

Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

DENIED: November 29, 2001

GSBCA 15660

CONTEMPORARIES, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Paul F. Donohue, President of ConTemporaries, Inc., Silver Spring, MD, appearing for Appellant.

Robert T. Hoff, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

BORWICK, Board Judge.

In this matter appellant, ConTemporaries, Inc., appeals from a \$10,534.46 Government claim (by and through a General Services Administration (GSA) contracting officer) for appellant's alleged underpayment of the industrial funding fee (IFF) for services allegedly covered by appellant's multiple award schedule (MAS) contract with the Government. The Government discovered that the National Institutes of Health (NIH) had entered into blanket purchase agreements (BPAs), referencing the MAS contract, with appellant. Under the BPAs, the NIH ordered \$1,053,446 worth of services, which appellant did not report as MAS contract sales because appellant had a pre-existing contractual relationship with the NIH for those services.

Appellant submitted an appeal under the small claims procedure of the Contract Disputes Act of 1978, 41 U.S.C. § 608 (1994) and Board Rule 202 (48 CFR 6102.2 (2000)). Respondent submitted a motion for summary relief and appellant submitted its case on the record, with respondent submitting a reply record submission. This decision is issued by the panel chairman and is final and conclusive. It shall not be set aside except in case of fraud and shall have no value as precedent. Rule 202.

We deny the appeal. We conclude that the BPAs issued by NIH to appellant were issued under the MAS contract, that appellant was required to report the sales under those

BPA's to GSA in accordance with the terms of the MAS contract, and that appellant is required to remit the one percent IFF for those sales under the BPA's. The fact that appellant may have had a prior contractual relationship with NIH is irrelevant.

Findings of Fact

On April 17, 1997, the Government awarded appellant contract GS-23F-97180-H, effective October 1, 1997, to provide temporary support help services. Appeal File, Exhibit 2. The contract was an MAS contract and covered temporary clerical, legal and medical secretary, receptionist, general clerk, administrative clerk, accounting clerk, and transcribing machine operator services. Id., Exhibit 1 at ¶ B, DESCRIPTION OF SERVICES. Under the contract, the legislative, judicial and executive branches of the Federal Government including all executive agencies and departments, independent establishments, and government corporations were allowed to issue orders to appellant. Id. at 22 (¶ C.2.15). The contract term was for five years with the Government having the right to unilaterally exercise options for five one-year periods. Id. at ¶ I-FSS-168 (June 1996). The geographic area included Washington, D.C., and surrounding suburban counties in Maryland and Virginia. Id. at ¶ C.2.1.2.1. By contract modification FCX2, the service area was expanded to include Baltimore, Maryland. Id. at Modification FCX2.

Appellant was required by its contract to provide an authorized schedule contract price list to a mailing list of addressees supplied to appellant by the Government. Appeal File, Exhibit 1 at 24 (¶ C.2.20).

Regarding the contractor's report of sales, the contract also provided:

CONTRACTOR'S REPORT OF SALES (APR 1998)

(a) The Contractor must report the quarterly dollar value (in U.S. dollars and rounded to the nearest whole dollar) of all sales under this contract by calendar quarter (i.e., January-March, April-June, July-September, and October-December). The dollar value of a sale is the price paid by the schedule user for products and services on a schedule contract task or delivery order, as recorded by the Contractor. The reported contract sales value must include the industrial funding fee (see Clause 552.238-77).

. . . .

(e) The report is due 30 days following the completion of the reporting period. The Contractor must also provide a close-out report within 120 days after the expiration of the contract. The contract expires upon physical completion of the last, outstanding task or delivery order of the contract. The close-out report must cover all sales not shown in the final quarterly report and reconcile all errors and credits. If the Contractor reported all contract sales and reconciled all errors and credits on the final quarterly report, then show zero sales in the close-out report.

Appeal File, Exhibit 1, Modification FQ-03 at 2 (¶ 552.238-72). The contract also provided:

INDUSTRIAL FUNDING FEE (APR 1998)

(a) The Contractor must pay the Federal Supply Service, GSA, an industrial funding fee (IFF). The Contractor must remit the IFF in U.S. dollars within 30 days after the end of each quarterly reporting period as established in clause 552.238-74, Contractor's Report of Sales. The IFF equals 1% (one percent) of total quarterly sales reported. The IFF reimburses the GSA Federal Supply Service for the costs of operating the Federal Supply Schedules Program and recoups its operating costs from ordering activities. Offerors must include the IFF in their prices. The fee is included in the award price(s) and reflected in the total amount charged to ordering activities.

(b) The Contractor must remit any monies due as a result of the close-out report required by Clause 552.238-74 at the time the close-out report is submitted to GSA.

(c) The Contractor must pay the IFF amount due by check, or electronic funds transfer through the Automated Clearing House (ACH), to the "General Services Administration." If the payment involves multiple special item numbers or contracts, the Contractor may consolidate the IFFs into one payment. To ensure that the payment is credited properly, the Contractor must identify the check or electronic transmission as an "Industrial Funding Fee" and include the following information: contract number(s); report amount(s); and report period(s). If the Contractor makes payment by check, provide this information on either the check, check stub, or other remittance material.

....

(d) If the full amount of the IFF is not paid within 30 calendar days after the end of the applicable reporting period, it constitutes a contract debt to the United States Government under the terms of FAR [Federal Acquisition Regulation] 32.6. The Government may exercise all rights under the Debt Collection Act of 1982, including withholding or setting off payments and interest on the debt (see FAR 52.232-17, Interest).

(e) If the Contractor fails to submit sales reports, falsifies sales reports, or fails to pay the IFF in a timely manner, the Government may terminate or cancel this contract. Willful failure or refusal to furnish the required reports, falsification of sales reports, or failure to pay the IFF timely constitutes sufficient cause for terminating the Contractor for cause under the termination provisions of this contract.

Id. 3 (¶ 552.238-77).

In 1999, the NIH issued its BPA 263-000446074-05-BPA/B for temporary clerical support services to appellant, citing the MAS contract number and stating: "BPA amended to convert to FSS." Appeal File, Exhibit 12. The BPA was for the period July 30, 1999, to September 30, 2002. Id. In 2000, the NIH issued BPA 263-0046074-06-BPA/B, for the period February 7, 2000, to September 30, 2002, under the MAS contract. The BPA incorporated the referenced MAS contract number.

In the winter of 2001, GSA scheduled a meeting on February 13 with appellant to review appellant's accounting and tracking system for appellant's GSA contract. GSA requested access to appellant's records pertaining to sales and an oral explanation of appellant's tracking system for Government sales. Appeal File, Exhibit 9.

As a result of the meeting, the GSA contracting official made the following summary analysis:

1. The contractor does not have [an] acceptable tracking system.
2. The contractor was awarded two NIH BPA, one in 1999, the other in 2000, referencing the existing GSA contract number. The sales applied to the NIH BPAs were not included in the 72A [sales tracking] reports. The quarter ending December 2000 identified \$142,953.43 in sales from NIH that were not reported as IFF eligible. Based on the quarter sales found, the estimated value of missed sales over the last two years is over a million dollars.

Appeal File, Exhibit 10.

On February 14, appellant forwarded copies of the relevant BPAs to the GSA procurement officials and stated:

As I explained to [the GSA contracting official] after our firm was included on the GSA schedule the NIH BPA, which we had previously negotiate[d] was scheduled for renewal. I asked the [NIH] Contracting Officer if he would like to use our new GSA schedule. Logically, I assumed that any business we had generated prior to being on the schedule would not be subject to the [IFF].

....

If I had any idea that such a fee would apply to the NIH account, I would never [have] suggested that my client [meaning NIH] use the schedule on the BPA we were going to get regardless of the schedule. In fact at the time he wasn't at all aware temporary services were included on the schedule.

Appeal File, Exhibit 12.

On March 22, 2001, GSA wrote to appellant and advised appellant that if appellant's prior customers were eligible to purchase from the GSA MAS contract and did not reference another contract vehicle, then the sales must be reported and the IFF paid. Appeal File, Exhibit 13. GSA urged appellant to review all sales since the inception of the contract to ensure that all federal sales were reported and the required IFF paid. Id.

Appellant responded on March 27 that when its BPA contract with NIH "was being renewed," appellant suggested that NIH use "our GSA number." Appellant stated that "it was simply a matter of [NIH] using our GSA number versus issuing an NIH number." Appeal File, Exhibit 15. Appellant stated that if it had known that it would have to pay the IFF, it

would never have suggested that NIH use the MAS contract number to order the services. Id. Appellant states that:

as a new BPA was to be issued regardless, this was simply an attempt on our part to expedite the process for the convenience of our client. At no time did we believe, nor do we now, that the assignment of an arbitrary number should allow a retroactive collection of fees on business established prior to the assignment of that number.

Id., Exhibit 19.

On August 3, 2001, the Government issued a demand for payment (also issued as an appealable contracting officer's decision) of \$10,534.46, which was the IFF due on \$1,053,446 of orders under the NIH BPAs that were not reported to the Government as MAS schedule contract sales. Appeal File, Exhibit 21. On August 21, appellant filed an appeal of that decision at the Board.

Discussion

The Government acted in accordance with the contract's terms in demanding payment of the \$10,534.46. The appellant is required by the MAS contract to "report the quarterly dollar value (in U.S. dollars and rounded to the nearest whole dollar) of all sales under this contract by calendar quarter" and to pay the IFF, which "equals 1% (one percent) of total quarterly sales reported." Appellant failed to report sales under two NIH BPAs because it believed that sales under those BPAs represented a pre-existing (i.e., non-MAS contract) relationship whose sales did not need to be reported. Appellant is wrong. The NIH BPAs referenced the MAS contract and adopted its terms and conditions.

Contrary to appellant's view, the issuance of those BPAs with the MAS contract number did not merely represent "assignment of an arbitrary number," but defined the contractual vehicle and the terms and conditions under which NIH was to purchase the covered services from appellant. The Federal Acquisition Regulation (FAR) provides that agencies may use BPAs to order from GSA MAS contracts. 48 CFR 8.404-4 (2000). The FAR also provides that BPAs may be established with Federal Supply Schedule contractors provided that the terms of the BPAs are not inconsistent with the terms of the applicable schedule contract. Id. 13.303-2(c)(3). Here, the BPAs incorporated the MAS contract number and made the terms and conditions of the schedule contract applicable to the BPAs. Those terms and conditions included payment of the IFF.

Decision

The appeal is **DENIED**. Appellant owes the Government \$10,534.46 plus any expenses and penalties or debt collection costs or interest that may be properly assessed in accordance with the Government's demand letter of August 3, 2001.

ANTHONY S. BORWICK
Board Judge