

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

MOTION TO DISMISS AND MOTION FOR SUMMARY RELIEF
DENIED: July 6, 2006

GSBCA 16796-TD

JJA CONSULTANTS,

Appellant,

v.

DEPARTMENT OF THE TREASURY,

Respondent.

Edward V. Gregorowicz, Jr., and James P. Connor of The Law Offices of Edward V. Gregorowicz, Jr., Fairfax, VA, counsel for Appellant.

Lori R. Larson and John T. Kirsch, Office of the Chief Counsel, General Legal Services, Internal Revenue Service, Department of the Treasury, Washington, DC, counsel for Respondent.

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

DeGRAFF, Board Judge.

In this appeal, the contractor seeks to recover discounts which it claims the agency was not entitled to take. The agency filed a motion to dismiss the appeal, contending the contractor waited longer than permitted by the contract to notify the agency of the claim. We deny the motion to dismiss because the contract did not set a time within which the contractor had to notify the agency of the claim. The agency also filed a motion for summary relief which we deny because there is a material fact in dispute.

Background¹

On April 1, 1998, the Internal Revenue Service (IRS) awarded a contract to JJA Consultants (JJA). Exhibit 2 at 7, 42. The contract required JJA to provide training services for IRS employees, had a term of one year from the date of award, and gave IRS the option to renew the contract for four one-year periods. Exhibit 2 at 8-10, 21. The contract was an indefinite delivery, indefinite quantity type of contract, and guaranteed JJA minimum orders of \$9000. Exhibit 2 at 10.

IRS exercised all four of its options to renew the contract for one-year periods, which extended the term of the contract to March 31, 2003. Exhibit 2 at 35, 37, 39, 46. In addition, IRS modified the contract to extend the term to September 30, 2003, and to provide that in the event a delivery order required performance beyond the contract term, JJA would perform in accordance with the delivery order.² Exhibit 2 at 48, 51. During the term of the contract, IRS issued twenty task orders for approximately \$4.7 million. Exhibit 2 at 52-314.

Task Order 13

In early 2002, IRS sent JJA a statement of work and asked for a proposal in support of the agency's executive development program (XD-2).³ Exhibit 2 at 151. The statement of work contained eight tasks. The first four tasks were preparation and planning, design of a workshop, design of group development sessions, and design of a candidate transition session. These tasks were to be performed from June 1 through September 30, 2002. Exhibit 2 at 151-52. The remaining four tasks were optional tasks five through eight, each of which required JJA to repeat the first four tasks for subsequent IRS executive development programs. For each of the optional tasks, the statement of work provided, "Funding will be provided if the IRS elects to exercise this option." Exhibit 2 at 152.

¹The background facts are put forward either by the appellant or the respondent, are uncontested, and are supported by the record. Citations are to exhibits contained in the appeal file.

²Neither party explains how the contract's duration could have been extended to September 30, 2003. The explanation is contained in the contract, which provided that although the total duration of the contract, including the exercise of options, was not to exceed five years, IRS had an option to extend JJA's performance for an additional six months. Exhibit 2 at 32-S.

³Although the parties do not mention this statement of work in their briefs, it is the predicate for JJA's subsequent proposal which is discussed in the briefs.

On March 1, 2002, JJA submitted a proposal in response to the statement of work. Exhibit 2 at 141. JJA's proposed cost for the first four tasks was \$2180 per session, which amounted to approximately \$212,000. Exhibit 2 at 144. However, JJA offered to perform the work at a discounted price of \$150,000, stating "This price has been discounted to the IRS due to the long-term nature of this contract. The current rate considers the option to execute four additional tasks related to this project." Exhibit 2 at 144-45. JJA's proposal covered services to be delivered from June through September 2002, "with optional four optional tasks [sic] which would result in the extension of the base contract for several fiscal years." Exhibit 2 at 146. The price for each optional task was \$150,000 "after discount applied." Exhibit 2 at 146.

On May 3, 2002, IRS issued task order 13 for the work covered by the statement of work and JJA's proposal, for the price of \$150,000. Exhibit 2 at 137. On January 8, 2003, IRS modified task order 13 to exercise the first optional task for the fixed price of \$150,000. Exhibit 2 at 138-40. Between May 15, 2002, and May 31, 2003, JJA submitted invoices for the work it performed for task order 13, and IRS paid JJA \$300,000. Exhibit 4 at 444, 453-516.

Task Order 19

In early 2003, IRS sent JJA a statement of work and asked for a proposal in support of the agency's accelerated executive readiness program (AXR).⁴ The statement of work contained four tasks and said the period of performance and funding would be from January 27 through September 30, 2003, with the option to extend the period of performance. Exhibit 2 at 232-33.

In January 2003, JJA submitted a proposal in response to the statement of work. Exhibit 2 at 199. JJA's proposed cost to perform the four tasks set out in the statement of work was \$2180 per session, which amounted to approximately \$131,000. Exhibit 2 at 200. However, JJA offered to perform the work at a discounted price of \$86,000, stating, "This price has been discounted to the IRS due to the long-term nature of this contract. The current rate considers the option to execute four additional tasks related to this project." Exhibit 2 at 200. JJA's proposal contained eight optional tasks, each of which required JJA to repeat the first four tasks for subsequent IRS executive readiness programs. The price of each option was \$86,000. Exhibit 2 at 201-03. The proposal said it covered services to be delivered from January through May 2003, "with three [sic] remaining optional tasks which

⁴Although the parties do not mention this statement of work in their briefs, it is the predicate for JJA's subsequent proposal which is discussed in the briefs.

would result in the extension of the base contract for up to three fiscal years.” Exhibit 2 at 203.

On January 16, 2003, IRS issued task order 19 for the work covered by the statement of work, for the period January through May 2003. The price was \$86,000. Exhibit 2 at 196. Between either late January or early February 2003, and May 2003, JJA submitted invoices for the work it performed for task order 19, and IRS paid JJA \$86,000. Exhibit 4 at 451.

Task Order 20

In early 2003, IRS sent JJA a statement of work and asked for a proposal in support of the agency’s executive readiness program (XR-3). The statement of work contained eight tasks and said the period of performance was between twelve and fifteen months. Exhibit 2 at 313.⁵

In late February 2003, JJA submitted a proposal in response to the statement of work.⁶ On March 3, IRS told JJA, “Due to the expiration of the umbrella contract further optional contracting vehicles will need to be explored. [The optional] tasks are to be excluded from this proposal.” Exhibit 2 at 251.

On April 2, JJA submitted a revised proposal which did not contain optional tasks. The proposed cost to JJA was approximately \$890,000. However, JJA offered to perform the work at a discounted price of \$600,000 and stated the discount was “due to the long-term nature of this engagement, preferred customer benefits, and the comprehensive integrated aspects of each program.” Exhibit 2 at 254, 258.

On April 4, 2003, IRS issued task order 20 for the work covered by the statement of work, for the period May 1, 2003, through September 30, 2004. JJA’s April 2 proposal was made a part of the task order and the price was \$500,000. Exhibit 2 at 239. On May 3, IRS amended task order 20 to add \$100,000. Exhibit 2 at 242. Between April 2003 and April 2004, JJA submitted invoices for the work it performed for task order 20, and IRS paid JJA \$600,000. Exhibit 4 at 452, 522-36.

⁵Although the parties do not mention this statement of work in their briefs, it is the predicate for JJA’s subsequent proposal which is discussed in the briefs.

⁶Although this proposal is not included in the appeal file, it is referenced at pages 292 and 296 of Exhibit 2.

The Claim

On October 25, 2004, IRS wrote to JJA. In its letter, IRS said the contract was completed and ready to be closed out. IRS asked JJA either to sign a release stating it had been paid, or to submit a final voucher. Exhibit 3 at 417. On November 11, JJA said the IRS had “forfeited discounts . . . as a result of uncooperative contractual actions taken by selected IRS executives and staff,” and asked for an unspecified amount of compensation for the discounts it provided for “XR and XD programs.” Exhibit 3 at 420.

On October 12, 2005, JJA submitted a certified claim for payment of forfeited discounts. JJA listed the forfeited discounts as those taken in connection with task orders 13, 19, and 20, which JJA said amounted to \$461,031.93. JJA said the basis for the discounts was the execution of a long-term contract, which never occurred. Exhibit 3 at 425-26.

The contracting officer issued her decision and denied the claim on December 9, 2005. Exhibit 1. This appeal followed.

Discussion

IRS asks us to dismiss the appeal because JJA did not timely notify IRS of the demand for refund of the discounts. Alternatively, IRS asks us to grant summary relief. We deny the motion to dismiss because it is based upon a misapprehension of JJA’s claim. We deny the motion for summary relief because there is a material fact in dispute.

The Motion to Dismiss

According to IRS, JJA claims IRS changed the terms of the contract when it failed to order additional optional work pursuant to task orders 13 and 19, and failed to order additional work after it issued task order 20. IRS argues we should dismiss the appeal because JJA did not give IRS timely notice of the change. IRS says the contract’s changes clause required JJA to notify IRS within thirty days of any change which would cause an increase in the cost of performance. According to IRS, JJA’s November 11, 2004 letter contained the first notice that JJA wanted to recover the discounts it had provided to IRS and thereby increase the amount the IRS would have to pay for the work JJA performed. IRS says this notice fell outside the thirty-day window set out in the changes clause because JJA knew the terms of the contract prevented IRS from ordering any new work after September 30, 2003, yet JJA completed all of its contract work and submitted its final invoice in April 2004, and did not notify the IRS until November 2004 that it had forfeited discounts and owed JJA more money. IRS says it was prejudiced during contract administration and will be prejudiced in its effort to defend against this appeal by JJA’s

failure to provide IRS with timely notice of the claimed change as required by the changes clause. Respondent's Memorandum of Points and Authorities at 9-14.

IRS misapprehends JJA's claim. JJA does not claim IRS changed the terms of the contract. Rather, JJA claims IRS is not entitled to JJA's discounted prices because IRS did not fulfill the requirements for taking the discounts. In other words, from JJA's perspective it is seeking to enforce the terms of the parties' agreement, not claiming the agreement changed. Appellant's Memorandum of Points and Authorities at 16-17. IRS's argument that we should dismiss the appeal because JJA did not give timely notice of a change misses the mark.

IRS says it does not matter whether JJA claims IRS breached the contract or changed its terms because in either case, the notice provision contained in the contract's changes clause applies to bar JJA's claim. Respondent's Reply Memorandum at 8-9. We cannot accept IRS's argument, however, because the changes clause does not provide a remedy for a breach of contract by the agency. Although a delay by JJA in advancing its breach claim could have a bearing upon our view of the credibility of JJA's assertions in support of its position, a delay does not bar its claim.

The Motion for Summary Relief

When considering a motion for summary relief, we review affidavits, declarations, documents, and appeal file exhibits. Board Rule 108 (48 CFR 6101.8 (2005)). We do not weigh evidence in order to determine the truth of the matter. Rather, we examine evidence in order to determine whether there are factual issues in dispute. Summary relief is appropriate when there are no genuine issues of material fact in dispute and when the moving party is entitled to relief as a matter of law. A fact is material if it will affect our decision. An issue is genuine if enough evidence exists such that the fact could reasonably be decided in favor of the non-movant at a hearing. Summary relief will be granted if the movant demonstrates there is an absence of evidence to support an essential element of the non-movant's claim or defense. Although the non-movant is entitled to the benefit of the doubt as to the facts, it cannot rest its opposition upon allegations, conclusions, and denials contained in its pleadings. If the moving party demonstrates the absence of a genuine issue as to any material fact, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue as to a material fact to be resolved at a hearing. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The proposals for both task order 13 and task order 19 said, "This price has been discounted to the IRS due to the long-term nature of this contract. The current rate considers the option to execute four additional tasks related to this project." Exhibit 2 at 144-45, 200.

The proposal for task order 20 said, the discounted price was “due to the long-term nature of this engagement, preferred customer benefits, and the comprehensive integrated aspects of each program.” Exhibit 2 at 258.

According to IRS, the plain language of the three proposals says the price was discounted due to the long-term nature of the contract, which was in existence for five and one-half years. Also, IRS says it considered whether it wished to exercise the options provided by JJA in task orders 13 and 19, and exercised one of the options under task order 13. IRS points out that nothing in the language of the task orders said IRS would forfeit the discounts if it did not exercise the options provided by the task orders or if it did not extend the term of the contract. It also says reading the task orders to allow discounts to be forfeited is contrary to the fixed price nature of the contract. Respondent’s Memorandum of Points and Authorities at 15-19. IRS offers a declaration from the contracting officer who was responsible for negotiating the terms of task orders 13, 19, and 20. She says the discounts were not intended to be contingent upon the execution of options or additional task orders, and that she never stated or indicated anything to the contrary to JJA. She also says she never stated or indicated to JJA that the contract would be extended or reissued to JJA beyond September 30, 2003. Declaration of Tamara K. Palmer (June 19, 2006).

JJA says its proposals for task orders 13 and 19 “set forth in detail the options that the IRS needed to exercise to be entitled to the discounts.” Appellant’s Memorandum of Points and Authorities at 21. JJA also says it had discussions with the IRS regarding the discounts, and IRS representatives understood “the options [the IRS] needed to exercise to be entitled to the discounts.” Appellant’s Memorandum of Points and Authorities at 21. JJA also says the discount language in its proposals would be rendered meaningless if we accept IRS’s reading of the task orders. Appellant’s Memorandum of Points and Authorities at 21. Regarding task order 20, JJA says based upon the “course of dealing and negotiations between the parties with regard to [task orders 13 and 19],” the IRS understood it was entitled to the task order 20 discount only if it exercised options under task orders 13 and 19, and executed “subsequent contract vehicles which authorized JJA to perform additional work.” Appellant’s Memorandum of Points and Authorities at 22. In support of its position, JJA relies upon an affidavit signed by its chairman. Affidavit of Dr. Johnson A. Edosomwan (May 22, 2006).

We do not agree with IRS’s characterization of the proposal language as being plain, or with JJA’s assertion that the proposals explain in detail what IRS had to do in order to be entitled to the discounts. All three proposals said the discounts were due to the long-term nature of the contract, and two of the proposals also said the discounted price “consider[ed]” the option to execute additional tasks. This language does not clearly state what, if anything, IRS had to do in the future or had done in the past in order to qualify for the discounts. The fact that we do not find the language clear, however, does not mean it is ambiguous. An

ambiguity exists if the parties held differing, reasonable interpretations of the language when the task orders were issued.

JJA escapes having its appeal summarily denied because it has provided evidence that the parties shared a common understanding of the language of the proposals. According to JJA, IRS understood when it issued the task orders that JJA intended to provide the discounts only if IRS exercised the options offered in the proposals for task orders 13 and 19, or in the case of task order 20, only if IRS executed another contract with JJA. If this is true, then there is no ambiguity because the parties held the same interpretation of the proposal language. JJA's position is supported by the statement of its chairman, and is squarely contradicted by the statement of the contracting officer. The opposing statements create a genuine issue as to a material fact, and we cannot weigh one against the other in order to determine the truth of the matter. Because JJA might be able to establish the parties shared a common understanding of the proposal language when the task orders were issued, summary relief is not appropriate.

Decision

The motion to dismiss and the motion for summary relief are **DENIED**.

MARTHA H. DeGRAFF
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

CATHERINE B. HYATT
Board Judge