



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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DENIED: August 22, 2011

CBCA 2118

SWORD & SHIELD ENTERPRISE SECURITY, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Wade M. Bass of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Mandeville, LA; and Darwin A. Hindman, III, Nashville, TN, counsel for Appellant.

Michael J. Noble, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

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

**HYATT**, Board Judge.

Appellant, Sword & Shield Enterprise Security, Inc. (Sword & Shield), has appealed a contracting officer's decision, issued by respondent, the General Services Administration (GSA), declining to exercise an option to extend its schedule contract. The appeal has been submitted for decision on the written record pursuant to Board Rule 19 (48 CFR 6101.19 (2010)). The record consists of the complaint and accompanying exhibits, the answer, the appeal file, and the briefs of the parties. For the reasons stated below, we deny the appeal.

Findings of Fact

On August 1, 2005, GSA's Information Technology (IT) Acquisition Center awarded Federal Supply Service (FSS) schedule contract number GS-35F-0772R to Sword & Shield. The award was for a five-year period with an expiration date of July 31, 2010. Appeal File, Exhibits 1, 8.

The contract permitted Sword & Shield to sell two line items to ordering agencies: (a) IT backup and security services and (b) other IT services, not elsewhere classified, under the schedule category "Special Item No. 132-51 - Information Technology Professional Services." Appeal File, Exhibit 1.

Section C.24 of the contract provided an option to extend the term of the contract:

(a) The Government may require continued performance of this contract for an additional 5 year period when it is determined that exercising the option is advantageous to the Government considering price and other factors. The option clause may not be exercised more than three times. When the option to extend the term of this contract is exercised the following conditions are applicable:

(1) It is determined that exercising the option is advantageous to the Government considering price and the other factors covered in (2 through 4 below).

(2) The contractor's electronic catalog/pricelist has been received, approved, posted, and kept current on GSA Advantage!(tm). . . .

(3) Performance has been acceptable under the contract.

(4) Subcontracting goals have been reviewed and approved.

(b) The Contracting Officer may exercise the option by providing a written notice to the Contractor within 30 days, unless otherwise noted, prior to the expiration of the contract or option.

(c) When the Contracting Officer exercises [an] option to extend the term of this contract, prices in effect at the time the option is exercised

will remain in effect during the option period, unless an adjustment is made in accordance with another contract clause.

Appeal File, Exhibit 1 at 34.

Section C.25 of the schedule contract, Notice Regarding Option(s) (GSAR 552.217) (NOV 1992), provided:

The General Services Administration (GSA) has included an option to extend the term of the contract in order to demonstrate the value it places on quality performance by providing a mechanism for continuing a contractual relationship with a successful offeror that performs at a level which meets or exceeds GSA's quality performance expectations as communicated to the Contractor, in writing, by the Contracting Officer or designated representative. When deciding whether to exercise the option, the Contracting Officer will consider the quality of the Contractor's past performance under the contract in accordance with 48 CFR 517.207.

Appeal File, Exhibit 1 at 34.

The contract also included section C.41, Contract Sales Criteria (I-FSS-639) (MAR 2005). This clause stated:

(a) A contract will not be awarded unless anticipated sales are expected to exceed at least \$25,000 within the first 24 months following contract award, and are expected to exceed \$25,000 in sales each 12-month period thereafter.

(b) The government may cancel the contract in accordance with 552.238-73, Cancellation, unless reported sales are at the levels specified in paragraph (a) above.

Appeal File, Exhibit 1 at 47.

The contract also included an Industrial Funding Fee (IFF) clause intended to reimburse FSS for its operating costs, which represented a percentage of the total quarterly sales. Appeal File, Exhibit 1 at 33-34.

Sword & Shield's reported sales for the term of the contract totaled \$713,506.67, from 2006 through July 31, 2008. The lion's share of these sales were to the United States Geological Survey (USGS). Sword & Shield received a purchase order from the Bureau of

Land Management (BLM) in 2007, but BLM was unable to fund the contract after the base and first option years. After July 31, 2008, there were no further sales reported under the contract. Complaint, Exhibit C; Appeal File, Exhibits 9, 13.

On May 7, 2010, a contract specialist with the Department of Veterans Affairs (VA) contacted the GSA contracting officer assigned to administer Sword & Shield's schedule contract to request assistance with a problem the VA had with Sword & Shield. The VA asserted that it had purchased software from Sword & Shield but had not received the hardware needed to run the software. The GSA contracting officer in turn forwarded the message to Sword & Shield and requested an explanation. Sword & Shield responded promptly, explaining that the order in question was not placed under the GSA schedule contract, but rather was generated under the National Aeronautics and Space Administration's (NASA's) Solutions for Enterprise-Wide Procurement [SEWP] Government-Wide Acquisition contract. The SEWP order was not for hardware but for training and support/maintenance. Sword & Shield assured GSA that someone would contact the VA to resolve the matter. Appeal File, Exhibit 7.

On May 26, 2010, GSA notified Sword & Shield that its schedule contract would not be extended through exercise of the option. GSA stated:

Your contract GS-35F-0772R under Multiple Award schedule 70 General Purpose Commercial Information Technology (IT) Equipment, Software, and Services is due to expire July 31, 2010. This letter is to advise you that the Government has decided not to exercise the option to extend your contract. The decision was based upon your failure to comply with one or more of the bulleted terms and conditions provided below:

I-FSS-163 Option to Extend the Term of the Contract  
(Evergreen) (APR 2000)

552.217-71 Notice Regarding Option(s) (NOV 1992)

I-FSS-639 Contract Sales Criteria (MAR 2002)

Appeal File, Exhibit 8.

Sword & Shield responded to this notice asking for a more detailed explanation of the decision not to extend the term of the contract for another five years. The contracting officer responded by citing to section C.41 of the contract regarding sales criteria and asking for more information about the company's sales strategy. Appeal File, Exhibit 9.

In a letter dated June 21, 2010, Sword & Shield presented additional information to GSA concerning its sales history and plans to expand sales under the schedule contract. Specifically, Sword & Shield noted that it had made “a significant investment of time and money over the last six months to improve [its] government consulting sales” and had engaged an outside consultant to assist in this effort.<sup>1</sup> Appellant noted that while it is still very small by most consulting firm standards, it has been challenged by its loss of small business status under most NAICS [North American Industry Classification System] categories. The company is now endeavoring to develop partnerships with its customers and other small businesses that should enable it to compete effectively with larger consulting businesses. Appeal File, Exhibit 11.

In an e-mail message dated July 19, 2010, the GSA contracting officer informed Sword & Shield:

After carefully reviewing the recently submitted Option package and generated reports, it's in the best interest of the Government not to exercise the Option for Sword & Shield Enterprise Security. Please see the explanation below:

No Sales Activity in two years  
Labor Rates are not in competitive range  
Cost Effectiveness: cost of administering the contract  
Other than favorable past performance; received notification  
from NASA SEWP customer.

Appeal File, Exhibit 12 at 2.

In response to a subsequent request from Sword & Shield for a more detailed explanation of her reasons, the contracting officer confirmed her decision not to exercise the option to renew in an email message sent on July 28, 2010:

The decision not to exercise the Option was primarily based on Sword & Shield's inability to meet the sales requirement.

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<sup>1</sup> In an undated affidavit submitted with appellant's brief, the president and chief executive officer of Sword & Shield averred that the company spent \$14,000 on federal marketing efforts in 2010 before GSA declined to exercise the option to extend the contract. Affidavit of John P. McNeely ¶ 9.

After reviewing the labor rates posted on GSA Advantage, it was determined that Sword & Shield's rates weren't competitive and therefore awarding the Option wouldn't be in the best interest of the government.

The "[o]ther than favorable" customer feedback previously referenced was an email received from a Contract Specialist with the VA. . . . Though the order was from a NASA SEWP contract, it was still taken into consideration.

Appeal File, Exhibit 12.

Sword & Shield has submitted evidence reflecting a comparison of its own labor rates with those of four direct competitors holding GSA schedule contracts during the period of the contract. After reviewing labor rates for thirty-one comparable job titles, Sword & Shield determined that its rates were lower in twenty-nine of those categories and that on average its rates were eighteen percent lower than those of the competitors. Complaint, Exhibit E.

With respect to the less than favorable feedback on the SEWP contract, Sword & Shield provided a printout of an online NASA SEWP performance report, dated August 24, 2010, showing that Sword & Shield was rated excellent in every area of performance. Complaint, Exhibit G.

On August 24, 2010, Sword & Shield appealed the contracting officer's decision to the Board.

### Discussion

Sword & Shield has appealed GSA's decision not to extend its schedule contract for an additional five years, asserting that "as the country was in the grips of a recession, the Contracting Officer unfairly, and based on incorrect information, decided that Sword & Shield's opportunity to market its services via the GSA schedule would end." In particular, Sword & Shield takes issue with the factual conclusions relied upon by the contracting officer in her explanation of this decision. While recognizing that the decision might be technically permissible, Sword & Shield urges that the standard applied in these circumstances is unfair and has caused actual harm to appellant in the form of lost revenue, the retraction of Sword & Shield's anticipated growth, a stifling of anticipated marketing expenditures, and decreased competition in the marketplace.

An option contract customarily binds the option giver, but not the option holder, who retains both the power to exercise it and the privilege not to. *See Green Management Corp.*

*v. United States*, 42 Fed. Cl. 411, 434 (1998) (citing *Dynamics Corp. of America v. United States*, 389 F.2d 424, 431 (Ct. Cl. 1968)). When a contract contains an option to extend its term, unless the contract provides otherwise, the Government enjoys broad discretion and is under no obligation to exercise it. *Government Systems Advisors, Inc. v. United States*, 847 F.2d 811, 813 (Fed. Cir. 1988); *AFR & Associates, Inc. v. Department of Housing & Urban Development*, CBCA 946, 09-2 BCA ¶ 34,226, at 169,168-69; *Innovative (PBX) Telephone Services, Inc. v. Department of Veterans Affairs*, CBCA 44, et al., 08-1 BCA ¶ 33,854, at 167,584; *Integral Systems, Inc. v. Department of Commerce*, GSBCA 16321-COM, 05-2 BCA ¶ 32,984, at 163,472.<sup>2</sup> The Government's decision not to exercise an option can thus provide a vehicle for relief only if the contractor proves that the decision was made in bad faith or was so arbitrary or capricious as to constitute an abuse of discretion. *Blackstone Consulting, Inc. v. General Services Administration*, CBCA 718, 09-1 BCA ¶ 34,103, at 168,636; *Greenlee Construction, Inc. v. General Services Administration*, CBCA 416, 07-1 BCA ¶ 33,514, at 166,062; *Aspen Helicopters, Inc. v. Department of Commerce*, GSBCA 13258-COM, 99-2 BCA ¶ 30,581, at 151,024.

GSA points out that it is exceedingly difficult to show that the decision not to exercise an option was made in bad faith or that it constituted an abuse of discretion. As the Board recently observed in *AFR & Associates, Inc.*, the Board follows the precedent of the United States Court of Appeals for the Federal Circuit in evaluating whether the evidence presented establishes bad faith. 09-2 BCA at 169,169. The case law in the Federal Circuit requires that:

[I]n order to overcome the presumption of good faith on behalf of the government, the proof must be almost irrefragable. "Almost irrefragable proof" amounts to clear and convincing evidence. In the cases where the court has considered allegations of bad faith, the necessary "irrefragable proof" has been equated with evidence of some specific intent to injure the plaintiff.

*Id.* (quoting *Galen Medical Associates, Inc. v. United States*, 369 F.3d 1324, 1330 (Fed. Cir. 2004)); *see also Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239-40 (Fed. Cir. 2002) (citing *Price v. Symsek*, 988 F.2d 1187, 1191 (Fed. Cir. 1993) for the proposition that clear and convincing evidence is "evidence which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is 'highly probable'"); *Greenlee Construction, Inc.*, 07-1 BCA at 166,062. The Board further stated:

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<sup>2</sup> *See also* 36 Comp. Gen. 62 (1956) ("options [are] purely for the interest and benefit of the Government").

In determining whether the decision not to exercise the option was so arbitrary or capricious as to constitute an abuse of discretion, we consider —

(1) evidence of subjective bad faith on the part of the government official, (2) whether there is a reasonable, contract-related basis for the official’s decision, (3) the amount of discretion given to the official, and (4) whether the official violated an applicable statute or regulation.

*AFR & Associates, Inc.*, 09-2 at 169,169 (quoting *McDonnell Douglas Corp. v. United States*, 182 F.3d 1319, 1326 (Fed. Cir. 1999) (citing *United States Fidelity & Guaranty Co. v. United States*, 676 F.2d 622, 630 (Ct. Cl. 1982))).

Sword & Shield acknowledges that the contracting officer’s action was not taken in bad faith, but urges that both logic and overarching procurement policy objectives, set forth in the Federal Acquisition Regulation (FAR), mandate a different approach for review of this decision. Appellant cites to FAR 1.102-2(c)(1) (48 CFR 1.102(c)(1) (2005)), which establishes the general guideline that the Government conduct business fairly, openly, and with integrity.<sup>3</sup> Appellant maintains that this principle supports its position that the decision not to renew should be overturned. Appellant questions the automatic application of the existing standard merely because it is settled law. Despite appellant’s urging, it is not the Board’s prerogative to depart from binding precedent established by the Federal Circuit. *See AFR & Associates, Inc.*, 09-2 at 169,169 & 169,172 n.2. Moreover, appellant’s approach asks us to take a sweeping set of general guidelines intended to provide broad guidance to procurement professionals and redefine the meaning of the term “option,” which the FAR, in pertinent part, defines as a “unilateral right . . . by which . . . the Government . . . may

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<sup>3</sup> This provision states:

An essential consideration in every aspect of the [Federal Acquisition] System is maintaining the public’s trust. Not only must the system have integrity, but the actions of each member of the [Acquisition] Team must reflect integrity, fairness, and openness. The foundation of integrity within the System is a competent, experienced, and well-trained, professional workforce. Accordingly each member of the Team is responsible and accountable for the wise use of public resources as well as acting in a manner which maintains the public’s trust. Fairness and openness require open communication among team members, internal and external customers, and the public.



elect . . . to extend the term of the contract,” FAR 2.101, by replacing the existing legal standard with a subjective standard based on fairness.

Since appellant agrees that there was no conduct amounting to bad faith on the part of the contracting officer, we will address only whether appellant’s evidence has shown that the contracting officer’s action may have constituted an abuse of discretion. In this regard, Sword & Shield takes issue with the factual accuracy of all of the stated reasons provided by the contracting officer for choosing not to exercise the option. It asserts that while there were admittedly no sales over the last seven quarters of the contract, taken as a whole, the approximately \$713,000 in sales for the full five years of the contract more than achieves the stated minimum goal of \$25,000 sales each year, and generated significant IFF fees for GSA. It also counters the contracting officer’s determination that its labor rates are not competitive with its own evidence showing that its labor rates are generally lower than those of certain of its competitors on the GSA schedule. Finally, Sword & Shield points out that the contracting officer was misinformed with respect to the company’s performance history under the NASA SEWP contract. The VA’s concerns arose from a misunderstanding of its contract and were resolved promptly when brought to appellant’s attention. Further, NASA’s online performance evaluation of Sword & Shield and other SEWP contractors showed that appellant’s performance was rated excellent under that contract.

Appellant’s evidence, even if we are persuaded by it, fails to demonstrate that the contracting officer’s decision was an abuse of discretion. This option clause in no way restricts the decision not to renew, but rather instructs that in order to affirmatively exercise the option the contracting officer must determine that this action is advantageous to the Government considering price and other factors, including (1) that the contractor’s electronic price list is current and posted on GSA Advantage; and (2) performance has been acceptable under the contract. A separate clause notifies the contractor that quality of performance will be considered in deciding whether to extend the term of the contract. Finally, another clause of the contract provides dollar parameters for awarding and continuing the contract. Specifically, the Government may cancel the contract if reported annual sales do not exceed \$25,000 in each twelve month period following the first twenty-four months of the contract. For the final twelve month period of the contract, and for nearly a year before that, Sword & Shield had no reported sales under this contract.

Although Sword & Shield makes a creative argument with respect to contract sales, the contracting officer is under no obligation to use an average of sales generated under the contract to determine whether to exercise the option. In this case, virtually all of appellant’s sales under the schedule contract were made to the USGS, although appellant also had a contract with BLM. Since no purchases were made by either agency after July of 2008, it was far from unreasonable for GSA to conclude that Sword & Shield would likely not be

able to meet the sales requirement in the option years. Finally, even if appellant's evidence is viewed as definitively rebutting the contracting officer's conclusions with respect to labor rates and performance history, this does not alter the undisputed fact that Sword & Shield had generated no sales under its contract for nearly two years. Although we recognize that appellant invested money to attempt to achieve more sales, there is no way to determine if these efforts would have been successful. Given the nature of the option, appellant expended funds to improve its sales under the contract at its own risk.

In sum, the contracting officer had a responsibility to exercise her discretion in this situation and did so appropriately. As is usually the case with the exercise of judgment, reasonable people may differ as to the evaluation of the facts and the conclusions to be drawn therefrom. It is not the Board's role to substitute its judgment for that of the contracting officer. Appellant is not entitled to any relief.

Decision

The appeal is **DENIED**.

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CATHERINE B. HYATT  
Board Judge

We concur:

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BERYL S. GILMORE  
Board Judge

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ANTHONY S. BORWICK  
Board Judge