of the claim.

The contracting officer's decision also claims entitlement to penalty charges and administrative costs "associated with the carrying and collection of delinquent accounts." In its brief, GSA does not specify or seek these amounts. We consequently consider this portion of the Government's claim to have been abandoned.

In conclusion, we grant AIM's appeal of the contracting officer's decision which asserts a Government claim to the extent that we award to GSA less than the principal amount claimed and do not award to GSA any interest, penalty charges, or administrative costs.

Contractor's claims – GSBCA 16610

In its claims, AIM seeks three separate amounts: $34,781, the amount of purchase orders GSA issued to Spencer Industries in February 2003; $46,350.53, the total additional amount which AIM calculates that GSA should have paid if the minimum order required by the contract for any purchase order were $8000; and $75,000, the amount AIM sought but was refused in loans from two banks. We will address each of these matters in turn. Before we do, however, we consider and reject GSA's contention that we have no jurisdiction to decide them because AIM did not certify its claims.

Jurisdiction

The Contract Disputes Act mandates that –

> [f]or claims of more than $100,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable, and that the certifier is duly authorized to certify the claim on behalf of the contractor.

41 U.S.C. § 605(c)(1). If the dollar value of a claim is above the certification threshold and the claim is not certified, we have no jurisdiction to consider an appeal from a contracting officer's decision on that claim. *Hemmer-IRS L.P. v. General Services Administration*, GSBCA 16134, 04-1 BCA ¶ 32,509, at 160,814; *Paulos Land Co. v. General Services Administration*, GSBCA 14093, et al., 98-1 BCA ¶ 29,570, at 146,593; *Keydata Systems, Inc. v. Department of the Treasury*, GSBCA 14281-TD, 97-2 BCA ¶ 29,330, at 145,823-24.

GSA assumes that because AIM submitted to the contracting officer a single letter claiming money, all the matters presented in the letter constitute a single claim. The total value is above the $100,000 certification threshold and the letter is uncertified, so GSA believes that the Board has no jurisdiction to consider the matters raised by AIM. We disagree with the premise and the conclusion from which it follows. If the matters raised in a contractor's request for a contracting officer decision involve a common set of operative facts, such that the Board will have to review the same or related evidence to decide those matters, a single claim is present. On the other hand, if we will have to examine different or unrelated operative facts to decide the various matters, separate claims exist. *Kinetic Builder's Inc. v. Peters*, 226 F.3d 1307, 1312 (Fed. Cir. 2000); *Wood & Co. v. Department of the Treasury*, GSBCA 12534-TD, 94-1 BCA ¶ 26,445, at 131,573 (1993); *see also Whiting-Turner/A. L. Johnson Joint Venture v. General Services Administration*, GSBCA 15401, 02-1 BCA ¶ 31,708, at 156,623 (2001); *Clark Concrete Contractors, Inc. v. General Services Administration*, GSBCA 14340, 99-1 BCA ¶ 30,280, at 149,771. Because each of the matters raised by AIM involves different operative facts, we consider each of those matters to be a separate claim. Because each of the claims is in an amount less than the $100,000 certification threshold, the fact that the letter is uncertified poses no hurdle to our jurisdiction.

"Auctioning off"

AIM first claims that GSA "wrongfully auctioned off" its contract by awarding four purchase orders to Spencer Industries for the same NSN signs involved in the contract. This contention cannot prevail because at the time GSA issued the purchase orders to Spencer, AIM did not have a contract with GSA. GSA awarded two instruments to AIM during the period of time noted in our findings of fact. The first was a blanket purchase agreement, which was awarded on April 3, 2002, and remained in effect until August 31, 2002. The second instrument awarded by GSA to AIM was the actual contract, which was not entered into until March 25, 2003. The issuance of the purchase orders to Spencer occurred on February 4, 2003, a date between the end of the BPA and the beginning of the contract. At that time, GSA and AIM had no legal relationship.

We perceive that AIM has an imperfect understanding of the law regarding the various relationships at issue here and take this opportunity to clarify that understanding. First, a BPA is not a contract, but rather, a "'charge account[]' with a qualified source[] of supply" for "filling anticipated repetitive needs for supplies or services." 48 CFR 13.303-1(a). Second, the purchase orders given to Spencer resulted from a competition entirely separate from the one that led to the AIM contract, and AIM willingly participated in that competition, knowing full well that a contract had not been awarded under the March 15, 2002, solicitation. AIM confirmed that knowledge by extending the period during which GSA could accept the bid it made in response to the solicitation, even after GSA had issued the purchase orders to Spencer and the acceptance period for bids had expired. Third, even if AIM's contract had been in effect at the time GSA issued the purchase orders to Spencer, the issuance of those purchase orders would not have been an "auctioning off" of contract rights. The contract was an indefinite delivery/indefinite quantity instrument. This form of contract obliges the buyer to purchase a stated minimum quantity of supplies or services from the vendor. Unlike a requirements contract, it does not oblige the buyer to buy from the seller all of its requirements for the supplies or services. *Varilease Technology Group, Inc. v. United States*, 289 F.3d 795, 799 (Fed. Cir. 2002); *Travel Centre v. Barram*, 236 F.3d 1316, 1318-19 (Fed. Cir. 2001). In an ID/IQ contract, the guaranteed minimum may be very low – here, it was only $100. Once it has been met, the buyer "is free to purchase additional supplies or services from any other source it chooses" and even "less than ideal contracting tactics fail to constitute a breach." *Travel Centre*, 236 F.2d at 1319.

Minimum order limitation

AIM claims that GSA violated the minimum order limitation of the contract by issuing purchase orders in dollar amounts of less than $8000. Again, the contractor has misunderstood a provision of its contract. The solicitation provided that for the signs for which AIM was awarded a contract, the minimum dollar value of any purchase order placed under the contract would be $2500. AIM's bid incorporated this limitation, and the contract

did, too. Although the solicitation changed the minimum order for another item to $8000, it did not change the minimum order for the signs AIM was to supply. The contract did not include at inception a minimum order limitation different from $2500, and the parties never amended the contract to change this limitation. As GSA has observed, under AIM's theory that the minimum order permitted was $8000, the contract would be nonsensical, since the minimum would be higher than the maximum order limitation of $6500, which AIM effectively concedes was never changed. This claim is denied.

Damage to ability to obtain credit

According to AIM, after GSA made its claim for a refund of overpayments made on purchase orders issued under the contract, AIM applied for $75,000 in bank loans (perhaps, we cannot tell, to refinance other indebtedness). AIM says that it disclosed the existence of GSA's claim in response to questions posed by two banks and was refused the loans, with the existence of GSA's claim being "a large portion of the reason" why the applications were rejected. AIM claims that this sequence of events entitles it to receive $75,000 from GSA.

This claim makes no sense. Even if an action by GSA had caused AIM's applications for bank loans to be rejected – a proposition for which AIM offers no supporting evidence – it is hard to understand why this should necessarily result in GSA's having to pay outright the amount which AIM would have received merely in loan if one of the applications had been accepted. Further, the banks' actions appear to have been nothing more than normal business decisions. Even if AIM had produced evidence that the existence of the Government claim was the precipitating factor for the rejection of the applications, the idea that GSA should pay something as a consequence could be plausible only if the contractor could prove that there was something wrongful about the making of the claim. We have found to the contrary that the claim is valid (if slightly overstated in amount).

Decision

GSBCA 16504 is **GRANTED IN PART**. AIM shall pay to GSA the sum of $52,157.48, rather than the sum of $61,502.14 plus interest claimed by the agency.

GSBCA 16610 is **DENIED**.

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STEPHEN M. DANIELS
Board Judge

We concur:

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EDWIN B. NEILL
Board Judge

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ALLAN H. GOODMAN
Board Judge