



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED: August 13, 2010

CBCA 1093

DSS SERVICES, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Ronald J. Shaw of The Shaw Law Firm, P.C., San Antonio, TX, counsel for Appellant.

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

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

SOMERS, Board Judge.

This case involves a contract between DSS Services, Inc. (DSS) and the General Services Administration (GSA) for the provision of nonpersonal services support of various information technology (IT) systems for the United States Army Medical Information Technology Command (USAMITC).¹ After considering the testimony presented at a hearing

¹ Previously in this appeal, DSS filed two separate motions for partial summary relief. In one motion, DSS sought payment for the services that had been invoiced under the contract but for which it had not been paid. We granted this motion, finding that if the Government had not used contract funds allocated to a labor contract line item to pay for equipment, the funding would have been sufficient to cover all of the invoices for services

held on October 9, 2009, as well as the parties' post-trial briefs, we find that DSS is entitled to the remaining amount sought in the appeal, specifically \$134,028, plus interest pursuant to the Prompt Payment Act and the Contract Disputes Act. Accordingly, we grant the appeal.

Background

On September 29, 2003, GSA awarded DSS,² in coordination with the Small Business Administration, a task order contract to provide worldwide support services for various video conference, telecommunication, infrastructure, and tri-service information technology systems for the USAMITC, which is headquartered in San Antonio, Texas. The contract called for DSS to acquire hardware and software in support of these services or at the request of the Government. GSA used Standard Form 1449, which incorporates by reference Federal Acquisition Regulation (FAR) clause 52.212-4, Contract Terms and Conditions - Commercial Items, for the contract document. The initial contract ran from October 1, 2003, to September 30, 2004, and included one option year.

GSA modified the contract several times, first by adding a fourth contract line item (CLIN) to cover travel and training. The second modification revised the statement of work to require the contractor to provide equipment "listed on the IGCE [Independent Government Cost Estimate³] or as requested by the Government in support of various IT projects worldwide." The other contract modifications increased funding for the various CLINs, exercised the one-year option, and redefined some of the labor skill categories. None of the

rendered under the contract. *See DSS Services, Inc. v. General Services Administration*, CBCA 1093, 09-1 BCA ¶ 34,119. We concluded that DSS should be paid the difference between the amount invoiced for services and the amount paid for services, specifically \$691,048, plus interest pursuant to the Prompt Payment Act, 31 U.S.C. § 3902 (2006), and the Contract Disputes Act, 41 U.S.C. §§ 601-613, to be paid after trial. DSS filed a second motion for summary relief for payment for one outstanding invoice for equipment ordered for which the Government has made a partial payment. We denied that motion, finding that disputed issues of material facts precluded summary relief.

² DSS Services is a woman-owned minority small business contractor which operates and employs people in a historically underutilized business zone (i.e., in a designated HUBZone). *See* 15 U.S.C. §§ 632(a), 632(j), 632(p), 657(a) (2006).

³ The record does not contain the "Independent Government Cost Estimate" referenced in this clause.

contract modifications identified a CLIN against which equipment could be charged under the contract.

During the first year of the contract, GSA ordered services and equipment under the contract for the client agency, USAMITC, and funded the projects through contract modifications, ultimately resulting in nine additional contract modifications. To do this, the agency's representative, Mary Gillenwater, would obtain a quote for materials and then send a request to GSA's project manager, Jerry Johnson, for a modification to the contract to add the equipment requested by USAMITC. The records indicate that GSA charged these equipment orders against CLIN 0001, the category identified for labor, most likely because the contract did not have a separate CLIN for equipment. Toward the end of the first year, Ms. Gillenwater sent an e-mail message to Mr. Johnson asking questions about exercising the option year. Ms. Gillenwater told Mr. Johnson that USAMITC intended to add services and equipment orders under the task order for the United States Army Medical Research Institute of Chemical Defense (USAMRICD), located in Aberdeen Proving Ground, Maryland.

With the first option year, GSA changed the procedure to be used when ordering goods and services. Rather than issuing separate contract modifications for each order, GSA decided to fully fund the contract for the year, according to the "Acquisition Plan" prepared by GSA's project manager, Mr. Johnson.⁴ Thus, each time USAMITC needed services or equipment, Ms. Gillenwater, representing the agency, would discuss the projects with DSS and obtain a price quote from that company. She would then forward the quote to Mr. Johnson. Mr. Johnson would obtain approval from GSA's contracting officer who was assigned responsibility for this task order and would instruct Ms. Gillenwater to proceed with the order. Ms. Gillenwater would then order the services and equipment, and DSS would perform the services and/or provide the equipment. DSS would submit the invoices to GSA, and GSA would review the invoices. Once the invoices had been reviewed, GSA would make payment to DSS, without the necessity of modifying the contract. The Government paid twelve invoices for equipment and/or materials using this process.

This process had some serious flaws. As Mr. Johnson testified at trial, the Government appeared to have no mechanism in place to double-check which services or equipment had been charged against the contract. In the standard process, in order to receive

⁴ The plan included a document entitled "Determinations and Findings Authority to Use Time-and-Materials Project 735227/03RT1081," contained the typed name of Jerry Johnson included on the signature block, and was dated September 23, 2004.

payment for services or equipment, the contractor would submit invoices to GSA's Fort Worth office, which would review the invoices for accuracy. Under that process, the personnel, however, could not confirm whether the invoices had correctly been linked to a CLIN because they did not have any information identifying the specific CLINs for the contract. GSA's Fort Worth office would then forward the invoice to GSA's finance office, located in Denver, Colorado, which would prepare a receiving report and would then forward the invoice to the client agency's representative, Ms. Gillenwater. Ms. Gillenwater would ascertain whether the goods had been received and whether they had been accepted by the client agency. Once the client agency confirmed receipt and acceptance, the agency would return the receiving report to the finance office, which, assuming that funds were available on the applicable contract, would authorize payment, again without regard to whether the equipment fell under any of the CLINs to a contract. Finally, Mr. Johnson stated that neither he nor the GSA contracting officer would see the actual invoice or documents attached, so they did not know what goods and/or services had been provided or charged against the contract.

On October 1, 2004, DSS sent Ms. Gillenwater a pricing proposal/quote for what is identified as "Ft Detrick fiber," with equipment costs totaling \$267,338.78. On October 5, 2004, Ms. Gillenwater forwarded DSS's proposal to Mr. Johnson, including a line item for the equipment. In her e-mail message, Ms. Gillenwater stated, "I approve attached quote for inclusion in the contract." The record does not indicate what actions Mr. Johnson took in response to this e-mail message. Nonetheless, USAMITC ordered the IT equipment under the contract in October 2004.

In January 2005, after the IT equipment had been ordered but before it had been delivered, another client representative, Myrna Pina, Chief of the Logistics Division for USAMITC, contacted GSA's Mr. Johnson by e-mail message, asking him why the contract had not yet been modified to add a CLIN for equipment. Whether Mr. Johnson responded to this inquiry is unclear. The record contains a series of internal correspondence in which several USAMITC employees reach the conclusion that DSS is on the GSA schedule for professional services only, and not on the GSA schedule for equipment purchases. The USAMITC employees struggle to determine which GSA office is responsible for the award of the task order to DSS, hoping to resolve the issue, because, as an e-mail message from Joyce Baker⁵ states, "USAMITC has bought many, many equipment items from DSS Services."

⁵ Ms. Baker identifies herself as the COR (contracting officer's representative) for the "Infor Tech Spec, Proc Spt Br" of USAMITC.

While the USAMITC representatives continued to investigate the issue, it appears that no one from GSA or the agency ever informed DSS that a problem could have arisen. Thus, pursuant to the October 2004 order, DSS purchased, delivered, and ultimately installed the equipment in April 2005. DSS submitted invoice no. 4088, dated April 11, 2005, seeking payment of \$267,339. DSS submitted a DD Form 250, entitled "Material Inspection and Receiving Report," with the invoice, providing verification that the Government had received and approved the equipment.

On April 19, 2005, GSA rejected invoice no. 4088 because the amount of the invoice exceeded the contract funding remaining on the contract. A note on the invoice referenced the need to sign an outstanding modification in order to provide additional funding to the contract. Effective on May 2, 2005, GSA and DSS agreed to a bilateral modification which increased the contract funding by \$808,924.79. It increased CLIN 0001 by \$800,000 and CLIN 0004 (Travel and Training) by \$8924.79. None of the money had been allocated specifically to pay for equipment.

On May 9, 2005, GSA contract specialist Aimee Ward wrote a memorandum to the contract file which stated:

A twelfth modification was issued to contract GS08TO03BPC1081 (TO 45001294) on 5/2/05 in order to add funding to cover costs until the end of the POP [period of performance] (9/30/05). The modification resulted in an increased ceiling price from \$2,154,208.22 to \$2,963,133.01.

Up until this point, the vendor had seven outstanding invoices, with three invoices more than 100 days old. As a result, the vendor had contacted Ben Gonzales [the GSA Assistant Regional Administrator], who then intervened in order to get the modification processed and pushed through to Pegasys [a GSA accounting software program] so that the outstanding invoices could be paid.

As of 5/9/05, the bilateral modification had been signed by the vendor (DSS Services) and the CO [contracting officer] (Linda Reynolds).

On May 13, 2005, when GSA again attempted to process invoice no. 4088, GSA had sufficient funds to pay only \$133,310.70 of this invoice, leaving the balance unpaid. At that time, GSA informed DSS that the amounts sought for services and equipment exceeded the

funds obligated under the contract, even after the contract had been modified to add more funds. The GSA contracting officer would not or could not issue another contract modification to obligate additional funds to pay the remaining amount. On June 29, 2005, the contracting officer instructed DSS to provide written documentation in the form of a claim in order to receive additional funding.

At the same time, once the Government realized that the funding obligated to the contract had been exhausted, but outstanding invoices remained, it began to investigate the reason for the shortfall. In a July 18, 2005, interagency e-mail message, Lori Rhodes, a branch chief with GSA Region 8 (the Rocky Mountain Region), notified the then-designated contracting officer, Gilbert Olivas, that according to GSA Finance, funding provided by the Army could not be used to pay the outstanding DSS invoices because the funding came from prior year funds.

As part of his investigation into what happened on this contract, the GSA contracting officer, Mr. Olivas, questioned both government employees and the contractor about the services provided and the equipment purchased under the contract. When confronted with allegations that Mr. Johnson had acted outside his authority as a project manager, Mr. Johnson submitted a lengthy statement in response and obtained a statement from Wilton W. Webb, the prior GSA contracting officer with authority over the contract. Mr. Webb confirmed by e-mail message dated July 30, 2005, that he had authorized all of the actions taken by Mr. Johnson, that he considered Mr. Johnson's actions to be proper, and that Mr. Johnson had consulted with him on all aspects of the contract order.

After the investigation, Mr. Olivas concluded that the program manager did authorize the purchase of equipment and related labor, and that the contractor had provided equipment in performing the contract, but determined that the program manager had acted without proper authority, despite contracting officer Webb's statement to the contrary.

On August 12, 2005, Mr. Olivas terminated the contract, stating as follows, in pertinent part:

The purpose of this letter is to inform DSS Services, Inc., that the Government hereby terminates the subject task order effective immediately pursuant to Contract Clause 52.212-04(1), Termination for the Government's Convenience, and Paragraph c.7., Incremental funding/limitation of liability, of the statement of work. DSS Services, Inc., shall stop all work under the order at that this time (sic) and shall cause any and all of your suppliers and subcontractors to similarly cease work.

As provided by Paragraph c.7(e) of the statement of work, funds allocated under the subject contract have been depleted and additional funds are not available at the present time. As you know, this is a result of the Government having paid your company for equipment not provided for in the contract.

After issuing the termination notice, Mr. Olivas sent DSS a series of letters seeking information from DSS related to contract transactions. In those letters, the contracting officer indicated that he intended to determine whether an unauthorized commitment had been made. The contracting officer did not specifically question whether the equipment ultimately invoiced under invoice no. 4088 fell under the category of IT equipment.

Subsequently, after evaluating the information provided by DSS, Mr. Olivas wrote a letter to DSS on March 23, 2006. In the letter, Mr. Olivas summarized the information that he had received during his investigation. He concluded that the task order contract was improperly awarded and contained many flaws, including “preclusion of competition, unpriced items and an unclear statement of work.” Mr. Olivas advised DSS that he had concluded that an unauthorized commitment had occurred and that he would not ratify the unauthorized commitment. At the end of the letter, Mr. Olivas incorrectly directed DSS to submit a claim to the Government Accountability Office.

On January 31, 2007, DSS submitted a certified claim to Mr. Olivas, seeking \$824,846.07 plus Prompt Payment Act interest. The amount sought included the unpaid costs for both services and equipment. When the contracting officer failed to issue a final decision or inform DSS when he would issue such a decision within sixty days, DSS appealed to this Board. The Board docketed the appeal on February 28, 2008.

Appellant submitted two motions for partial summary relief. By decision dated April 16, 2009, the Board granted one of appellant’s motions and awarded appellant \$691,048, as well as interest pursuant to the Prompt Payment Act and the Contract Disputes Act. The Board denied appellant’s second motion for partial summary relief on the ground that a disputed issue of material fact, i.e, whether Mr. Johnson had the authority to order the equipment, precluded summary relief.

At a hearing held on October 27, 2009, Mr. Johnson denied that he had made any unauthorized commitments on the contract. He testified that GSA’s contracting officer, Mr. Webb, had reviewed and approved all of his actions. During cross-examination, Mr. Johnson specifically confirmed that the contracting officer approved the purchase of the equipment on invoice no. 4088.

Discussion

DSS submitted invoice no. 4088 for equipment purchased under the contract. The Government has paid a portion of the amount invoiced. The issue is whether DSS is entitled to be paid for the rest of the amount due under the invoice, i.e., \$134,028.08, plus interest, even though no additional funds have been allocated to cover the remaining amount owed.

DSS does not challenge the right of the contracting officer to terminate the contract for convenience or the grounds relied upon by the contracting officer – it simply contends that it should be paid for the equipment ordered and installed by DSS at the Government’s request. DSS asserts that the contracting officer approved the purchase of the equipment, and that the only reason that the Government failed to pay the remaining portion of the invoice was due to an internal funding dispute between GSA and USAMITC. Alternatively, assuming for the sake of argument that the contracting officer did not expressly authorize the purchase, DSS argues that the evidence supports the conclusion that the contracting officer ratified the contract. Finally, DSS claims that it is entitled to recover on the basis of *quantum valebant*: the Government ordered the equipment, DSS obtained it for the Government, and the Government accepted the equipment, meeting all of the elements for an award.

GSA disagrees, arguing that the contract did not contemplate the ordering of the equipment identified on the invoice, that no implied-in-fact contract existed, and that DSS cannot prevail under an implied ratification theory or under the doctrine of *quantum valebant*. GSA further maintains that DSS is not entitled to any interest under the Prompt Payment Act because, in the absence of a written contract, no payment due date exists.

To the extent necessary to resolve this appeal, we address the arguments in turn.⁶

a. Did the contract contemplate ordering the equipment identified on the invoice?

Although GSA has conceded that the contract authorized the ordering of equipment, GSA contends that the contract did not specifically authorize DSS to supply equipment destined for Fort Detrick. GSA states that only GSA’s contracting officer could modify the contract to add Fort Detrick equipment to the list of deliverables, and that the contracting officer did not do so.

⁶ The fact that we do not address each and every argument presented by either party in this opinion should not be taken as any indication that we did not consider these arguments fully and completely.

GSA misses the point. The contract's statement of work contained within the second modification expressly required the contractor to provide equipment "listed on the IGCE or as requested by the Government in support of various IT projects worldwide." As noted previously, the record does not include the IGCE, leaving us without any method to determine whether the equipment for Fort Detrick is listed on that document or not. In any event, even if the equipment did not appear on that list, the clause does not limit the equipment that can be ordered under this contract to that listed on the IGCE. In addition, the clause required DSS to provide equipment "as requested by the Government in support of various IT projects worldwide." A plain meaning of the contract clause does not require the exact destination of the equipment ordered to be specified in order for it to be included within the scope of the clause. The Government fails to explain why the equipment ordered for an IT project at Fort Detrick should not be included within the scope of a clause which contemplated support for IT projects "worldwide."

b. Did the contracting officer authorize the equipment to be ordered?

GSA contends that neither Mr. Johnson, GSA's project manager, nor Ms. Gillenwater, USAMITC's representative, had the authority to make changes or to add requirements to the contract. GSA argues that because GSA's contracting officer did not formally amend the contract to expressly add the Fort Detrick fiber to the list of deliverables, the contracting officer never intended that equipment should be ordered for Fort Detrick.

As discussed above, the contract permitted the Government to order equipment for various IT projects worldwide, not limited to those included on the list of deliverables. The evidence indicates that the equipment identified on invoice no. 4088 was ordered for use for an IT project at Fort Detrick.⁷ Therefore, the contracting officer did not need to modify the contract to add the equipment to the contract. The ordering of the equipment at issue was within the scope of the contract and was not a change or an extra requirement.

c. Is the theory of an implied-in-fact contract necessary to justify the ordering of the equipment?

Although appellant does not rely upon a theory of implied-in-fact contract in support of its claim here, GSA presents an argument addressing that theory. First, GSA identifies the

⁷ The Government has not raised the issue or submitted any evidence suggesting that the equipment had not been ordered for an IT project which was located at Fort Detrick. The only issue raised is whether equipment for Fort Detrick had been listed on the IGCE, which the Government refers to as the list of deliverables.

requirements for an implied-in-fact contract. Citing to various cases, including *Flexfab L.L.C. v. United States*, 424 F.3d 1254, 1265 (Fed. Cir. 2005), and *Angel Menendez Environmental Services, Inc. v. Department of Veterans Affairs*, CBCA 19, et al., 08-1 BCA ¶ 33,731 (2007), GSA states that in order to establish an implied-in-fact contract, DSS must show: “(1) mutuality of intent to contract; (2) consideration; (3) an unambiguous offer and acceptance; and (4) actual authority on the part of the government’s representative to bind the government.” GSA next explains that DSS cannot rely upon an implied-in-fact contract to support its claim that it should be paid for the equipment. Specifically, GSA asserts that DSS cannot rely upon the theory of implied-in-fact contract because DSS cannot establish that anyone with actual authority had authorized the purchase of the equipment. GSA urges that because neither Mr. Johnson nor Ms. Gillenwater had actual authority to bind the Government, an implied-in-fact contract could not arise from the facts of this case.

Ultimately, GSA’s argument focuses upon a theory of the law that has not been argued by appellant and is unnecessary to resolve this appeal. As we have noted above, the contract specifically permitted the Government to order the equipment identified on invoice no. 4088. As the order of the equipment was within the scope of the contract, arguments as to an implied-in-fact contract are not relevant to the resolution of the appeal.

d. The contracting officer reviewed and authorized all contract actions taken by Mr. Johnson.

In our previous opinion, we denied appellant’s motion for partial summary relief for payment of the remaining amount due under invoice no. 4088, because a genuine issue of fact existed as to whether anyone with contractual authority had authorized the purchase of the equipment. Based upon the evidence presented, we now conclude that the contracting officer authorized the purchase of the equipment.

The record shows that during the first option year of the contract, GSA decided to fully fund the contract for the year, so that each time USAMITC needed services or equipment, the agency’s representative, Ms. Gillenwater, would discuss the projects with DSS and obtain a price quote from DSS. She would forward the quote to GSA’s Mr. Johnson. Mr. Johnson would obtain approval from GSA’s contracting officer, Mr. Webb, and would instruct the agency to proceed with the order. USAMITC would then order the services and equipment, and DSS would perform the services or provide the equipment. DSS would then submit the invoices to GSA, and GSA would review the invoices. Once the invoices had been reviewed, GSA would make payment to DSS, without the necessity of modifying the contract. GSA paid twelve invoices for equipment and/or materials using this process.

The record includes the e-mail message from GSA's contracting officer, Mr. Webb, revealing that he approved all of Mr. Johnson's actions. Mr. Johnson's testimony at trial confirmed the fact that, consistent with the standard procedure, the contracting officer approved the purchase of the equipment included on invoice no. 4088.

GSA suggests that because the contracting officer did not sign a modification adding the equipment to the contract, he did not authorize the purchase of the equipment. As noted above, the equipment ordered fell within the scope of the contract and did not need to be added by modification. In addition, there was no need to modify the contract during the first option year. The procedure used by the parties permitted GSA to make payment to DSS without modifying the contract to add funding for each request. The Government had intended to fully fund the contract from the beginning of the first option year.

Also, the record indicates that when, in October 2004, the agency ordered the equipment listed in invoice no. 4088, sufficient money had been allocated to the contract to pay for the entire amount on the invoice. Although the Government discovered that the contract had a cost overrun at least as early as February 2005, and even though it was aware that the equipment had been ordered, it took no action to prevent delivery of the equipment. Thus, DSS delivered the equipment to the Government in April 2005. The Government accepted the equipment and has presumably used the equipment for the purposes intended. In any event, the equipment has never been returned to DSS.

In light of our finding that the equipment was properly ordered under the contract and with full authorization by the contracting officer, we conclude that DSS is entitled to the amount remaining due under the contract, \$134,028, plus interest.

Decision

For the reasons stated above, appellant's claim is **GRANTED**. DSS is entitled to payment of the total amount claimed, i.e., \$824,846.07, which includes the amount previously awarded in our decision granting appellant's first motion for partial summary relief, \$691,048, and the amount sought at trial, \$134,028, plus interest pursuant to the Prompt Payment Act and the Contract Disputes Act.

JERI KAYLENE SOMERS
Board Judge

We concur:

HOWARD A. POLLACK
Board Judge

ALLAN H. GOODMAN
Board Judge