

IBCA

APPEAL OF SANFORD COHEN & ASSOCIATES, INC.

Contract No. 68D20185 FY's 1993 - 1997

Decided: September 8, 2004

ENVIRONMENT PROTECTION AGENCY

Sustained; Remanded for Quantum Determination

APPEARANCE FOR APPELLANT: Claude P. Goddard, Jr., Esq.

Wickwire Gavin, P.C.

Vienna, Virginia 22182-7732

APPEARANCE FOR GOVERNMENT: Anthony G. Beyer, Esq.

Agency Counsel

Research Triangle Park, North Carolina 27711

OPINION BY CHIEF ADMINISTRATIVE JUDGE STEEL

Summary

This is an appeal from the Environment Protection Agency's (EPA's) Contracting Officer's (CO's) denial of Sanford Cohen & Associates' (SCA's) claim for breach of contract damages arising out of EPA's alleged failure (1) to order a contractually specified number of work hours for the base year, and for subsequent years, as set forth in the Contract; and (2) to renegotiate the fixed fee based on a realistic estimate of the level of effort. Appellant alleges that EPA knew or should have known that its estimates of direct labor hours for each performance period were grossly inflated and impossible to achieve, and that for the base period and four renewal option periods, the level of effort actually ordered never exceeded 40% of EPA's estimates.

The parties are in agreement that the Contract was a level of effort, cost-reimbursement, term contract with five renewal options, the fifth option having been added by Contract Modification 0052 on September 23, 1997. The Contract was neither a Requirements contract nor an Indefinite Delivery/Indefinite Quantity (ID/IQ) contract. It provided that:

The Contractor shall perform all work and provide all required reports within the level of effort specified below. The Government will order 119,000 direct labor hours [dlh] for the base period which represents the Government's best estimate of the level of effort required to fulfill these requirements. (Emphasis added)

By Modification 0008, dated May 26, 1993, EPA exercised Option Period I but deleted the above clause and substituted the following:

(a) The Contractor shall perform all work and provide all required reports within the level of effort specified below. The Government's best estimate of the level of effort required to fulfill these requirements is as follows:

PERIOD	DIRECT LABOR HOURS
Base Period	119,000
Option Period I	119,000

Although Appellant describes the foregoing as "non-standard language," EPA included it in each option exercised except for Option V, which was added by Modification 0052 and established an estimated level of only 7,000 hours for that option period. This modification also lowered the estimate of direct labor hours for Option Period IV from 119,000 dlh to 112,000 dlh. Along with these unilateral reductions in level of effort, EPA reduced the Contractor's fees by the same percentage as its level-of-effort cost reductions, an action it said was permitted under paragraph (1) of FAR's Limitation of Funds (LOF) clause, 52-232-22. This paragraph, incorporated by reference into the Contract, provided:

(1) If the Government does not allot sufficient funds to allow completion of the work, the Contractor is entitled to a percentage of the fee specified in the Schedule equaling the percentage of completion of the work contemplated by this contract.

Appellant contends, however, first, that the LOF clause does not apply because sufficient funds were allotted to the Contract, and, second, as shown by the fact that in every year except Option Periods III and V EPA either shifted funds from the current year to the next Option Period or deleted funds already obligated, that funds were always readily available in excess of the amounts required for the actual level of effort. We agree and find that Appellant is entitled to a renegotiation of the fees it received on the basis of what it would have earned had EPA's estimates more accurately reflected the true level of effort that it required on the basis of known conditions.

Facts

The Appellant is a corporation incorporated as "SC&A, Inc." and doing business as S. Cohen & Associates, Inc. (Hereinafter "SCA"). Respondent is the Environmental Protection Agency ("EPA").

1. The Board has jurisdiction over this appeal pursuant to the Contract Disputes Act of 1978, [41 U.S.C. § 601](#) et seq. SCA filed a properly certified claim which was denied by EPA's Contracting Officer; and SCA timely appealed the denial of its claim. EPA awarded SCA Contract No. 68D20185, effective September 30, 1992, to provide technical support to EPA relating to the assessment and evaluation of radon contamination, gaseous and other airborne radioactive materials, and electromagnetic field radiation.

2. The Contract was a level of effort, cost-reimbursement, term contract, with a base period of performance, and an option to extend the term for four additional periods of fifteen months each.

3. The Solicitation and resulting Contract incorporated standard cost reimbursement provisions by reference in Section I of the solicitation. These cost reimbursement provisions included the "Allowable Cost and Payment (JUL 1991)"

clause ([FAR B 52.216-7](#)), the "Limitation of Cost (APR 1984)" clause ([FAR B 52.232-20](#)), and the "Limitation of Funds (APR 1984) clause ([FAR B 52.232-22](#)).

4. Clause B-1 of the contract, entitled "Level of Effort - Cost-Reimbursement Term Contract," EPAAR 1552.212-70 (APR 1984), provided in part that,

(a) The Contractor shall perform all work and provide all required reports within the level of effort specified below. The Government will order 119,000 direct labor hours for the base period which represents the Government's best estimate of the level of effort required to fulfill these requirements.

* * *

(d) If the Contractor provides less than 90 percent of the level of effort specified for the base period or any optional period ordered, an equitable downward adjustment of the fixed fee, if any, for that period will be made.

5. Thus, the Contract established a Level of "Effort of 119,000 direct labor hours for each option period. Costs and fixed fees were also established for the base and options periods as follows:

Period	Estimated Cost	Fixed Fee
Base Period	\$6,565,091	\$426,731
Option Period I	\$6,709,566	\$436,122
Option Period II	\$6,896,855	\$448,296
Option Period III	\$7,089,668	\$460,828
Option Period IV	\$7,276,576	\$472,977
Option Period V	\$ 428,034	\$ 27,822

6. By unilateral Modification 0008, dated May 26, 1993, the government exercised Option Period 1. The Modification also deleted the original clause at B. 1 set out in paragraph 4, above, and substituted a new clause with the same estimate as follows:

(a) The Contractor shall perform all work and provide all required reports within the level of effort specified below. The Government's best estimate of the level of effort required to fulfill these requirements is as follows:

PERIOD	DIRECT LABOR HOURS
Base Period	119,000
Option Period 1	119,000

7. EPA used identical language for each subsequent option exercise . Except for Option Period V and amended Option Period IV, the estimated direct labor hours for each performance period continued to be 119,000 hours. Modification 0052 established the level of effort for Option Period V at 7,000 direct labor hours and lowered the estimated direct labor hours for Option Period IV from 119,000 to 112,000 dlh. 8. The EPA's estimated hours and actual orders per option period were as follows:

Contract Period	DLH Estimated	DLH Ordered
Base Period	119,000	35,608
Option Period I	119,000	50,583
Option Period II	119,000	69,306
Option Period III	119,000	32,963
Option Period IV	112,000	28,124
Option Period V	7,000	4,717

9. The EPA incrementally funded the Contract throughout its duration, allotting funds to the Contract at levels consistent with the actual levels ordered. At the end of each performance period, EPA had allotted the following amounts:

Performance Year	Total Allotted	Allotted to Cost	Allotted to Fee
Base Period	\$2,058,022	\$1,932,415	\$125,607
Option Period I	3,021,774	2,837,346	184,428
Option Period II	3,952,051	3,654,732	296,319 [FN1]
Option Period III	1,623,040	2,523,981	99,059
Option Period IV	1,635,000	1,535,211	99,789
Option Period V	299,000	280,751	18,249

The estimated costs and fixed fees, however, remained at their original levels for each performance period. During these performance periods, the amounts allotted were driven by the level of effort, not by the absence of funding availability.

10. SCA's incurred costs and fees received were as follows:

Base Period	\$1,925,275.46	124,970.60
Option Period I	\$2,745,804.12	177,839.97
Option Period II	\$2,654,445.75	163,816.88
Option Period III	\$1,503,019.03	102,729.45
Option Period IV	\$1,438,143.41	108,060.97
Option Period V	\$271,487.04	19,030.20
Total:		\$696,448.07

The difference between the total of \$2,244,945 in fixed fees set forth in the Contract and the total fees paid is \$1,548,505.93.

11. By letter dated December 3, 1996, EPA sent SCA a proposed bilateral Modification 0044 that would have retroactively changed clause B-1 of the Contract to reflect the Government's "best estimate" of the level of effort as follows:

PERIOD	DIRECT LABOR HOURS
Base Period	32,516.86 (actual)
Option Period I	46,877.14 (actual)
Option Period II	43,459.86 (actual)
Option Period IV	119,000 (later reduced to 112,000 by Modification 0052)

12. SCA refused to sign Mod 0044 because it thought basing the fee on a lesser

number of hours was inequitable. It proposed an equitable adjustment of the fee based on the midpoint between the original fixed fee and EPA's fee, which was based solely on dollars per hour delivered. EPA rejected the proposal.

Discussion

In their well-written and well-received "bible", *Formation of Government Contracts* (3rd ed., George Washington University, 1998), Mssrs. Nash and Cibinic devote more than 200 pages to Types of Contracts. But their recent newsletters suggest that they have a particular interest in requirements and ID/IQ contracts. The Contract before us is of neither type, but its legal construction depends upon case law in these areas because any level-of-effort, cost reimbursement, option contract must specify in some manner the quantities the parties have agreed to, since pricing depends on the quantities ordered.

EPA, the agency involved here, apparently originally made use of ID/IQ contracts (see *Dot Systems v. United States*, 231 Ct. Cl. 707 (1982)) but more recently has used Level-of-Effort contracts instead (see *Sociotechnical Research Applications, Inc.*, IBCA 3969, 01-1 BCA 31,235 and 03-1 BCA 32,214 (hereafter *STRA*)). In both cases, EPA grossly over-estimated its needs, as it has in this Appeal. The effect, whether intended or not, is to entice prospective contractors into offering lower prices than they otherwise would, since greater quantities generally mean lower costs per unit. It is therefore necessary to analyze the nature and extent of EPA's legal obligations in this matter.

The earlier cases pretty well agree that the Government's only obligation in an ID/IQ contract is to purchase the minimum quantity specified in the contract, regardless of the Government's needs. EPA's contract form in *Dot Systems*, above, expressly reserved the Government's right to award contracts and orders to other companies for like services during the same period. The Government's estimate of its contractual needs was not guaranteed. The Court of Claims affirmed this approach, stating that "in light of this provision, plaintiff could not reasonably have believed that it had any right to expect that the estimated quantities would in fact be ordered." 231 Ct. Cl. at 769.

Although Nash and Cibinic observe that there is no requirement in the FAR for an agency to include estimated quantities in an ID/IQ contract--and that all that is required is a statement of minimum and maximum quantities--they note with approval that many agencies now use estimated quantities to establish a basis for evaluation of offers, and that the Comptroller General also has "no difficulty in recognizing that offerors rely on estimated quantities in ID/IQ contracts."

These authors would propose a rule making the Government liable for negligently prepared estimates in both ID/IQ and requirements contracts whenever the contractor has reasonably relied on those estimates in arriving at its offered prices. They also suggest that "while reasonable reliance on the estimate in a requirements contract is presumed, the contractor would have to show that it reasonably relied on the estimate in an IDIQ contract." (Nash & Cibinic Report, Vol 13, No. 12, December 1999, par. 63) They go on to say:

Our proposed rule would probably not lead to a great amount of contractor recovery on IDIQ contracts because the burden of proof on the contractor would be substantial. However, it would have one significant benefit. It would stop the appeals boards from continuing to state or imply that contractors should not rely on estimated quantities in IDIQ contracts. The boards' approach is damaging to the

procurement process for two reasons. First, as recognized by the Comptroller General, it is probably not correct as a matter of fact in most instances. Second, it permits Government agencies to be careless in preparing estimates on IDIQ contracts when they are well aware that such estimates may induce offerers to submit reduced prices based on the estimates. This is not a healthy state of affairs.

We agree. Even our decision in STRA, which discussed these issues at great length and ultimately granted EPA's motion for summary judgment, found it reasonable that STRA would have relied on EPA's estimates. (01-1 BCA at 154,178). The same finding is appropriate here with respect to SCA, and we hereby make it. We find it particularly egregious that as early as its first option exercise in May 1993, EPA felt the need to change the statement that it would order 119,000 direct labor hours to less-definite "best estimate" language, while still retaining the same number of hours as the required level-of-effort-- apparently in an attempt to relieve itself of any legal responsibility for lesser orders--but at the same time requiring Appellant to maintain sufficient staffing to accommodate an order for the original 119,000 hours if EPA later changed its mind on the number of hours it needed.

The essential unfairness of this EPA practice did not escape the agency's notice. EPA's Regional Operations Division on April 3, 1998, issued a memorandum entitled, "Monitoring the Level of Effort (LOE) in Cost-Reimbursement Term Form Contracts," which stated the following:

Purpose: This Contract Guidance Document (CGD) provides information to contracting officers (CO's) administering cost-reimbursement-Level of Effort (LOE) term form contracts.

Background: The current Environmental Protection Agency Acquisition Regulation (EPAAR) clause 1552.211-73, entitled "Level of Effort-Cost-Reimbursement Term Contract" states that EPA "will order" a specified number of direct labor hours for the base period, which number of hours "represents the Government's best estimate of the level of effort" required. The clause provides that if the direct labor hours actually provided falls below 90% of the specified LOE, an equitable downward adjustment will be made to the fixed fee. The clause states that no adjustment will be made to the fee if the Government orders up to 110% of the specified LOE.

In recent years, the direct labor hours ordered under many superfund/TRCRA contracts have been substantially less than 90% of the specified LOE. Sometimes, the specified LOE is not achieved because a significant portion of the effort is ordered shortly before the current contract period is about to expire.

Analysis: The Office of General Counsel (OGC) has advised that if 90% of the specified LOE will not be ordered, the contract should be modified to reduce the LOE before the current base or option period expires. CO's should attempt to negotiate a bilateral modification which reduces both the LOE and the fixed fee. If an acceptable modification cannot be negotiated in a timely manner, CO's should issue a partial termination for convenience of the LOE to remove any excess labor hours from the current and all remaining contract periods of performance. If the LOE is not reduced (either by means of a bilateral modification or a partial termination for convenience) before the current period of performance expires, the Government may have breached the contract. The contractor could pursue a claim to recover the entirety of the fixed fee and other damages associated with the breach of contract.

Conclusion: CO's should monitor cost-reimbursement, LOE term form contracts closely to ensure that the total number of direct labor hours ordered and completed

during a given period of performance falls within the 90-110% range specified in the contract LOE clause. If such monitoring indicates that the original LOE estimate will not be achieved, timely action should be taken to negotiate a reduction in the labor hours and the corresponding fixed or base fee. Alternatively, the CO may issue a partial termination for convenience which (1) removes the excess labor hours from the current and each remaining contract period of performance, and (2) reduces the fixed fee. A partial termination for convenience may result in a contractor claim for termination costs.

By contrast, as in STRA, Government counsel argues here that the number of hours ordered is essentially a funding issue; that is, that EPA is liable to the contractor only to the extent that funds have been allotted to a particular contract. The Board in STRA accepted that argument on the basis of the agency's assurance that sufficient appropriations were not available to fully fund the contract's LOE estimates. Here, there is no representation that sufficient funds were not available, as partially indicated by the fact that unused contract funds in prior years were allotted to the contract in subsequent years. Counsel does not discuss his General Counsel's concerns or satisfactorily refute Appellant's contention that the limitation of funding clause is not involved in this Appeal because adequate funds were available for the full performance of the Contract. We find that sufficient funds were in fact available to meet the agency's LOE estimates.

The only remaining issue is the matter of damages. Appellant argues that it is entitled to compensation midway between the fee it would have earned if all of the estimated hours had been ordered and the lesser fee based on the hours that were actually ordered. Such a result might have been appropriate for a settlement outside the scope of this litigation, but it is not an appropriate basis for an award by this Board, particularly in light of the Federal Circuit's opinion in [Rumsfeld v. Allied Companies, 318 F. 3d 1317 \(2002\)](#) which found that the contractor was not entitled to anticipatory profit damages and that the proper methodology for determining damages was by equitable adjustment in the price of units delivered. Thus, a remand of the case to the parties for a determination of damages in accordance with Rumsfeld is necessary.

Decision

Appellant's motion for summary judgment is granted, and the Government's motion is denied. The matter is hereby remanded to the parties for a determination of damages based on an equitable adjustment in the price of hours delivered. If the parties cannot agree on damages, the Board should be notified within 60 days so that it can determine damages. It is so ordered.

Candida S. Steel

Chief Administrative Judge

I concur:

Bernard V. Parrette

Administrative Judge

FN1. Per Modification 0050 of September 9, 1997.