UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY RELIEF DENIED: July 7, 2010

CBCA 1789

ALK SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Dennis P. Zapka and David H. Boehm of McLaughlin & McCaffrey, LLP, Cleveland, OH, counsel for Appellant.

Phillipa L. Anderson, Office of the General Counsel, Department of Veterans Affairs, Washington, DC; and Tracy Downing, Office of the General Counsel, Department of Veterans Affairs, Augusta, GA, counsel for Respondent.

Before Board Judges **BORWICK**, **HYATT**, and **McCANN**.

HYATT, Board Judge.

Appellant, ALK Services, Inc. (ALK), has appealed a contracting officer's decision denying its claim for breach damages under a contract with the Department of Veterans Affairs (VA) to provide snow and ice removal services at the Ohio Western Reserve National Cemetery in Rittman, Ohio. The VA has moved for summary relief, arguing that as a matter of law it is entitled to prevail.

Background

Contract number VA250-07-P-0219, for snow and ice removal at the Ohio Western Reserve National Cemetery in Rittman, Ohio, was awarded to ALK in October 2007. Under the statement of work, the contractor was to supply all necessary supervision, labor, materials, supplies, tools, and equipment to perform the snow removal operations. The contract provided for a base year from October 1, 2007, to September 30, 2008, with three one-year renewal options.

Paragraph II.1 of the solicitation, which was incorporated into the contract, provided, in pertinent part, that "[t]his is an Indefinite Quantity Indefinite Delivery [IDIQ] contract." The statement of work, paragraph I.1, included a Schedule of Unit Prices with instructions for prospective contractors on formulating unit prices:

> The itemized services listed below are an estimated maximum amount[;] the minimum quantity is one occurrence. Monthly billing and payment will be on an "as-needed/as-used" basis only and will include only the work activities that have been authorized by the COTR [contracting officer's technical representative] and have actually occurred during the month. There is no guarantee that all of these estimated quantities will be fully utilized during that month. There is no guarantee that any of these estimated quantities will be fully utilized during any period of the contract.

Appeal File, Exhibit 1.

Federal Acquisition Regulation (FAR) clause 52.216-19, Order Limitations, 48 CFR 52.216-19 (2007), was also included in the contract. Subparagraph (a) of this clause states that the contractor is not obligated to furnish supplies or services in an amount of less than one occurrence. Under subparagraph (b) the contractor is not obligated to honor an order for a single item in excess of fifty occurrences, or for a combination of items in excess of 160 occurrences, or for a series of orders from the same ordering office within two days that together calls for quantities exceeding the foregoing limitations. Subparagraph (c) states that if this is a requirements contract, the Government is not required to order a part of any one requirement from the contractor if that requirement exceeds the maximum-order limitation in paragraph (b) above. The solicitation included FAR clause 52.216-21, Requirements, which was set forth in full. Appeal File, Exhibit 1.

The VA ordered work under the base year of the contract for which ALK was paid $82,294.73. On October 1, 2008, the VA exercised the first option for an additional year. The VA ordered snow removal services amounting to $30,278.17 during the first option year. The VA did not exercise the option for a second year. Appeal File, Exhibit 5.

On May 15, 2009, ALK asserted a claim under the contract for damages in excess of $50,000. ALK alleged that VA personnel responsible for administering the contract drastically reduced the use of ALK's services in retaliation for the participation of ALK's subcontractor's employees in an administrative proceeding. According to ALK, the cemetery director instituted proceedings to remove the COTR following an alleged confrontation between the COTR and another cemetery employee. The ALK subcontractor employees witnessed the event in issue and provided testimony favorable to the COTR. ALK asserted that but for the animus generated toward it as a result of these proceedings, it would have continued to receive work under the contract. Appeal File, Exhibit 4.

Discussion

Shortly after ALK filed this appeal, the VA filed a motion for summary relief, maintaining that this was an IDIQ contract with a guaranteed minimum purchase of one occurrence.[1] Since the Government satisfied the minimum purchase obligation, the VA argues that, under the reasoning of *Travel Centre v. Barram*, 236 F.3d 1316, 1319 (Fed. Cir. 2001), the agency owes no further legal obligation to the contractor and the Government is entitled to prevail as a matter of law.

Summary relief is properly granted when there is no genuine issue of material fact and the moving party is clearly entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *US Ecology, Inc. v. United States*, 245 F.3d 1352, 1355 (Fed. Cir. 2001); *Olympus Corp. v. United States*, 98 F.3d 1314, 1316 (Fed. Cir. 1996). The moving party bears the burden of establishing the absence of any genuine issue of material fact. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987); *accord Parkview Engraving LLC v. Department of Veterans Affairs*, CBCA 1564, 10-1 BCA ¶ 34,372, at 169,728. The nonmoving party is then required to "go beyond the pleadings and . . . designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp.*, 477 U.S. at 324.

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[1] Although the contract contains provisions for both IDIQ and requirements contracts, the parties seem to agree that this is an IDIQ contract.

In response to the VA's argument, ALK contends that its allegations concerning the drastic reduction in services ordered by the VA following the administrative proceedings, in which ALK's subcontractor's employees testified, defeat the Government's motion at this juncture in the proceedings. ALK submits that, regardless of whether the VA has met its minimum purchase obligation, the agency's actions subsequent to the incident reflect a failure to act in good faith toward ALK. The purchase of the guaranteed minimum, in ALK's view, does not absolve the agency from its obligation to act in good faith and cannot shield the VA from liability arising out of bad faith conduct.

The VA is mistaken in its argument that once the guaranteed minimum has been purchased under an IDIQ contract there be can no breach of the contract. This Board has recently acknowledged precedent in which summary judgment was denied, even though the Government had met its minimum purchasing obligations under an IDIQ contract, because there were disputed facts regarding the Government's good faith. *Electronic Data Systems, LLC v. General Services Administration*, CBCA 1552, 10-1 BCA ¶ 34,316 (2009) (citing *Advanced Technologies & Testing Laboratories, Inc.*, ASBCA 55805, 08-2 BCA ¶ 33,950; *Community Consulting International*, ASBCA 53489, 02-2 BCA ¶ 31,940; and *Burke Court Reporting Co.*, DOT BCA 3058, 97-2 BCA ¶ 29,323). As the Armed Services Board aptly observed in *Community Consulting International*, "[w]hile the minimum quantity represents the extent of the Government's purchasing obligation, however, it does not constitute the outer limit of all of the Government's legal obligations under an indefinite quantity contract." 02-2 BCA at 157,789.

The board in *Burke Court Reporting* similarly recognized that every contract includes the implied obligation that the parties will act in good faith during performance and that, while an IDIQ contract may only obligate the Government to order a specified amount of services, the contractor nonetheless is entitled to rely on other contract provisions implying that it will be fairly considered for additional work, if required by the Government. 97-2 BCA at 145,801.

At this stage of the proceedings, the parties have not yet engaged in discovery. In passing upon a summary judgment motion, the opposing party must be given an adequate opportunity to conduct discovery in support of its position. *See Anderson v. Liberty Lobby,* 477 U.S. at 250 n. 5; *Burnside-Ott Aviation Training Center, Inc. v. United States*, 985 F.2d 1574 (Fed. Cir. 1993); *Diplomatic Painting & Building Services Co. v. General Services Administration*, GSBCA 12031, 93-3 BCA ¶ 26,101. Although proving that bad faith has

occurred in the administration of a government contract is a formidable endeavor,[2] ALK is entitled to conduct the discovery needed to make its case.

Decision

The VA's motion for summary relief is **DENIED**.

CATHERINE B. HYATT
Board Judge

We concur:

ANTHONY S. BORWICK
Board Judge

R. ANTHONY McCANN
Board Judge

[2] The Board follows the guidelines set forth by the Court of Appeals for the Federal Circuit in *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239-40 (Fed. Cir. 2002). *AFR & Associates, Inc. v. Department of Housing and Urban Development*, CBCA 946, 09-2 BCA ¶ 34,226.