UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: April 2, 2012

CBCA 2091

THE CARRINGTON GROUP, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Thomas W. Vassar of Jung & Vassar, P.C., Gaithersburg, MD, counsel for Appellant.

William R. Korth, Office of the General Counsel, Department of Veterans Affairs, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **GOODMAN**, and **SHERIDAN**.

SHERIDAN, Board Judge.

The Carrington Group appealed the final decision of a Department of Veterans Affairs (VA) contracting officer denying its claim of $261,936.10 for unpaid services allegedly provided under VA contract V101(93)P-2093. The VA asserts that appellant is not entitled to the claimed costs because it has fully paid for all the services appellant provided.

Factual Background

Doyle Carrington worked for thirty-two years as an engineer and architect for the VA's Office of Facility Management (OFM), the office that supports the VA's major construction and real property programs. He left the VA OFM and formed The Carrington Group (Carrington), where he was the sole owner, president, and chief executive officer. In the years preceding and following the dispute at issue, Carrington was awarded several contracts to provide information technology (IT) support and maintenance services for the VA OFM's resident engineer management system (REMS) and worked both as a sub and prime contractor on the system.[1] The instrument that serves as the basis of the appeal before us involves what has been referred to as contract V101(93)P-2093.[2]

Carrington was awarded commercial item contract V101(93)P-2093 on October 1, 2002, to provide "user systems support and maintenance services" (IT support) for REMS from October 1, 2002 through September 30, 2003.[3] REMS was the computer system that was used by approximately eighty-six VA resident engineers (REs) and fifty support staff at the VA OFM's headquarters in Washington, D.C., and approximately thirty-four field sites. REMS supported a project management database, office applications, electronic mail, and progress payments, and provided multi-user and multi-function work stations. The first page of the contract listed five types of services that Carrington was to provide by contract line items (CLINs), showing the type of service (e.g., network system administrator, network support technician, subject matter expert, etc.), number of hours, hourly rate, and total amount to be paid for the services the VA anticipated ordering.

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[1] Carrington was awarded at least four contracts to provide IT services in support of REMS, V101(93)P-1802, V101(93)P-2021, V101(93)P-2093, and task order 101-E57037 under General Services Administration (GSA) schedule contract GS-35F-0561N. Pursuant to those contracts, Carrington continuously serviced the VA REMS IT system from October 1, 2001 through September 30, 2006, when the VA informed it that they would not be exercising option year two of task order 101-E57037.

[2] While we ultimately conclude that contract V101(93)P-2093 is void, for purposes of this decision we frequently refer to this instrument as a contract.

[3] Carrington filed several appeals relating to the services it provided for the VA REMS. Appeal files were submitted in both CBCA 2091 and CBCA 1646, an appeal which has been dismissed. The appeals were consolidated for processing. The Board has considered documents in both appeal files, as well as testimony adduced at hearing, to reach its decision.

CLIN 001A was for the services of a network system administrator with the schedule showing 2080 hours of services at $46.67 per hour for a total of $97,073.60. CLIN 001B was for the services of a network support technician, with the schedule showing 2080 hours of services at $37.34 per hour, for a total of $77,667.20. CLIN 001C was for the services of a subject matter expert, with the schedule showing 520 hours of services at $101.13 per hour, for a total of $52,587.60. CLIN 001D was for the services of a project management administrator with the schedule showing 520 hours of services at $20.23 per hour, for a total of $10,519.60. CLIN 001E was for the services of a database specialist, with the schedule showing 1040 hours of services at $57.80 per hour, for a total of $59,883.20.[4] CLIN 001F was for travel, with ten trips to be provided at $1200 per trip, for a total of $12,000. Line 26 of the contract showed an award amount of $309,731.20.[5] The contract provided for a base year and two option years.

The bulk of the services were to be provided at the VA OFM's headquarter with some travel to specific sites to resolve technical issues that could not be resolved remotely. The statement of work also set forth a variety of tasks and reporting requirements. Work was to commence "upon receipt of [a] signed purchase order."[6] The contracting officer's technical representative was to "make specific tasks on a daily basis." The contractor was to track and bill all services on an hourly basis, with each employee submitting a daily time sheet. Written time sheets were to be submitted for each employee every seven calendar days.

The contract type was shown as "Fixed Price, Labor Hours." The contract contained the payment clause set forth at paragraph (i) of Federal Acquisition Regulation (FAR) at FAR 52.212-4, CONTRACT TERMS AND CONDITIONS–COMMERCIAL ITEMS (MAR 2001), which provides: "Payment shall be made for items accepted by the Government that have been delivered to the delivery destinations set forth in this contract." 48 CFR 52.212-4 (i) (2001).

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[4] We note that 1040 hours at $57.80 per hour actually would cost $60,112.

[5] The contract continued with CLINs for option years one and two with small increases in hourly rates. The number of hours for each CLIN remained the same for each option year.

[6] Based on a review of the contract modifications, the VA referenced several "purchase orders" (POs) for payment purposes, including 101-C27114, 101-C37028, 101-C37093, 101-C37113, 101-G47051, 101-G47258, 101-G47259, 101-V47038. However, in some places these numbers were referred to as "obligations."

The contract also contained the clause found at FAR 52.216-22, INDEFINITE QUANTITY (OCT 1995), which provides:

> (a) *This is an indefinite-quantity contract for the supplies or services specified, and effective for the period stated, in the Schedule. The quantities of supplies and services specified in the Schedule are estimates only and are not purchased by this contract.*
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> (b) Delivery or performance shall be made only as authorized by orders issued in accordance with the Ordering clause. The Contractor shall furnish to the Government, when and if ordered, the supplies or services specified in the Schedule up to and including the quantity designated in the Schedule as the "maximum." The Government shall order at least the quantity of supplies or services designated in the Schedule as the "minimum."
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> (c) Except for any limitations on quantities in the Order Limitations clause or in the Schedule, there is no limit on the number of orders that may be issued.

48 CFR 52.216-22 (1995) (emphasis added). The clauses found at FAR 52.216-18, ORDERING (OCT 1995), and FAR 52.216-19, ORDER LIMITATIONS (OCT 1995), were also in the contract.

The contract did not state the maximum or minimum quantities the VA agreed to order.

The VA exercised the options to extend the contract for two option years and, under contract V101(93)P-2093, Carrington agreed to provide IT services from October 1, 2003 through September 30, 2004 (option year one) and from October 1, 2004 through September 30, 2005 (option year two). Nine bilateral modifications were issued throughout the base and option years of the contract, mostly to increase or decrease the quantity of hours of a particular CLIN service. On September 30, 2004, the parties executed contract modification 9, by which they agreed to execute option year two of the contract, but also agreed to reduce the period of performance from twelve to three months, from October 1, 2004 through December 31, 2004. They also agreed to eliminate completely the requirement for CLIN 003D, project management administrator services, and establish new CLINs for systems programmer/analyst services (CLIN 003G) and LAN/WAN [local area network/wide area network] network engineer services (CLIN 003H).

With contract V101(93)P-2093 set to expire on December 31, 2004, the VA issued task order 101-E57037 to Carrington under General Services Administration (GSA) schedule contract GS-35F-0561N on December 29, 2004. The task order covered the same types of IT

services Carrington had been providing for REMS under the prior contracts. The term of task order 101-E57037 ran from January 1, 2005 through December 31, 2005, and provided for four option years. The option for option year one was exercised via modification 3, effective on January 1, 2006.

In January 2006, a closeout specialist from the VA's Office of Acquisition Operations Service attempted to closeout some outstanding purchase orders that had been issued to Carrington, including "purchase order 101-G47259." On February 1, 2006, Carrington represented in an e-mail message that with regard to 101-G47259: "The VA has paid all of the amounts due to our company, and our work (IT services) was performed in a high quality manner under contract no. V101(93)P-2093 [sic]." On November 29, 2006, the VA informed Carrington it would not be exercising its option for option year two of task order 101-E57037 (issued under GSA contract GS-35F-0561N) and on December 31, 2006, the VA's relationship with Carrington for REMS servicing ended. Around this time, Carrington wrote the VA's Office of Inspector General (OIG) and a Member of Congress complaining of contract irregularities associated with contract V101(93)P-2093 and task order 101-E57037 (issued under GSA contract GS-35F-0561N) as well as the VA's refusal to exercise its option for option year two of task order 101-E57037. In a report issued on February 4, 2008, the VA OIG found Carrington's complaints unsubstantiated.

On August 22, 2008, over four and a half years after contract V101(93)P-2093 had ended, Carrington submitted an invoice to the VA titled: "CG-8-CLOSEOUT." By invoice CG-8-CLOSEOUT, Carrington sought an additional $179,136.13, an amount it says it was due for "closeout" of contract V101(93)P-2093, referencing services provided from September 27, 2002 through December 28, 2004.[7] According to Carrington, this was a new "adjusted" invoice for services provided under contract V101(93)P-2093 that Carrington claimed had not previously been invoiced. The CG-8-CLOSEOUT invoice was different from all previous invoices in that it did not contain information regarding the services provided, such as the date of service, description of service (e.g., network system administrator, network support technician, subject matter expert, etc.), name of the employee, number of hours provided, or hourly rate charged. Invoice CG-8-CLOSEOUT was a lump sum invoice with the amount derived by subtracting the total amount Carrington asserted it was paid under contract V101(93)P-2093 from what it asserts was the total contract amount due.

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[7] On August 8, 2008, Carrington also submitted an "adjusted" invoice, CG-5-CLOSEOUT, seeking an additional $24,823.99 for closeout of contract V101(93)P-1802, referencing services provided from September 28, 2001 through September 26, 2002.

While the CG-8-CLOSEOUT invoice did not request a contracting officer's final decision, it was treated as a claim by the contracting officer, who issued a final decision on May 15, 2009. The final decision analyzed invoices and payments made under four Carrington contracts - V101(93)P-1802, V101(93)P-2021, V101(93)P-2093, and task order 101-E57037 - which were in place from October 2001 through December 2004.[8] The contracting officer concluded Carrington was due a payment of $45,630 on all four contracts.

Carrington appealed the final decision to this Board on July 7, 2009, where the appeal was docketed as CBCA 1646. As CBCA 1646 involved multiple contracts and issues, it became clear that each contract needed to be dealt with separately. Subsequent discussions between the Board and counsel revealed that the disputes associated with contract V101(93)P-2093 were for amounts over $100,000 but had never been certified.

On January 8, 2010, Carrington submitted a certified claim to the contracting officer demanding payment of $261,936.10 under contract V101(93)P-2093. Carrington asserted that contract V101(93)P-2093 contained "contract provisions [that] incorporate five different contract types or categories, as well as certain unclear requirements, and conditions prohibited by law." The contract provisions, Carrington posited, support its interpretation that contract V101(93)P-2093 was a firm-fixed price definite quantity contract and that it should be paid the $179,136.13 remaining on the contract. Carrington stated that as no minimum or maximum quantities were set forth in the schedule:

> To insure that adequate staffing and performance was provided to carry out the actual quantities shown in the contract the company staffing and other overhead expense-related arrangements were increased. [Carrington] accepted the quantities designated on the schedule as minimum [quantities]."

Carrington also claimed it was entitled to an additional $128,429.97 for heretofore uninvoiced and "unpaid services," including $101,782 for project manager services, $10,518.60 for project management administrator services, and $16,128.37 for connectivity assistant services. No compelling evidence was provided as to when these alleged services were provided. Carrington derived the claimed amounts using Bureau of Labor statistical rates and estimating the number of hours that had allegedly been allocated each week to contract V101(93)P-2093.

The contracting officer issued another final decision on April 21, 2010, denying this claim in total. The contracting officer concluded that "there was never any agreement

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[8] As the appeal before us involves only contract V101(93)P-2093, we have not described the disputes relating to the other contracts Carrington held with the VA.

between the two parties that the government would pay billable hours for work performed by Carrington's project manager," and there is no CLIN in the schedule or orders placed for project manager services. The VA acknowledged that while the original intent of the contract was to have project management administrator services, that requirement changed and those services were entirely deleted via contract modification two, which was executed by Carrington on March 5, 2003. The contracting officer observed that while there was a description of connectivity assistant services in the statement of work, connectivity assistant services were not shown as being needed on the schedule and there was no CLIN, estimated quantity, or unit price for those services in the contract. The VA also noted that Carrington's proposal did not include an hourly rate for connectivity assistant services. The VA asserts that it never ordered connectivity assistant services under contract V101(93)P-2093, and that Carrington did not have an option to provide connectivity assistant services under the contract.[9]

The April 21, 2010, final decision was appealed to the Board, assigned docket number CBCA 2091, and consolidated with CBCA 1646 for purposes of processing. Attempting to resolve the overlap between the appeals and correct jurisdictional deficiencies, appellant requested that the portion of the dispute relating to contract V101(93)P-2093 be withdrawn from CBCA 1646. On June 22, 2010, the Board dismissed all claims associated with contract V101(93)P-2093 from CBCA 1646 for lack of jurisdiction. The remaining disputes associated with CBCA 1646 were resolved by the parties, and on November 10, 2010, CBCA 1646 was dismissed with prejudice. Only CBCA 2091 and the $261,936.10 in dispute relating to contract V101(93)P-2093 remain before this Board for consideration and decision.

Discussion

The terms of this contract, Carrington's performance and billing, and the VA's administration and payments were presented to the Board in a jumble of facts with notable gaps that took significant time to unravel. The VA appears to have used numbers for funding mechanisms and obligations interchangeably with contract numbers, making the tracking of payments, contracts, and obligations very difficult to sort out. Whatever system the VA had was understood, at best, only by the VA, or, possibly, not at all. The confusion caused by funding issues complicated what should have been a very simple procurement.

[9] The VA further posits that had such services actually been provided, they should have been provided at REMS sites as opposed to Carrington's office, which is where appellant claims the services were provided.

When Carrington's relationship with the VA on REMS ended, Carrington believed it was entitled to additional payments for the work it had performed over the years. After the payments on various contracts were sorted through, most were resolved, with only the $261,936.10 claim associated with contract V101(93)P-2093 remaining in dispute. Through this claim Carrington seeks the alleged balance on V101(93)P-2093 as well as payment for additional services it claims it provided.

Unpaid contract balance

Carrington posits that the contract in issue was a firm-fixed price definite quantity contract and as such, it is entitled to be paid the $179,136.13 remaining on the contract. Appellant states that even though the contract contained indefinite quantity clauses, no minimum or maximum quantities were provided and, as a result, it considered the quantities in the schedule as the minimum quantities to be provided. It asserts it should be paid for those minimum quantities whether or not they were provided. Carrington does not aver that it provided the $179,136.13 worth of services that it now seeks; it claims that amount solely on its purported entitlement to what it asserts remains in the contract. We note that until Carrington invoiced for the balance of the contract amount in August 2008, there is no indication in the record that it construed the contract to provide for payment of services that had not actually been provided.

The VA responds that the contract in issue is an indefinite delivery/indefinite quantity (ID/IQ) contract for the services described in the schedule and that it has fully paid for the services it ordered and Carrington provided. In the alternative, respondent argues that the contract is void for lack of consideration because no minimum quantities were set forth in the contract, and as such, Carrington is only entitled to be paid for the services it provided. Either way, the VA asserts it has fully paid Carrington for all the work it performed.

Whether a contract is of one variety or the other is determined by an objective reading of the language of the contract, not by one party's characterization of the instrument. *Varilease Technology Group, Inc. v. United States*, 289 F.3d 795, 799 (Fed. Cir. 2002); *Travel Centre v. Barram*, 236 F.3d 1316, 1319 (Fed. Cir. 2001); *Maintenance Engineers v. United States*, 749 F.2d 724, 726 n.3 (Fed. Cir. 1984); *Marut Testing & Inspection Services, Inc. v. General Services Administration*, GSBCA 15412, 02-2 BCA ¶ 31,945, at 157,820.

To determine whether, as the appellant alleges, the contract at issue is a firm-fixed price definite quantity contract, or, as respondent asserts, an ID/IQ contract, we turn to the language of the contract. The Court of Appeals for the Federal Circuit, our appellate authority, has provided well-established guidance on the rules of interpretation for contracts:

> In interpreting a contract, we begin with the plain language. We give the words of the agreement their ordinary meaning unless the parties mutually intended and agreed to an alternative meaning. In addition, we must interpret the contract in a manner that gives meaning to all of its provisions and makes sense.

Jowett, Inc. v. United States, 234 F.3d 1365, 1368 (Fed. Cir. 2000) (citations omitted); *see also Coast Federal Bank, FSB v. United States*, 323 F.3d 1035, 1038 (Fed. Cir. 2003) (en banc)*; Hunt Construction Group, Inc. v. United States*, 281 F.3d 1369 (Fed. Cir. 2002); *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972 (Ct. Cl. 1965).

The Federal Circuit has explained additionally:

> If the provisions of the solicitation are clear and unambiguous, they must be given their plain and ordinary meaning; we may not resort to extrinsic evidence to interpret them. Finally, we must consider the solicitation as a whole, interpreting it in a manner that harmonizes and gives reasonable meaning to all of its provisions.

Banknote Corporation of America, Inc. v. United States, 365 F.3d 1345, 1353 (Fed. Cir. 2004) (citations omitted). Further, outside evidence may not be brought in to create an ambiguity where the language is clear. *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996); *see also Tacoma Department of Public Utilities v. United States*, 31 F.3d 1130, 1134 (Fed. Cir. 1994); *Interwest Construction v. Brown*, 29 F.3d 611, 615 (Fed. Cir. 1994).

Based on Federal Circuit precedent we see no reason to look beyond the terms of the contract before us to determine the type of contract. We do not give credence to appellant's assertions we should consider the other types of contracts the parties previously entered into, or those contracts' terms, conditions, and practices, in considering how the contract before us should be interpreted. Read in a manner that gives harmony and reasonable meaning to all of its provisions, this instrument contained the clauses appropriate for an indefinite quantity contract, FAR clauses 52.215-18, -19, and -22. The clause found at FAR 52.216-22, INDEFINITE QUANTITY (OCT 1995) was in the instrument and unequivocally stated: "This is an indefinite-quantity contract for the supplies and/or services specified, and effective for the period stated, in the schedule. *The quantities of supplies and services specified in the schedule are estimates only and are not purchased by this contract."* However, the instrument was invalid as an indefinite quantity contract because it lacked the stated minimum and maximum quantities that the VA promised to order.

> FAR 16.504(a) defines an indefinite quantity contract as a contract which:
>
> Provides for an indefinite quantity, within stated limits, of supplies or services during a fixed period. The Government places orders for individual requirements. Quantity limits may be stated as number of units or as dollar values.
>
> (1) The contract must require the Government to order and the contractor to furnish at least a stated minimum quantity of supplies or services. In addition, if ordered, the contractor must furnish any additional quantities, not to exceed the stated maximum. . . .
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> (2) To ensure that the contract is binding, the minimum quantity must be more than a nominal quantity, but it should not exceed the amount that the Government is fairly certain to order.

48 CFR 16.504(a) (2001).

A contract lacking a minimum quantity term cannot be construed as a valid indefinite quantity contract and is binding only to the extent it was performed. *Willard, Sutherland & Co. v. United States*, 262 U.S. 489 (1923); *Coyle's Pest Control, Inc. v. Cuomo*, 154 F.3d 1302, 1306 (Fed. Cir. 1998).

In light of the clear terms of the contract stating that it was an indefinite quantity contract and that the "quantities of supplies and services specified in the schedule are estimates only and are not purchased by this contract," we cannot find appellant's proffered construction reasonable. Appellant's construction, that the figures in the schedule should be used as the minimum quantities, puts unwarranted emphasis on only one portion of the contract, the schedule, and ignores the language in other clauses. Read in a manner that gives harmony and reasonable meaning to all of the instrument's provisions this was a defective indefinite delivery/indefinite quantity (ID/IQ) contract that lacked stated minimum quantities. Lacking minimum quantities, Carrington is entitled only to the compensation agreed upon in the contract attributable to the work performed, with the reasonable value of the work measured by the contract prices. *Coyle's Pest Control,* 154 F.3d at 1306; *Urban Data Systems v. United States*, 699 F.2d 1147 (Fed. Cir. 1983); *Ralph Construction, Inc. v. United States*, 4 Cl. Ct. 727, 733 (1984). Carrington has already been fully paid for the work performed and is not entitled to be compensated for services it never provided.

Unpaid services in the amount of $128,429.97 for a project manager, project management administrator, and connectivity assistant.

Appellant asserts it is entitled to be paid an additional $128,429.97 for unpaid services that it provided at its own office: $101,782 for project manager services, $10,518.60 for project management administrator services, and $16,128.37 for connectivity assistant services. The evidence reveals that during the pendency of the contract the parties followed certain practices to order, provide, bill, and pay for contract services. The practice was that the VA ordered the specific service(s), Carrington provided the service(s), and Carrington then invoiced the VA for the service(s) it provided. The invoices, which set forth the service(s) provided, included the date of service, description of service, name of employee, number of hours provided, and hourly rate charged. Those invoices were then reviewed by the VA and paid. These practices seemed perfectly acceptable to both parties until Carrington's services were no longer required by the VA. It was not until several years after the contract had ended and the last invoice was paid that Carrington began to allege that it had provided additional services for which it had not been compensated.

The contract does not list the claimed services in the schedule, and there is no indication in the contract that any services were to be provided at Carrington's own office. There is no documentation or other compelling evidence that the VA ordered any of the alleged services, or that Carrington submitted contemporaneous time sheets or invoices for the services. Carrington did not follow its typical invoicing procedure for the alleged unpaid services by submitting an invoice showing the services provided, including the date of service, description of service, name of employee, number of hours provided, and hourly rate charged. The allegation of unpaid services was not raised until Carrington's January 8, 2010 certified claim. Had such services been ordered, they would have been a change to the contract necessitating a modification. There is no such modification. To the extent testimony was offered alleging that these services were actually provided, that testimony was neither credible nor compelling. We are convinced that Carrington was fully paid for all the services it provided under the contract.

Decision

The appeal is **DENIED**.

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PATRICIA J. SHERIDAN
Board Judge

We concur:

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JERI KAYLENE SOMERS
Board Judge

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ALLAN H. GOODMAN
Board Judge