



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: July 9, 2008

CBCA 814

BUSINESS MANAGEMENT RESEARCH ASSOCIATES, INC.,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Douglas E. McKinley of McKinley & Bornmann, PLC, Alexandria, VA, counsel for Appellant.

Douglas W. Kornreich, Office of the General Counsel, Department of Health and Human Services, Baltimore, MD, counsel for Respondent.

Before Board Judges **PARKER, BORWICK, and KULLBERG.**

PARKER, Board Judge.

Business Management Research Associates, Inc. (BMRA) appealed the decision of a Department of Health and Human Services (HHS) contracting officer denying BMRA's claim that HHS's failure to follow through on a potential order under BMRA's contract to provide training courses constituted a partial termination for convenience. We deny the appeal.

Findings of Fact

On September 11, 2000, HHS awarded to BMRA an indefinite quantity/indefinite delivery contract to provide acquisition and project officer training courses. The contract

was for one year and contained options for four additional years. Over the years, all of the options were exercised, and BMRA received a total of twenty-five task orders totaling \$4,083,528.

Work to be performed under the contract was obtained through the issuance of task orders. According to the contract:

- (a) The work required under this contract shall be obtained through the issuance of Task Orders on an as required basis.
- (b) The contract Administrator may provide to the Contractor, individual Statements of Work listing the courses required and calling for a written proposal. Each such request will indicate that the resultant work is to be done on a firm fixed price basis. . . . The Contractor shall return to the Contract Administrator its proposal, including the price for performing the required work. . . .
- (c) The Government may accept the proposal or enter into negotiations. After acceptance of the proposal or conclusion of negotiations, the Contracting Officer will issue a formal Task Order. The Contractor shall not commence work on any Task Order unless specifically authorized by the Contracting Officer to do so. Each Task Order will reflect the dollar amount which the Contractor will be paid.

Appeal File, Exhibit 2 at 19-20.

In 2001, HHS approached BMRA about the possibility of developing certain web-based courses that had not previously been provided under the contract. BMRA incurred various costs in developing and demonstrating to HHS the types of courses BMRA could provide. HHS later negotiated and issued task orders to BMRA to provide two pilot sessions. The task orders were performed and paid for.

On June 3, 2003, HHS officials met with BMRA to discuss a future requirement for additional online courses, this time for a larger group of students (approximately 300-600). At the hearing on the merits of this appeal, BMRA's president testified on cross-examination:

Q [L]et's talk about the June 3rd meeting. When you came in that meeting, you didn't have a definitized order for any classes, did you?

A No, it wasn't assigned.

Q Right. You didn't even have a schedule or even a--

A Well, we had, we had, what I looked [at] as an oral commitment from the, Mr. Weisman [one of the contracting officers who was associated with the contract].

Q You had a promise from Mr. Weisman to order these things in the future, is that what you are saying?

A No, we had an oral commitment to go ahead and start work on it. We didn't have a schedule or anything else, because no one, that was just something we would have to negotiate on the schedule.

Transcript at 49.

According to Mr. Weisman, no commitment was made to BMRA:

So, while it may be a desire to move [to] distance learning, certainly, I couldn't make a commitment because, you know, in our structure we don't, we don't, we don't actually don't commit to that, because we wait for the customer [other parts of HHS] to buy the classes.

Transcript at 73.

Based upon what it believed to be an oral commitment to enter into a formal task order, BMRA began the process of developing the courses. The subcontractor that BMRA used to provide the electronic platform necessary for the online training told BMRA that, in order to take on a task of this magnitude, it would require that BMRA enter into a multi-year commitment. BMRA, convinced based upon what had happened with previous courses that a formal task order would eventually be awarded, entered into the multi-year contract with the subcontractor.

Potential HHS customers for these additional courses ultimately determined that the courses were not needed and, thus, HHS never negotiated or entered into a task order for the courses. BMRA filed a claim for \$21,520, representing costs incurred preparing for the task order, the bulk of which is the amount paid to BMRA's subcontractor for unused platform services. The claim was denied by HHS's contracting officer, and BMRA appealed HHS's decision to the Board.

Discussion

BMRA maintains that, based upon prior experiences in which the parties discussed courses that HHS intended to order under the contract and later formalized through the issuance of a written task order, the contract had been constructively changed such that the oral direction by HHS to develop a course offering constituted a binding contractual agreement. In the case of the proposed courses at issue here, according to BMRA, HHS constructively terminated for convenience a binding order when it decided not to negotiate and enter into a written task order.

The contract was of the indefinite quantity/indefinite delivery type, which did not obligate the HHS to purchase all of its training requirements from BMRA. *See Varilease Technology Group, Inc. v. United States*, 289 F.3d 795 (Fed. Cir. 2002). The contract set forth a specific procedure for ordering training: (1) the HHS contract administrator was to ask BMRA for a written proposal for a specified requirement; (2) BMRA was to submit its proposal, including a fixed price; and (3) HHS could accept the proposal as submitted or after concluding negotiations by issuing a “formal” task order.

The parties agree that no formal task order was issued for the courses at issue here: there was no written proposal from BMRA, with or without a price; no acceptance by HHS of a proposal; and no issuance of a written task order.

We do not agree with BMRA that its course of dealing with HHS on previous task orders changed the contract so as to bind HHS when the two parties discussed HHS’s desire to order additional training. It is true that evidence of a prior course of dealing may demonstrate that a contract requirement has effectively been waived. A contract requirement for the benefit of a party becomes dead if that party knowingly fails to exact its performance over such an extended period that the other side reasonably believes the requirement to be dead. *4J2R1C Limited Partnership v. General Services Administration*, GSBCA 15584, 02-1 BCA ¶ 31,742.

Here, however, BMRA had no reasonable basis upon which to conclude that the contract’s requirements for negotiating, pricing, and formalizing task orders had been abandoned by HHS. To the contrary, rather than waiving the contract’s requirements by discussing its future needs with BMRA prior to the issuance of a formal task order, we view HHS’s actions, both here and in connection with previous orders, as following the procedure set forth in the contract. BMRA was asked whether and, if so, how it could perform a relatively large project, a project that the company certainly wanted to perform. Although it is true that BMRA incurred expenses for preparing to do the work, the company’s decision to incur those expenses, including the expense of locking in a subcontractor, was a business

judgment, the risk of which under the contract was solely on BMRA. In this respect, the situation was no different from that of any contractor that incurs proposal preparation expenses in the hope of receiving a contract award. In connection with some past orders, BMRA's business judgment paid off handsomely; this time it did not.

Decision

Because there was no task order or other contractual commitment, there could be no termination for convenience. The appeal is thus **DENIED**.

ROBERT W. PARKER
Board Judge

We concur:

ANTHONY S. BORWICK
Board Judge

H. CHUCK KULLBERG
Board Judge