UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED: March 17, 2015

CBCA 3552

IMPACT ASSOCIATES, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Andrew K. Wible and William F. Savarino of Cohen Mohr LLP, Washington, DC, counsel for Appellant.

Michael J. Noble, Office of General Counsel, General Services Administration, Atlanta, GA, counsel for Respondent.

Before Board Judges **VERGILIO**, **McCANN**, and **ZISCHKAU**.

McCANN, Board Judge.

This decision pertains to the amount of damages appellant, Impact Associates, Inc. (Impact), is entitled to recover due to out-of-scope directives issued by the contracting officer (CO) of the ordering agency on a task order under a schedule contract with respondent, the General Services Administration (GSA). The contractor seeks the issuance of an award in the amount of $175,183.79 for damages suffered, plus interest. The agency does not dispute that the contracting officer's directives were inconsistent with the schedule contract and the task order. The agency maintains, however, that there should be no recovery because damages were not foreseeable given the no-cost nature of the contract. It also maintains that any damages would be lost profits, and, accordingly, unforeseeable and not recoverable. The Board rejects the agency's defenses.

Facts

The parties have submitted a stipulation of relevant facts to the Board. That stipulation is included below in its entirety, verbatim, as the first twenty findings of fact:

1. Impact and GSA entered into a base contract ("GSA Schedule Contract" or "Base Contract") for commercial services to be delivered from January 3, 2002 through December 31, 2011. The Base Contract's scope of work included conference, events and tradeshow planning services. These services included project management; coordination and implementation of third party participation; collection management of third party payment for participation; liaison support with venue; audiovisual and information technology support; topic and speaker identification; site location research; reservation of facilities; on-site meeting and registration support; editorial support; automation and telecommunication support; design and editing productions; mailing and other communication with attendees including pre-post meeting mailings and computer database creation. (R4 [Appeal File], Tab 2.)

2. On May 6, 2005, Modification GS-23F-0061M-PO-04 was incorporated into the Impact Associates contract, GS-23F-0061M. The modification incorporated the following terms and conditions for No Cost contracting to the contract:

> The Contractor may choose to provide for all services as required by the task order at no cost to the Government. The Contractor is entitled to all of the registration, exhibition, sponsorship and/or other fees collected as payment for performance under the task order if there is no cost to the Government. In this case, the Contractor is liable for all costs related to the performance of the task order as defined in the task order and the government's liability for payment of services under this task order is "zero." For Industrial Funding Fee calculation and Sales Reporting . . . the value of the task order is determined by the amount of the registration, exhibition, sponsorship and/or other fees collected under the task order. The Contractor shall provide an accounting of expenses and revenues when requested by the government agency issuing the task order.

(R4, Tab 25 at 2, ¶ 2.)

3. On September 2, 2005, pursuant to the GSA Schedule Contract, U.S. Army Corps of Engineers ("Ordering Agency") awarded to Impact Task Order No. W912DR-05-F-0317 (the "2006 TO"). This no-cost contract was for Impact's technical

assistance and support to plan and conduct the 2006 Unexploded Ordinance ("UXO")/Countermine Forum ("Forum"). It included a one-year base contract for the planning and execution of the Forum in 2006 and four one-year options to have Impact administer Forum planning and execution from 2007 through 2010. (R4, Tab 7.)

4. On September 19, 2008, the contracting officer, Mr. Jeff May, issued Amendment P00002 to the 2006 TO (the "2009 TO"). This Amendment exercised CLIN [contract line item number] 0004 of the 2006 TO, authorizing a 2009 Forum. (R4, Tab 9.)

5. The 2009 TO included terminology for No Cost Contracting and the order included the terms and conditions for No Cost Contracting as stated in modification GS-23F-0061MPO-04:

> C.3.1.13 The contractor shall be financially responsible for all obligations, assessments, and attendant fees for this conference. . . . The United States Government will not be liable for any aspect of DoD [Department of Defense] or AEC's [Army Environmental Center's] involvement with the conference and the contractor shall receive no appropriated funds from DoD or AEC for providing any support hereunder or for any other aspect of conducting the conference. The Government reserves the right to change the nature or extent of its involvement, reduce the level of participation, or even withdraw from the conference, and DoD, AEC, its officers or employees shall not be liable to the contractor. . . . The contractor may not claim against the government or its employees for any costs or other damages that the contractor might incur by government required changes, reduction in participation or withdrawal.
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> C.3.1.13.2 The contractor shall require a registration fee for all conference attendees and require a [sic] exhibition fee for all exhibitors. The contractor shall retain all funds collected for repayment of all expenses incurred. Budgeting of conference activities and the conference fee structure shall be determined by the contractor.
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> C.3.1.13.3 Nothing in this contract shall obligate the US Government to expend appropriated funds.

(R4, Tab 25 at 3, ¶ 5.)

6. On June 8, 2009, seventy-eight days before the start of the 2009 Forum, the CO sent directives to Impact, via email, regarding non-governmental corporate sponsorships and Impact's trade marking of the Forum's name. The directive stated:

The Army's Office of General Counsel (OGC) has reviewed the subject contract and related Countermine Forum. The OGC has issued guidance regarding corrective actions that must be taken to ensure that the contract and Forum comply with federal ethics and fiscal laws and regulations. Based upon the guidance, I am directing you to take the following actions to comply with those ethics and fiscal laws and regulations:

1. Corporate sponsorships in all forms must be eliminated as an additional funding source for the conference, and as any indication this is a joint Army and corporate conference.

2. Special billing for advertising of corporate logos on events or publications must be eliminated because of the appearance of endorsement by DoD, and use by corporate attendees of the conference or agencies' logos must be eliminated.

3. Contractors or nonfederal personnel cannot be entitled to "special access" to events or DoD personnel based on funding provided or contributions provided.

4. Contractor/nonfederal display booths are permitted as long as space is charged based on "actual cost" to the contractor.

5. Attendance fees for all participants must be based on actual cost.

6. Ethics restrictions on items given away by prohibited sources ($20 or less limit per gift, $50 maximum per year from one source) are to be observed.

7. "Sponsorship" of breaks and lunches by prohibited sources will not be permitted. Contractor social hours may not be conducted as a coordinated conference activity or suggest any DoD endorsement.

8. No other special treatment is permitted that would create even the appearance of preferential treatment.

9. All marks associated with this conference will be assigned to DoD.

Additional instructions will be provided regarding the management of collected fees and regarding ethics rules, as further information is gathered by the Government.

> Finally, Impact Associates must maintain a complete accounting of all costs and fees associated with this conference, to be submitted to me as directed and as required for the fulfillment of reporting requirements.
>
> Please respond to this letter in writing by 5:30 pm, Eastern Time, June 18, 2009, to confirm that you understand these instructions and will comply with all of them. At that time, I invite you to identify the effects these instructions have on your ability to organize the conference, and to notify me if you feel this constitutes a change to the contract. If you will need more time to calculate the cost impact related to this change, please let me know when you feel you will be able to prepare your calculations.

(R4, Tab 13.)

7. The contracting officer followed up his letter of June 8, 2009 with a June 12, 2009 e-mail. The e-mail provided the contracting officer's responses to questions Impact had raised vis-a-vis the June 12th letter, including the following:

> Q4. Our letter says that the contract must comply with ethics and fiscal law regulations.
>
> A4. The relevant ethics regulations include, among others, DoD 5500.7-R, Joint Ethics Regulation (JER), Chapters 2 and 3; and 5 C.F.R. Part 2635, Standards of Ethical Conduct for Employees of the Executive Branch (Office of Government Ethics Rules). I would add that the Government cannot receive any source of external funding without specific statutory authority. We have no specific statutory authority to receive external corporate funding to help defray the costs of the Countermine Forum. Further, payment-for-access gives the appearance of a conflict of interest, which is prohibited under the JER.
>
> Q5. You have noted that "our contract is very specific" regarding this.
>
> A5. I am not sure what you are referring to. In the 19 September 2008 exercise of the contract option, it states in paragraph C.3.1.12 that "The contractor may not use the fact of this contract to imply endorsement of the contractor or its activities by the United States Government." I am not sure if this is what you are looking for in response to this question, but I hope it is helpful to you. Additionally, please note that paragraph C.#.1.13 [C.3.1.13] of the contract states, among other things, that "…The Government reserves the right to change the nature or extent of its involvement, reduce the level of

> participation, or even withdraw from the conference, and DoD, AEC, its officers or employees shall not be liable to the contractor or its officers and employees. The contract may not claim against the Government or its employees for any costs or other damages that the contractor might incur by government required changes, reduction in participation or withdrawal."

(R4, Tab 16.)

8. By letter dated June 25, 2009, Impact responded to the Government regarding the June 8, 2009 letter. With regard to the elimination of corporate sponsorships, Impact stated the following:

> Corporate sponsorships have been an integral source of funding for conference activities under the Contract since it was first signed by the government on September 9, 2005. Since the government provides no funds to support the Forum or Impact's overhead costs to plan and manage the Forum, sponsorship monies are required to cover a broad range of Forum expenses and serve as working capital for the many months leading up to the actual conference delivery. Since the 2006 Forum, DoD representatives have reviewed and approved all sponsorships.
>
> . . .
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> Impact is certainly willing to take whatever steps are necessary to provide disclaimers and affirm to all parties and attendees that the Forum is not a joint Army and corporate conference (such as using similar language as many other DoD-sponsored conferences and differentiating between "host," "sponsors," and such entities as "promotional partners" and "marketing collaborators").
> . . .

(R4, Tab 17.)

9. By letter dated July 13, 2009, Impact reiterated that it would perform the Forum in accordance with the Government's directives in the June 8, 2009 letter, including the requirement that Impact would refund all sponsorship fees and charge sponsoring organizations only exhibitor or registration fees. (R4, Tab 18.)

10. On July 20, 2009, Impact confirmed that it considered the June 8, 2009, letter from the Government to have triggered the Changes clause in the Base Contract. (R4, Tab 20.)

11. As a direct result of its compliance with the Government's directives, Impact lost revenues, in the form of refunded sponsorships, totaling $128,950.00 (R4, Tab 21 at Exh. 8).

12. As a direct result of its compliance with the Government's directives, Impact incurred costs it otherwise would not have totaling $46,233.79, itemized as follows:

a. $4,548.07 in unrecoverable sales commissions paid to employees in connection with sales of sponsorships (R4, Tab 21 at Exh. 9);

b. $17,259.59 in labor costs associated with responding to Government directives (R4, Tab 21 at 5, ¶ I.C.3.b & Exh. 10);

c. $3,227.13 in travel costs (R4, Tab 21 at Exh. 11);

d. $3,000 in costs for changes to printed materials (R4, Tab 21 at Exh. 12); and

e. $18,199 in legal fees (R4, Tab 21 at Exh. 13).

13. Because of the Government's action, for the first time since the Task Order was issued in 2005, Impact's expenses exceeded its revenue for the Forum, resulting in a loss of $86,323.69. (R4, Tab 21 at 4, ¶ I.C.1 & Exh. 7.)

14. On August 6, 2010, Impact submitted a certified claim to the Ordering Agency in the amount of $215,183.79[1] for alleged breach of contract and an uncompensated unilateral change under the Contract's Change Clause. (R4, Tab 21.)

15. On March 31, 2011, Mr. Jeffrey May, Contracting Officer for the Ordering Agency, issued a final decision denying the claim. (R4, Tab 22.)

16. On May 10, 2011, Impact appealed the denial to the ASBCA [Armed Services Board of Contract Appeals], which dismissed the appeal for lack of jurisdiction nearly 2 years later on April 23, 2013. (R4, Tab 23.)

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[1] The total amount stated in the claim, $197,552.46, is incorrect, and was the result of an inadvertent error made in totaling the component elements of the damage claim.

17. On April 30, 2013, Impact referred the claim to the GSA CO pursuant to FAR [Federal Acquisition Regulation] 8.406-6(b). (R4, Tab 24.)

18. On August 28, 2013, the GSA CO issued a final decision "affirm[ing]" Impact's claim. (R4, Tab 25.)

19. On September 25, 2013, Impact appealed the final decision to the Civilian Board of Contract Appeal[s] seeking to reduce the COFD [contracting officer's final decision] to a final judgment. (R4, Tab 27.)

20. If successful on all theories of damages, Impact is entitled to judgment in the amount of $175,183.79 plus applicable interest under the Contract Disputes Act. (¶¶ 11-12, *supra*.)

21. The contracting officer's decision dated August 28, 2013, states:

> It is my decision that the schedule level no cost contract language plainly permits sponsorships. Further, it is my decision that FAR 52.212-4(q), GSAR [GSA Acquisition Regulation] 552.203-71, and DoD Joint Ethics Regulation 3-206 are not applicable to the claim. Additionally, it is my decision that the language in DO317 which prohibits the contractor from filing a claim is an unauthorized deviation from a mandatory FAR clause – the Disputes clause located at FAR 52.233-1 and incorporated into the schedule contract . . . .

Appeal File, Exhibit 25 at 10.

Discussion

Impact asserts entitlement to $175,183.79[2] in damages, contending GSA changed (or breached) the contract when it issued its directives on June 8 and 12, 2009. These directives required compliance with certain federal ethics and fiscal laws and regulations, along with, among other things, the elimination of corporate sponsorships. GSA opposes any quantum recovery by Impact on the ground that the damages suffered by Impact were not foreseeable because the contract shielded GSA from liability.

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[2] Impact has dropped its claim for $40,000 for the loss of sponsorships that it believes it would have obtained between the time it received the contracting officer's directive and the beginning of the forum. This claim was part of its original $215,183.79 claim submitted to the contracting officer.

On August 28, 2013, the GSA contracting officer issued a final decision in favor of Impact indicating that the June 8 and 12, 2009, directives were not in accordance with the terms of the contract. With regard to this decision, the parties have stipulated that "the GSA CO issued a final decision 'affirm[ing]' Impact's claim." Thus, the parties are in agreement that the June 8 and 12, 2009, directives by the contracting officer constituted a change to the contract.[3] Accordingly, the issue of liability for the change has been resolved in favor of Impact. The only issue left to be decided then is the amount of compensation due Impact.

The parties have stipulated that Impact has sustained actual damages of $175,183.79 directly caused by the directives. Of this amount, $128,950 was in the form of sponsorships that Impact refunded to companies that had already purchased sponsorships. The remaining $46,233.79 was incurred for unrecoverable sales commissions ($4548.07), labor costs ($17,259.59), travel costs ($3227.13), changes to printed materials ($3000), and legal fees ($18,199).

As detailed in the stipulated findings, Impact became obligated under a "no cost contract" task order to provide conference planning services to the Government without cost. As expressly stated in the task order, the Government reserved the right to change the nature or extent of its involvement, reduce the level of participation, or even withdraw from the conference. However, the contract did not shield the Government from liability when the ordering agency took action beyond the scope of the contract. In its directives, the ordering agency prohibited the contractor from accepting sponsorship money and imposed other restrictions on the contractor, not contemplated under the task order. Thus, these directives eliminated or reduced the contractor's ability to recoup various costs and generate income, and were fundamentally inconsistent with the terms and conditions of the task order.

While GSA recognizes the violation of the order and schedule contract, it contends that the recovery of damages should be zero because the task order made such recovery unforeseeable, due to the contract language insulating the Government from liability. That is, clause C.3.1.13 specified that the Government and ordering agency reserved the right to make various changes and that the contractor shall not receive appropriated funds for its services. In part, this provided that the "contractor may not claim against the government or its employees for any costs or other damages that the contractor might incur by government-required changes, reduction in participation or withdrawal." Further, GSA relies upon the

[3] The change may be a cardinal change tantamount to a breach of contract, as Impact alleges, but we see no need to address that issue here.

statement in clause C3.1.13.3: "Nothing in this contract shall obligate the US Government to expend appropriated funds."

These clauses, the task order, and the underlying schedule contract do not shield the ordering agency from liability arising from the directives. The directives by the ordering agency are not consistent with the contract, and the limitations of the clauses are not applicable to the directives. The Government's directives were not changes within the scope of the contract, as they were neither a reduction in participation nor a withdrawal. Rather, the agency took away the contractor's ability to receive compensation for its services, thereby fundamentally changing the bargain. Therefore, while the contract clauses may have insulated the Government from liability in some circumstances, when the ordering agency acted in a manner inconsistent with the contract, it was indeed foreseeable that the contractor would be harmed.

The recovery sought by Impact ($175,183.79) reflects out-of-pocket expenditures incurred due to the actions of the ordering agency. The legal fees incurred were part of these expenditures, predate this dispute, and do not reflect costs of litigation. They, too, are compensable.

The agency alternatively seeks to limit recovery to $86,323.69, the agreed figure of loss (revenue less expenses for the contract as performed) by Impact. The agency characterizes the dollars above this figure up to the $175,183.79 sought as speculative lost profits which cannot be awarded. On the contrary, the $175,183.79 damage figure and the amount that exceeds $86,183.69 do not represent lost profits, but rather specific out-of-pocket expenditures incurred. The speculative lost profit analysis is not appropriate for this circumstance.

Impact has been successful on all theories of recovery relating to its claim for $175,183.79 in damages. Therefore, in accordance with the parties' stipulation number 20, Impact is entitled to an award of $175,183.79 plus applicable interest under the Contract Disputes Act, 41 U.S.C. § 7109 (2012).

Decision

The appeal is **GRANTED**.

R. ANTHONY McCANN
Board Judge

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We concur:

JOSEPH A. VERGILIO
Board Judge

JONATHAN D. ZISCHKAU
Board Judge