

Appeal of:)
)
Inventory Discount Printers) CAB No. 2008-2
)
Under Jacket No. 310-079)
Purchase Order No. 93664)

Appearance for the Appellant: Christine D. Baldrige
Inventory Discount Printers

Appearance for the Respondent: Roy E. Potter, Esq.
Julie Kelly Cannatti, Esq.
U.S. Government Printing Office

DECISION

Inventory Discount Printers (IDP) appeals the Government Printing Office's (GPO) final decision denying the firm's claim for equitable adjustment for expenses incurred during the processing of Program 380-S Lubrication Orders for the Department of the Army. IDP asserts that the contract specifications were ambiguous and that the contracting officer improperly placed and terminated orders without a valid contract modification. As a result, IDP asserts that it is entitled to recover \$35,396.75 for expenses incurred during performance of the contract.

We dismiss the appeal for lack of jurisdiction.

BACKGROUND

This appeal involves an invitation for bids (IFB) issued by the GPO for laminating and other printing activities for Program 380-S Lubrication Orders for the Department of the Army. The IFB, which provided for bid opening on August 19, 2004, contemplated the award of a contract for a 1-year base period commencing on September 1, with three 1-year option periods. Rule 4 (R4), Tab 2, at 3. The IFB announced that approximately 25 to 60 orders would be placed each year, that each order would require approximately 100 to 5,000 copies, and that occasional orders could require up to 30,000 copies. Id. at 7. As is relevant here, the lamination requirements for each order were as follows:

After printing, laminate both sides of the sheet with **delustered polyester film**, 0.0015" thick. Lamination must be suitable for inscribing with grease pencil and erasing without damage to the surface and **must remain**

clear. Lamination must not distort printed matter and must not produce any visible evidence of an imperfect seal--no bubbles or blisters.

Id. at 8 (emphasis added).

IDP submitted a bid in response to the IFB that, upon bid opening, was determined to be the lowest priced bid. Because IDP's bid was 18 percent lower than the next lowest bid, the contracting officer requested that IDP review and confirm its bid before making award to the firm. On August 27, IDP responded that "[w]e have re-examined our bid prices and stand by the bid submitted." R4, Tab 5, at 21. Later that same day, IDP again confirmed that "[w]e are pretty comfortable with our bid as submitted and do not believe that the lamination requirement will pose any hardships on filling the contract as provided." R4, Tab 6, at 23.

The contracting officer awarded the contract to IDP and issued the first of several print orders to the firm on September 1. At the conclusion of the base period, the contracting officer declined to exercise the options, thus allowing the contract to expire on August 31, 2005. However, IDP continued to process outstanding print orders into 2007. R4, Tab 16, at 95. On February 16, 2007, the last of the open print orders were terminated for convenience at IDP's request. R4, Tabs 12 and 13, at 77-78.

On August 25 (nearly two years after the contract expired), IDP submitted a "formal claim" to the contracting officer, requesting an equitable adjustment. IDP's claim was "based on a mistake/error in the original bid amount." Attached to the claim was a letter explaining "how I made my initial mistake in bid prices and how my mistaken reliance on the wrong laminating equipment (Ibico pouch laminator), and materials led to my erroneous bid prices." R4, Tab 15, at 87-88. IDP's supporting letter, which was dated February 14, explained that IDP's costs were "out of sync" with information contained in the bid abstract and were the result of "a problem with the [a]bstract." IDP asserted that it mistakenly based its price on "pouch" laminate and the use of the Ibico pouch laminator, and that this was erroneous because IDP later discovered that "roll" laminate was required and the Ibico laminator could not be used with roll laminate. R4, Tab 16, at 89-91. IDP did not specify the amount of the requested equitable adjustment, but indicated that its out-of-pocket costs for the roll laminate were \$12,247.68, which exceeded the purchase order's price of \$11,881.00. Id. at 90.

On October 17, the contracting officer issued a final decision denying IDP's request for equitable adjustment. The decision stated that IDP had not demonstrated that a mistake occurred and had not furnished any supporting evidence of pricing errors. R4, Tab 16, at 95.

Upon receipt of the contracting officer's final decision, IDP appealed to this Board. In its complaint, IDP requested an equitable adjustment in the amount of \$35,396.75 based on two theories: (1) the contract specifications were ambiguous, and (2) the contracting officer exceeded the number of print orders permitted by the contract and then terminated several orders for convenience without a valid contract modification. Complaint ¶¶ 14, 15. With regard to the contract ambiguity ground of appeal, IDP complained that the word "delustered" as used in the IFB (quoted above) was "vague and ambiguous" because the term did not identify the type of finish to be used (*i.e.*, matte, satin, or other finish) and other language in the IFB indicated that the surface "must remain clear" after grease pencil markings are erased. Id. ¶¶ 24-26. IDP asserted that its misinterpretation of the type of finish required led to increased costs. Id. ¶ 25.

During the development of this appeal, the Board, sua sponte, requested that the parties address the jurisdictional matter of whether the issues raised in the complaint had been presented to the contracting officer for final decision. The parties have fully briefed the jurisdictional matter and the matter is before the Board for resolution.

DISCUSSION

Section 1501 of Title I of Division H of the Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 2249-50 (Dec. 26, 2007) (to be codified at 31 U.S.C. § 720 note) provides this Board with authority to hear appeals of contracting officers' decisions with respect to legislative agency contracts. This authority requires the Board to hear and resolve such appeals pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 601 et seq., as amended, with some exceptions not applicable here. Under the CDA, the Board has jurisdiction over disputes arising from claims which have first been presented to the contracting officer; the Board does not have jurisdiction over claims that have not been presented to the contracting officer and that are presented for the first time to the Board on appeal. Trepte Constr. Co., Inc., ASBCA No. 38555, 90-1 BCA ¶ 22,595. The contracting officer must first have the opportunity to analyze the claim and possibly find entitlement or reach a compromise. Id.; Bay Decking Co., Inc., ASBCA 33868, 89-2 BCA ¶ 21,834. Whether the claim has been previously presented to the contracting officer is a matter of jurisdiction, which the Board may raise sua sponte. See Advanced Techs. & Testing Labs., ASBCA No. 55805, 08-2 BCA ¶ 33,950.

The issue presented here is whether the allegations raised in pleadings or otherwise before the Board constitute new claims (which the Board does not have jurisdiction to consider) or are merely an extension of a claim that the contracting officer had the opportunity to consider (which the Board has jurisdiction to consider). That determination turns on whether the matters raised before the Board arise from the same set of operative facts as the original claim. Metric Constructors, Inc. v. United States, 44 Fed. Cl. 513, 518 (1999); see also Bay Decking Co., Inc., supra. The introduction of additional facts that do not alter the nature of the original claim, a dollar increase in the amount claimed, or the assertion of a new legal theory of recovery, when based on the same operative facts as included in the original claim, do not constitute new claims. Trepte Constr. Co., Inc., supra. However, where the new theory of recovery requires consideration of a different or unrelated set of operative facts, the claim is considered new and must first be presented to the contracting officer before the Board may hear the appeal. See Metric Constructors, Inc. v. United States, supra; Trepte Constr. Co., supra.

Here, IDP's claim to the contracting officer asserted a mistake theory, premised on the fact that IDP erred in pricing pouch laminate using an Ibico laminator, when IDP later discovered that roll laminate was required and the Ibico laminator could not be used with roll laminate. R4, Tabs 15 and 16, at 87-91. On appeal here, IDP complained that the word "delustered" in the IFB was ambiguous because it was not clear what type of finish was required, and this resulted in increased costs to IDP because different finishes are priced differently. Complaint ¶ 24.

In its pleadings, IDP confirms that the issue of mistake is a "non-issue" in this appeal, and the issue is not alleged in the Complaint. Appellant's Memorandum of Points and Authorities in Support of Legal Theory of Contract Ambiguity, at 4-5. IDP also admits that the "sole" issue before the Board is:

whether the Government's stated specifications requiring prospective bidders to use: "a delustered laminate film" that after laminating, "must remain clear" created sufficient enough ambiguity in terminology of the contract provision to cause Appellant to submit a bid that erroneously used a pricing scale for clear finish laminate film instead of matte finish film, which is *two* to *three* times higher in price.

Id. at 3.

There is simply nothing in the original claim that puts the contracting officer on notice that IDP found ambiguities in the IFB terms, or that its interpretation of "delustered" resulted in the purchase of a finish that was not acceptable to the agency. Rather, the only issue raised with the contracting office was whether IDP made a "mistake" in purchasing pouch laminate and the Ibico laminator, as opposed to roll laminate and another laminator. Simply stated, the type of finish was never at issue in the original claim. The Board therefore concludes that the issue raised on appeal is a new issue that must first be presented to the contracting officer before it may be raised on appeal to the Board. Bay Decking Co., Inc., supra.

IDP also raised on appeal that the contracting officer placed an excessive number of orders and terminated orders without a valid contract modification. Complaint ¶ 15. Although IDP's claim to the contracting officer asserted, in passing, that one order (which was larger than previous orders) contributed to the firm's financial hardship, IDP did not complain about an excessive number of orders placed, or the termination of orders, or that these actions were improper without contract modification. The basis of IDP's claim to the contracting officer was that the bid was in error because it was based on pricing for pouch laminate and the Ibico laminator. It is not the responsibility of the contracting officer to anticipate, and attempt to resolve, any and all potential claims that could eventuate. AAB Joint Venture v. United States, 75 Fed. Cl. 414, 422 (2007). Rather, it is the contractor that is required to submit to the contracting officer a "clear and unequivocal statement" in writing that gives the contracting officer adequate notice of the basis and amount of the claim. Contract Cleaning Maint., Inc. v. United States, 811 F.2d 586, 592 (Fed. Cir. 1987). IDP failed to satisfy that requirement here. The Board cannot conclude that a single statement that one order contributed to financial hardship was sufficient to put the contracting officer on notice that a claim was being asserted based on the fact that too many orders were placed and were terminated without a valid contract modification, as was asserted on appeal.

For the foregoing reasons, the Board concludes that it lacks jurisdiction to hear the issues presented in IDP's appeal.

The appeal is dismissed.

Dated: April 20, 2009

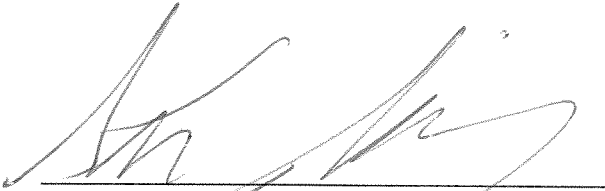


Sharon L. Larkin, Presiding Member
Government Accountability Office Contract Appeals Board



Glenn G. Wolcott

Government Accountability Office Contract Appeals Board



Scott H. Ribaek

Government Accountability Office Contract Appeals Board