

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Transtar Metals, Inc. ) ASBCA No. 55039  
 )  
Under Contract No. SPO500-99-D-0068 )

APPEARANCE FOR THE APPELLANT: Bryan B. Arnold, Esq.  
Gordee, Nowicki & Arnold LLP  
Irvine, CA

APPEARANCES FOR THE GOVERNMENT: Kathleen D. Hallam, Esq.  
Chief Trial Attorney  
Michael L. McGlinchey, Esq.  
Trial Attorney  
Defense Supply Center (DLA)  
Philadelphia, PA

OPINION BY ADMINISTRATIVE JUDGE DELMAN ON GOVERNMENT'S  
MOTION FOR SUMMARY JUDGMENT

In this appeal Transtar Metals, Inc. (Transtar or appellant) challenges the contracting officer's decision denying its claim for damages due to, *inter alia*, negligent misrepresentation, negligently prepared estimates and superior knowledge with respect to the subject contract. The government has moved for summary judgment, which appellant opposes. We have jurisdiction under the Contract Disputes Act, 41 U.S.C. §§ 601-613.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

The Solicitation

On 22 March 1999, the Defense Industrial Supply Center (DISC or government) issued Solicitation No. SPO500-99-R-0006 for a broad range of heat treated and non-heat treated aluminum sheets and plates in Federal Stock Class 9535 to be delivered on a just-in-time, direct-vendor-delivery (DVD) basis to its military service and federal customers. (R4, tab 1 at 22) Awards were to be made of heat treated or non-heat treated aluminum items for areas east and west of the Mississippi River. The solicitation, as amended, established six lots of line items: Lot/Line Item 0001 HEAT TREATED ALUMINUM—EAST; Lot/Line Item 0002 HEAT TREATED ALUMINUM—WEST; Lot/Line Item 0003 NON-HEAT TREATED ALUMINUM—EAST; Lot/Line Item 0004 NON-HEAT TREATED ALUMINUM—WEST; Lot/Line Item 0007 ALUMINUM FLOOR PLATES—EAST; and Lot/Line Item 0008 ALUMINUM FLOOR PLATES—

WEST. Amendment 0001 to the solicitation deleted line items 0005 and 0006 and added line items 0007 and 0008. (R4, tab 1 at 1, 23, 36; tab 2)

Each contract awarded under the solicitation was an indefinite delivery, indefinite quantity (IDIQ) contract. Orders were issued to the contractor and the contractor delivered directly to the customers. The contract required delivery within three (3) days for Priority 01 requisitions, seven (7) days for Priority 02 and 03 requisitions, and fifteen (15) days for all other requisitions. The contract included a base ordering period of one-year with four one-year options. (R4, tab 1 at 22, 26)

The solicitation included Clause (e) F051 Delivery Order Limitations – Indefinite Quantity Contract (Stock and/or DVD) (May 1997) DISC 52.216-9129, which contained the following definitions and terms:

(a) Definitions.

.....

(2) The term, “Annual Estimated Quantity”, refers to the Government’s good faith estimate of the requirements for each item during a specified “contract year.” If no specific contract year is cited, the annual estimated quantity shall apply to each and every contract year during the period of the contract, including each option year, if any.

(3) The “Annual Estimated Amount” for an item is the amount derived by multiplying the annual estimated quantity by the contract unit price at which the item is awarded.

(4) The “Annual Estimated Value of the Contract” is the sum of the annual estimated amounts of the items awarded. If the contract base period is in excess of one year, the “Estimated Value of the Contract” will be the annual estimated value of the contract multiplied by the number of years in the base period.

.....

(6) The term, “Guaranteed Minimum”, is that minimum quantity, or that minimum dollar value, which the Government will guarantee the Contractor for the effective period of the contract. This is not to be confused with the

Minimum Order Limitation set forth in Paragraph (b) below.  
The guaranteed minimum is set forth in Paragraph (e) below.

.....

(e) Guaranteed Minimum.

.....

(2) The Government guarantees that it will order under this contract, (and under the contract awarded for any partial set-aside) the following minimum, as applicable:

.....

**[X] Supplies which have a dollar value of at least 10 percent of the annual estimated value multiplied by one (1) (Base period of the contract).**

.....

(5) The aggregate of the delivery orders issued during the base contract period will [sic] applied to the minimum guarantee as defined above. When the aggregate of the delivery orders equals or exceeds the guaranteed quantity or guaranteed dollar value, as applicable, the minimum guarantee will have been met, and the Government's obligations with regard to the guarantee will have been satisfied.

(R4, tab 1 at 26-28) (Emphasis in original)

The annual estimated quantities for each National Stock Number (NSN) item were provided to interested parties through a 3.5 diskette enclosed with the specifications. The diskette listed NSNs in Federal Supply Class 9535 on a Microsoft Excel spreadsheet format, and included sales for the previous twelve months for each item (R4, tab 1 at 23). The solicitation explained the following regarding the purpose of the diskette: "This solicitation is for an indefinite quantity contract; no definite quantities of supplies can be specified. For informational purposes, and with no commitment made by DISC, the attached diskette shows annual demand/requirements for previous years. This information reflects historical demand; it represents no guarantee of future purchase quantities." (R4, tab 1 at 4)

Part D, Statement of Work, paragraph C, in the solicitation contained the following concerning the scope of the work:

1. Award by Area Requirements

.....

2. Customer and sales data.

- a) Estimated Sales. DISC's sales for the previous 12 months for each item is found on the attached diskette and is listed as the annual estimated quantity. The annual estimated quantities for the area of the Continental United States, East of the Mississippi River do not include the estimated quantities for the following Activities which are covered by DISC's Regional Integrated Supplier Contract(s) for the area:

Lots 0001, 0003 and 0005 – FSC 9535 East of the Mississippi River

SIMA Norfolk  
Norfolk Naval Shipyard  
NADEP Cherry Point

- b) [sic] The annual estimated quantities for the area of the Continental United States, West of the Mississippi River, [sic] for the following Activities which are covered by DISC's Regional Integrated Supplier Contract(s) for the area:

Lots 0002, 0004 and 0006 – FSC 9535 West of the Mississippi River

Puget Sound Naval Shipyard

Note: DISC reserves the right to issue orders to the contractor for delivery to those sites for requirements which cannot or will not be filled by the prime vendor.

(R4, tab 1 at 23)

The solicitation also provided at Part D, paragraph C.2.b [sic] 2, that the contractor must be able to supply the items identified in the spreadsheet, referred to as the core group of items. Items not initially identified in the core group of items could be added at any time based on the requirements of the customers or ordering activities. (*Id.*)

Offerors were to include their prices in the spreadsheet on the diskette (R4, tab 1 at 4). The solicitation in Part E advised offerors as follows:

**NOTE: In calculating proposed prices, the offeror is advised to consider the business risk inherent in the possibility that actual sales volume may not equal the Government's estimate. This possibility may occur as estimated annual sales are based on previous history and do not take into account procurement initiatives being prepared by the Defense Industrial Supply Center.**

(R4, tab 1 at 40) (Emphasis in original)

Prior to award, appellant submitted an email to the contracting officer, dated 3 September 1999, that changed certain provisions of its proposal. Insofar as pertinent, appellant agreed to “waive the requested 25% Guaranteed Minimum and accept the 10% Guaranteed minimum stipulated in the solicitation.” (R4, tab 5)

### The Contract

On 30 September 1999, the contracting officer awarded appellant Contract No. SPO500-99-D-0068 for Lot/Line Item 0003 NON-HEAT TREATED ALUMINUM—EAST, and Lot/Line Item 0004 NON-HEAT TREATED ALUMINUM—WEST. The award amount was \$1,557,745.17 for Line Item 0003, and \$1,365,461.33 for Line Item 0004. Block 26 of the award document identified the total annual estimated award amount as \$2,923,206.50. Accordingly, we find that the annual guaranteed minimum, *i.e.*, 10% of the annual estimated value of the contract, was \$292,320.65. (R4, tab 6 at 1-2)

The government issued orders during the annual base contract period, and exercised each of the four annual options. The government ordered amounts that exceeded the 10% guaranteed minimum in each contract year. (Gov't mot. at 6, exs. 1-5)

Appellant submitted a certified claim to the contracting officer in the amount of \$644,349.63 on 16 April 2004. The claim alleged that Transtar had incurred substantial costs in purchasing and maintaining product inventories and in shipping products to regions covered by the contract, and was entitled to recover breach of contract damages as a result of: the substantial disparity between the government's actual purchases and the annual estimated quantities in the solicitation; the government's failure to use reasonable care in preparing the annual estimated quantities; negligent misrepresentation; and the doctrine of superior knowledge. (R4, tab 29)

The contracting officer issued a final decision, dated 16 May 2005, denying appellant's claim. On 2 June 2005, appellant filed an appeal with this Board. (R4, tabs 31, 32)

### CONTENTIONS OF THE PARTIES

In support of its motion for summary judgment, the government contends that there are no material facts in dispute. The solicitation was unambiguous in describing the contract as an IDIQ contract with a guaranteed minimum of 10% of the total annual estimated value per period of the contract, which the government ordered. The government disputes appellant's assertions with respect to any misrepresentations in the contract and negligently prepared estimates. However for purposes of its motion, the government assumes that appellant's assertions are correct. Nevertheless, the government maintains that any faulty or erroneous information in the solicitation or contract with regard to the annual estimated quantities is not material because the contract was an IDIQ contract, the government ordered the guaranteed minimum quantities and hence it fulfilled its contractual obligation.

Appellant contends that summary judgment is inappropriate because a material dispute exists over whether the solicitation contained any affirmative misrepresentation regarding the government's needs, and whether the government negligently prepared its estimates. Appellant also contends that summary judgment is inappropriate because it has not had an opportunity to complete discovery to determine how the government calculated the estimates and to gauge the accuracy of the estimates.

Appellant contends that while the government stated in the solicitation that its annual estimate of sales did not include estimated amounts the government would purchase under regional integrated supplier contracts, the government's estimate did include these estimated amounts. As a result, the annual estimated quantity figures were significantly overstated. In addition, appellant contends that the government's purchases were about 40% to 50% below the annual estimated quantities contained in the contract which were the result of faulty, inaccurate and negligently prepared estimates. Appellant asserts that it is entitled to recover costs it incurred in reliance on the alleged misrepresentations and negligently prepared estimates in the solicitation and contract.

In support of its opposition, Transtar submitted two declarations. The first is from Ms. Renee La Viers, branch manager of Transtar. She stated, *inter alia*, that: 1) “[t]he only measure Transtar had of the anticipated demand was the ‘estimated annual quantities’ contained in the Solicitation”; 2) in reliance on the estimated quantities, Transtar had acquired a significant amount of excess material which it was required to store and maintain; and, 3) “[h]ad the Government informed Transtar that its ‘annual estimated quantities’ included prior sales under Regional Integrated Supplier Contracts and sales at locations that would be covered by such contracts or adjusted its estimate to account for such sales, Transtar would have altered its pricing and inventory strategy to meet the reduced estimate of annual sales.” (App. opp’n, La Viers decl. ¶¶ 10, 12, 17) The second declaration is from appellant’s counsel, and is made to support the contention that additional discovery information is required from the government to determine, *inter alia*, how the government calculated the annual estimated quantities and whether they were accurate (app. opp’n, Arnold decl. ¶ 5).

### DECISION

Under familiar principles, summary judgment is properly granted where no material facts are genuinely in dispute and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Inferences are to be drawn in favor of the party opposing summary judgment. *Hughes Aircraft Company*, ASBCA No. 30144, 90-2 BCA ¶ 22,847. For reasons stated below, we conclude that there are no genuine issues of material fact, and that summary judgment is appropriate.

This was an IDIQ contract, and Transtar was guaranteed no more than 10% of the annual estimated value of the contract for the base year and for each annual option period. The contract stated that “[w]hen the aggregate of the delivery orders equals or exceeds the guaranteed quantity or guaranteed dollar value, as applicable, the minimum guarantee will have been met, and the Government’s obligations with regard to the guarantee will have been satisfied.” Clause (e) F051(e)(5).

The government ordered amounts which exceeded the guaranteed minimum for each contract period, and thus it fulfilled its obligations to appellant under the contract. *Travel Centre v. Barram*, 236 F.3d 1316, 1319 (Fed. Cir. 2001); *White Sands Construction, Inc.*, ASBCA No. 51875, 02-2 BCA ¶ 31,858; *see also, C.F.S. Air Cargo, Inc.*, ASBCA No. 40694, 91-2 BCA ¶ 23,985, *aff’d*, 972 F.2d 1353 (table) (Fed. Cir. 1992). As the Court noted in *Travel Centre*, “[r]egardless of the accuracy of the estimates delineated in the solicitation, based on the language of the solicitation for the IDIQ contract, Travel Centre could not have had a reasonable expectation that any of the

government's needs beyond the minimum contract price would necessarily be satisfied under this contract." (236 F.3d at 1319)

Transtar argues that it is not attempting to enforce the original estimate, but rather to "recover costs incurred as a result of affirmative misstatements in the Solicitation," an issue that has not "been previously addressed by the ASBCA" (app. opp'n at 16). However, a substantially similar issue was addressed by the Court in *Travel Centre*. In that case, the GSA solicited bids for an IDIQ contract to provide travel management services for federal agencies in Maine, New Hampshire and Vermont. Bidders were instructed to base their offers on past figures for services provided in those states. Prior to the submission of final bids, GSA learned that certain agencies, representing over one half of the expected business in Maine, would no longer be utilizing the travel management services. GSA failed to notify bidders of this information and awarded the contract. GSA's act of omission in failing to correct the solicitation meant that the solicitation contained inaccurate and faulty estimates. When the contractor experienced less revenue than it expected, it submitted a breach of contract claim. In rejecting the contractor's claim for breach, the Court stated that "[b]ecause GSA met the legal requirements of the contract at issue, its less than ideal contracting tactics fail to constitute a breach." (236 F.3d at 1319) Likewise, in this case, even assuming, *arguendo*, that the government possessed superior knowledge and negligently misrepresented and misstated the annual quantity estimates in the solicitation and the contract, this is not material because the government met its purchase obligations under the contract. See *Hermes Consolidated, Inc. d/b/a/ Wyoming Refining Co.*, ASBCA Nos. 52308, 52309, 02-1 BCA ¶ 31,767 at 156,899.

### CONCLUSION

For reasons stated, the government's motion for summary judgment is granted. The appeal is denied.

Dated: 24 January 2007

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JACK DELMAN  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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MARK N. STEMLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

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EUNICE W. THOMAS  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 55039, Appeal of Transtar Metals, Inc., rendered in conformance with the Board's Charter.

Dated:

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CATHERINE A. STANTON  
Recorder, Armed Services  
Board of Contract Appeals