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RESEARCH FINDINGS

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From: LegalEase Solutions, LLC

Date:

Re: Federal Contract Law: Contract Interpretation & Default

INTRODUCTION

A Government request for proposal (RFP) for a radio specifies that the battery life must be 50 hours for the threshold requirement and 100 hours for an objective requirement. Contractor offers a radio that meets or exceeds the objective requirement with an estimated battery life of 150 hours and is awarded the contract. The contract is a best value award. At the post award meeting the Government presented a spec that stated the battery life was 150 hours which they said was offered and is now the objective. Contractor says it was an estimate of the expected battery life but the offer was for 100 hours or better not 150 hours. The contractor is willing to accept the 100 hour battery life as the contractual spec and can meet it. The words in the technical volume offer can be interpreted either way. Assuming the Government's assumption is correct does the contractual spec become 150 hours if the RFP spec was no greater than 100 hours? Can the Government default the contractor if 100 hours can be achieved but not 150 hours? The SOW is silent on this technical issue.

DISCUSSION

ISSUE 1: If there was an offer of achieving 150 hours in the bid, can the contractual specification become 150 hours even though the RFP specification requirement was 100 hours? What if contractor can meet 130 hours?

Yes. Although we didn't find any case law with a similar fact pattern or an affirmative rule of law explicitly permitting the government to hold contractor to a bid specification that is higher than RFP specification under the federal contract rules, the general framework of public contract law appears to permit such an action.

Whether Contracting officer can accept a different hour requirement than offered seems to depend on a number of factors: needs of government agency, whether Contractor can still perform; and whether change affects evaluation of past competing bids.

Under general contract law, an RFP is not an offer but a request for offers and bids are considered offers that are susceptible to acceptance by government agency if not withdrawn in time. Second, because this was an award of best value and such awards do not have to be selected based on lowest price only, such a factor as enhancing the life of battery beyond specification minimum may have been an important consideration factor for bid selection and rejecting competing bids. Therefore, to ensure fair competition, the enhanced battery life provided by the offeror may be held as the requirement. However, it does appear that the contracting officer has some discretion to determine whether 130 hours is sufficient and institute that number as the required battery life specification if it finds that this meets the needs of government and does not affect fairness of bid competition.

CONTRACT INTERPRETATION - AMBIGUITY

Contract interpretation starts with analysis of the language of the written agreement. In the Federal Circuit, the rule is that a court, in interpreting a contract, begins with the plain language. The court gives the words of the agreement their ordinary meaning unless the parties mutually intended and agreed to an alternative meaning. In addition, the court must interpret the contract in a manner that gives meaning to all of its provisions and makes sense. *Armour of Am. v. United States*, 96 Fed. Cl. 726 (Fed. Cl. 2010). Intent is determined by looking to the contract and, if necessary, other objective evidence. In the absence of clear guidance from the contract language, the requisite intent on the part of the government can be inferred from the actions of the contracting officer. When the terms of a contract are clear and unambiguous, there is no need to resort to extrinsic evidence for its interpretation. That is, when the contract's language is unambiguous it must be given its plain and ordinary meaning, and the court may not look to extrinsic evidence to interpret its provisions. If ambiguity is found or if ambiguity has arisen during performance of the agreement, the judicial role is to implement the intent of the parties at the time the agreement was made. However, because an ambiguous or uncertain writing sometimes can only be understood upon consideration of the surrounding circumstances, extrinsic evidence will be allowed to interpret an ambiguous clause. That is because meaning can almost never be plain except in a context. *Armour of Am. v. United States*, 96 Fed. Cl. 726 (Fed. Cl. 2010).

The principles governing interpretation of Government contracts apply with equal force to the interpretation of solicitations issued by the Government for such contracts. *Banknote Corp. of Am., Inc. v. United States*, 365 F.3d 1345, 1353 (Fed. Cir. 2004).

In the case at hand, it does not appear that there is an interpretation issue as to the solicitation specifications. The only interpretation issue is with respect to the bid/proposal made. Depending on the language used and the offer made with respect to the battery life of the offered product, there may be grounds on which contractor can argue that Contracting Officer's interpretation of the bid offer is incorrect or unjustified and the bid does not guarantee providing a 150 hours battery life but meeting and exceeding the 100 hours RFP specification. If an estimate of 150 hours was provided in offer, it would seem difficult to argue that an estimate is a hard number and contractually part of the offer which was accepted.

OFFER AND ACCEPTANCE

It is well-established government contract law that the contract specifications are the standard for determining defects, 48 C.F.R. § 10.001. The government cannot impose a more stringent testing procedure or standard for demonstrating compliance than is set forth in the contract. *United Technologies Corp. v. United States*, 27 Fed. Cl. 393 (Fed. Cl. 1992)

A proposal or bid, to convert it into a contract, must be accepted by the other party, and the assent of the parties to the terms thereof must be mutual. An offer of a bargain by one person to another imposes no obligation upon the former until it is accepted by the latter according to the terms in which the offer is made. Until the terms of the agreement have received the assent of both parties the negotiation is open and imposes no obligation on either; and since an offer or bid is not a contract it necessarily follows that the party making it may withdraw it at any time before

acceptance. *Scott v. United States*, 44 Ct. Cl. 524, 527 (Ct. Cl. 1909). In order to prove a valid contract, plaintiffs must show "mutuality of intent to contract, offer and acceptance, and that the officer whose conduct is relied upon had actual authority to bind the government in contract. *Rochman v. United States*, 27 Fed. Cl. 162, 170 (Fed. Cl. 1992). The government will not be bound on the basis of an implied-in-fact contract for merely accepting or approving an initial application or proposal, especially where it is apparent to the parties involved that substantial review of such a proposal, according to applicable regulatory requirements, would be necessary prior to creation of any binding commitment. *Prevado Village Partnership v. United States*, 3 Cl. Ct. 219, 226 (Cl. Ct. 1983).

Material terms and conditions of a solicitation involve price, quality, quantity, and delivery. *L-3 Global Communs. Solutions, Inc. v. United States*, 82 Fed. Cl. 604, 610 (Fed. Cl. 2008). Procurement law generally forbids modifying a contract after award so as to deprive the losing bidders of their chance to compete for what is essentially, after the modification, a new contract. *L-3 Global Communs. Solutions, Inc. v. United States*, 82 Fed. Cl. 604, 613 (Fed. Cl. 2008). An actual modification that exceeds the scope of the original contract harms disappointed bidders because the modification prevents the disappointed bidders from competing for what is essentially a new contract. *Graphicdata, LLC v. United States*, 37 Fed. Cl. 771, 783 (Fed. Cl. 1997).

The Federal Acquisition Regulations provides the following guidance on the evaluation of bids: To be considered for award, a bid must comply in all material respects with the invitation for bids. Such compliance enables all bidders to stand on an equal footing and

maintains the integrity of the sealed bidding system. 48 C.F.R. § 14.301(a) (1988). Therefore, a bid which contains a material nonconformity must be rejected as nonresponsive. Material terms and conditions of a solicitation involve price, quality, quantity, and delivery. The rule is designed to prevent bidders from taking exception to material provisions of the contract in order to gain an unfair advantage over competitors and to assure that the government evaluates all bids on an equal basis. In other words, a bidder cannot receive award by offering a less expensive method of performance than that required by the solicitation. *Blount, Inc. v. United States*, 22 Cl. Ct. 221, 227 (Cl. Ct. 1990).

Assuming there is no ambiguity in the language of Contractor's bid and government's interpretation is correct, a contract is created by the government's acceptance of the bid and award of the contract. Deviating away from the RFP specification in that the bid does not meet the RFP specification is grounds for rejection of bid. *Id.* Otherwise, permitting certain Contractor bids to deviate from RFP specification and permitting these bids to be considered would create an uneven playing field for bidders as such bidders could offer more competitive contract pricing. In the case at hand, there is intent to contract, an offer and acceptance, and presumably a contracting officer who had authority to accept who accepted. It doesn't appear from the facts provided about the case at hand, that Contractor's bid was a preliminary bid or initial proposal where further discussion was contemplated. According to *L-3 Global Communs. Solutions, Inc.*, the battery life requirement would seem to be a material term in the solicitation as it directly relates to the quality of the product and such material terms may not be changed post award so as to maintain fairness of competition. It seems the guiding principle here is whether the change will affect any past competing bids and whether such a change would have

changed the evaluation of their bids. However, if the change doesn't affect other bidders or would not affect the evaluation of the best value award Contractor in case at hand obtained, then it seems the Contracting Officer may have some discretion to make a determination based on the facts at hand.

SPECIFICATIONS

According to the classic formulation defining design and performance specifications, design specifications "set forth in precise detail the materials to be employed and the manner in which the work [is] to be performed," from which the contractor is "not privileged to deviate . . . , but [is] required to follow . . . as one would a road map. In contrast, typical 'performance' type specifications set forth an objective or standard to be achieved . . .," requiring the contractor to exercise its ingenuity in achieving the standard of performance, in selecting the means, and in assuming a corresponding responsibility for that selection. *Aleutian Constructors v. United States*, 24 Cl. Ct. 372, 378 (Cl. Ct. 1991).

Detailed design specifications contain an implied warranty that if they are followed, an acceptable result will be produced. In contrast, the government does not impliedly warrant the adequacy of performance specifications. *Aleutian Constructors v. United States*, 24 Cl. Ct. 372, 378 (Cl. Ct. 1991).

In the case at hand, the battery life specification is a performance specification for which the Contractor is responsible in achieving on his own and assumes all risk associated with meeting that goal.

BEST VALUE AWARD

Best value awards allow the government to accept other than the lowest priced proposal where the perceived benefits of the higher priced proposal merit the additional costs. See 48 C.F.R. § 15.101-1(c) (1998). The government is required to document in the source selection decision its rationale for any business judgments and tradeoffs made, including benefits associated with additional costs. See 48 C.F.R. § 15.308 (1998). However, procurement officials have substantial discretion to determine which proposal represents the best value for the government. *Unified Architecture & Eng'g, Inc. v. United States*, 46 Fed. Cl. 56, 62-63 (Fed. Cl. 2000).

This may factor in Contracting Officer's decision in determining whether to accept 130 hours battery life instead of 150 hours battery life. As this was an award of best value and such awards do not have to be determined based on lowest price only, the increased 150 hours battery life beyond specification minimum may have been an important consideration factor in selecting Contractor as winning bid and rejecting competing bids. Therefore, the Contracting Officer may consider the competing bids and whether evaluation of contract award may have been affected if the enhanced battery life offered in the bid by Contractor is not held as the minimum requirement.

ISSUE 2: Can the Government Default Contractor for Not Meeting the Offered 150 Hours?

Yes, if there is a strict completion date and set milestones which do not seem to be achievable based on Contractor's present performance. Granted the Contracting Officer does not exercise his/her discretion to accept 130 hours requirement, it seems the Government can default the Contractor for not meeting the offered 150 hours. If there is indeed a default, pursuant to FAR 52.249-8, it appears the government has wide discretion to cancel the contract and reprocure it.

Detailed design specifications contain an implied warranty that if they are followed, an acceptable result will be produced. In contrast, the government does not impliedly warrant the adequacy of performance specifications. Government contracts often contain both design and performance specifications. The application of an implied warranty of adequacy is appropriate when the particular contract specification in question most properly can be characterized as a design specification. If the government breaches its implied warranty of adequate specifications, it is responsible for plaintiff's extra costs in performing under the defective specifications. However, when defendant has provided design specifications and drawings, and plaintiff persuades defendant to change them in favor of plaintiff's preferred specification, plaintiff assumes the risk that performance under its proposed specifications may be impossible. In general, the party originating the design specifications is responsible for losses suffered by the other party due to defects in the specifications. Detailed measurements, tolerances, and materials, i.e., elaborate instructions as how to perform the contract, are of a design nature, in contrast to operational characteristics and specifications that leave the details of how to comply with the contract up to the contractor. *Hawaiian Bitumuls & Paving, Div. of Dillingham Constr. Pacific, Ltd. v. United States,* 26 Cl. Ct. 1234 (Cl. Ct. 1992).

In order to support a termination, for default, of a government contract, the government must establish by a preponderance of the evidence a reasonable belief on the part of the contracting officer that there was no reasonable likelihood that the contractor could perform the entire contract effort within the time remaining for contract performance. *Armour of Am. v. United States*, 96 Fed. Cl. 726 (Fed. Cl. 2010). The propriety of a default termination invoked by a government agency, even though ultimately a question of law, is a fact-sensitive inquiry. The so-called "Lisbon" test requires the contracting officer's reasonable belief that there was no reasonable likelihood of timely completion. Therefore, it is inevitable that some case-by-case adjudication is required. The "Lisbon" test is a correct standard for determining whether a default termination for failure to make progress is justified. However, this test is intended to be applied where there is a definite contract completion date. It does not address the situation where the contract does not specify a fixed completion date. As such, the "Lisbon" standard cannot be literally applied in every default termination for failure to make progress case. Instead, an ad hoc, factual inquiry that allows careful examination and weighing of all relevant circumstances is favored by the courts. In determining whether a default termination was justified, a court must review the evidence and circumstances surrounding the termination, and that assessment involves a consideration of factual and evidentiary issues. *Armour of Am. v. United States*, 96 Fed. Cl. 726, 745 (Fed. Cl. 2010).

Assuming the government is correct in its interpretation that 150 hours is the new specification requirement, it appears that a default would be permitted if such specification is not met within prescribed timeline. Since the specification at issue is a performance specification, there isn't as much flexibility if Contractor cannot meet the requirement. Commercial

impracticability is one defense but it doesn't appear to be a strong argument in many public contracts cases. Another is if the completion date is not set and so the Contractor has plenty of time to cure any issues he/she is dealing with. Otherwise, the Contracting Officer can more easily declare that the contract is at risk of not being performed on time, request a cure notice, and if not complied with, declare a default.