RIDGE RUNNER FORESTRY,	)	**AGBCA No. 2000-161-1**
	)	
Appellant	)	
	)	
Representing the Appellant:	)	
	)	
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RULING ON GOVERNMENT'S MOTION TO DISMISS

February 13, 2001

Before HOURY, POLLACK, and VERGILIO, Administrative Judges.

Opinion for the Board by Administrative Judge HOURY. Separate Dissenting Opinion by Administrative Judge VERGILIO.

This appeal arose under Request for Quotation (RFQ) R6-99-117, and the alleged resulting Pacific Northwest Interagency Engine Tender Agreement, No. 56-04H1-9-117110 (PNIETA or agreement), between the Forest Service, U. S. Department of Agriculture, and Ridge Runner Forestry (Appellant) of La Grande, Oregon. Under the agreement, the Appellant could be called upon to provide three fire engines, services and support for purposes of fighting forest fires in Oregon and Washington during 1999. The parties had also executed substantially similar agreements for 1996, 1997, and 1998.

By letter dated December 7, 1999, Appellant filed a claim with the Contracting Officer (CO) in the amount of $180,000,[1] alleging that the Forest Service violated the "implied duty of good faith and fair dealing" because Appellant allegedly had "been systematically excluded for the past several years from providing services to the Government." The CO responded with a letter dated April 10, 2000, stating that "Based on advice contained in the General Counsel response I am advising you that the [CO] does not have authority to consider subject claims under the Contract Disputes Act [CDA]." The CO did not advise Appellant of its appeal rights.

By letter dated July 16, 2000, Appellant provided the CO with a certification of its claim, and advised the CO that it was appealing her failure to render a decision within 60 days. By letter dated July 17, 2000, along with attachments, Appellant filed an appeal with the Board based upon the CO's refusal to render a decision. The Board in its docketing letter, among other things, stated:

> Based upon the correspondence forwarded with the appeal, there is a considerable question raised regarding the Board's jurisdiction, since there appears to be no underlying contract other than a basic ordering agreement, or task order arrangement, the terms and conditions of which only become applicable if an order or task order is placed. If this is the case, then Appellant's "claim" is not a claim under the [CDA], but a protest against an award to a competitor for not having received an order or task order for particular work, or a particular job. The Board has no jurisdiction over such a protest, which should have been made to the General Accounting Office [GAO], the U.S. Court of Federal Claims, or a U.S. District Court at or near the time another contractor received the order or task order, Thus, a copy of the underlying contract should be filed as an attachment to the Complaint. In this same regard, Appellant, as part of its Complaint, should provide support detailing the nature and type of damages comprising the $180,000 it claims.

Appellant filed a Complaint, but failed to attach a copy of the agreement. Appellant also failed to provide additional support for the amount claimed. The Government filed a Motion to Dismiss, attaching a supporting affidavit from the CO, the RFQ, the agreement, and a Resource Order form. The basis for the motion was that the Board lacks jurisdiction under the CDA, 41 U.S.C. §§ 601-613, because the claim does not relate to an express or implied contract under the CDA. Appellant filed a Response to the Government's Motion to Dismiss. Appellant does not dispute the facts asserted by the Government, but, contrary to the Government, contends that the parties had an express contract. The Findings of Fact (FF) below are not in dispute.

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[1] The amount was based on Appellant's statement "that we would have netted approximately $45,000 per season ($15,000 per engine) if we had not been treated improperly. Accordingly, we hereby demand $45,000 in damages for breach of the implied duty of good faith and fair dealing for each season beginning with the last part of the 1996 season. We hereby demand $180,000."

FINDINGS OF FACT

1. The parties signed the PNIETA in June 1999. The PNIETA lists three vehicles that Appellant would provide for $92 per hour each, with a $460 "Guarantee Per Shift." The PNIETA is one page, with an attached Resource Order form. There are essentially no terms and conditions, except for one that provides that the "Terms and Conditions of RFQ R6-99-117 are incorporated into this agreement with the same force and effect as if given in full text."

2. Substantially similar RFQs as the 1999 RFQ were issued in 1996, 1997, and 1998. The RFQ in block 10 incorporates the following provision:

> IMPORTANT: This is a request for information, and quotations furnished are not offers. . . . The request does not commit the Government to pay any costs incurred in the preparation of the submission of this quotation or to contract for supplies or services.

3. Page 2 of the RFQ contained the following terms and conditions:

> Because the equipment needs of the Government and Availability of Contractor's equipment during an emergency cannot be determined in advance, it is mutually agreed that, upon request of the Government, the contractor shall furnish the equipment offered herein to the extent the contractor is willing and able at the time of order.
>
> The Government intends to issue interagency equipment rental agreements as a result of this request for quotations: . . . . The northwest area interagency agreements issued under this request for quotations for engines and tenders are joint agreements for federal and state agencies.
>
> **Award of an Interagency Equipment Rental Agreement based on response to this Request for Quotations does not preclude the Government from using any agency or cooperator or local EERA resources.**
>
> **Award of an Interagency Equipment Rental Agreement does not guarantee there will be a need for the equipment offered nor does it guarantee orders will be placed against the awarded agreements.** (Bold lettering in original.)

4. On page 9 of the RFQ, under Evaluation Of Quotes, the following provisions appeared:

> The Government intends to issue Interagency Equipment Rental Agreements as a result of this RFQ to those responsible quoters whose quotes conform to the solicitation, whose equipment has passed inspection by one of the inspecting offices, and whose personnel have met all of the training requirements as outlined in the RFQ.
>
> . . . .
>
> After quotes have been received and evaluated and Interagency Equipment Rental Agreements have been issued, a list of responsive, responsible Contractors will be completed. This list will be provided to Government dispatch offices. These dispatch offices will be responsible for confirming the contractors are listed by proper Forest/Dispatch Office for each dispatch area. The Forest/Dispatch Office will develop a listing of those contractors in their dispatch area. The Government will dispatch equipment in accordance with established procedures in the Northwest Mobilization Guide. The Government will dispatch contract equipment based on several factors such as closest available resource to the fire, cost and capability.
>
> The Government may issue orders to other than the lowest price, waive minor informalities or irregularities in quotes received, or elect to not award or place orders against the Interagency Agreement.

5. The RFQ at page 11 lists the terms and conditions applicable to an order. Thereafter, the RFQ incorporated by reference a number of general provisions from the Federal Acquisition Regulation (FAR). The CO, in her declaration, states that orders under the Agreement/RFQ were to be made by use of a Resource Order.

6. Based upon Appellant's claim and Complaint, Appellant alleges that it was wrongfully deprived of work because the Forest Service placed orders with other providers that the Forest Service should have placed with the Appellant. Specifically, Appellant asserts that "the Forest Service has violated the implied duty of good faith and fair dealing." (Appellant's claim, page (p.) 1.) Moreover, in Appellant's Response To Government's Motion To Dismiss, Appellant asserts that to qualify for orders it incurred costs that were not recouped.

DISCUSSION

Regarding RFQs, the FAR, in 48 C.F.R. § 13.004, Legal effect of quotations, at paragraph (a), provides:

> A quotation is not an offer and consequently, cannot be accepted by the Government to form a binding contract. Therefore, issuance by the Government of an order in response to a supplier's quotation does not establish a contract. The order is an offer

> by the Government to the supplier to buy certain supplies or services upon specified terms and conditions. A contract is established when the supplier accepts the offer.

The terms and conditions of RFQ R6-99-117 are consistent with the regulatory requirements (FF 1-4). Neither the RFQ nor the PNIETA obligate the Government to place orders with Appellant, nor do the RFQ or PNIETA require Appellant to accept orders the Government seeks to place. There are no estimates in terms of hours or days that the equipment will be ordered, and no minimum order requirements. Thus, the arrangement is not that of a requirements contract or an indefinite quantity/indefinite delivery contract described in § 16.500 of the FAR.

To the extent that the regulations describe the arrangement between the parties the arrangement is a Basic Ordering Agreement (BOA). A BOA is a collection of terms and conditions that become applicable, if and when, the supplies or services defined within the BOA are actually ordered. However, a BOA is not a contract. See § 16.703(a) of the FAR. When the Government has no obligation to place orders and the contractor has no obligation to accept orders, a contract does not come into being, and enforceable rights are not conferred on the contractor. See Modern Systems Technology Corp. v. United States, 979 F.2d 200 (Fed. Cir. 1992).

Appellant complains that the Government breached its duty of good faith in considering Appellant for the placement of orders (FF 6). However, the Board has no jurisdiction over an implied contract to treat a bid honestly and fairly. Coastal Corp. v. United States, 713 F.2d 728 (Fed. Cir. 1983). Further, as stated above in the Board's docketing letter, this issue was one that Appellant should have timely raised either with the GAO, the U. S. Court of Federal Claims, or a U. S. district court.

On appeal to the Board, Appellant argues that the parties entered into an express contract, citing A-Transport Northwest Co. v. United States, 36 F.3d 1576 (Fed. Cir. 1994) and Ace-Federal Reporters, Inc. v. Barram, 226 F.3d 1329 (Fed. Cir. 2000). However, the facts and law of both decisions are distinguishable from the present facts, because the contracts in A-Transport and Ace-Federal were determined by the court to have been requirements contracts.

In A-Transport , under the terms of the solicitation there was no disagreement that the contractors' prices constituted continuing offers that the Government was free to accept during the period within which the continuing offers were required to remain open. Moreover, the Government was required to satisfy its requirements only from the contractors whose continuing offers were acceptable to the Government. Thus, the court found a mutuality of obligation in the form of a requirements contract that does not exist under the present facts.

Under the present facts, the RFQ does not result in an offer by Appellant, let alone a continuing offer. Further, Appellant has no obligation to provide the services in response to the Government's request. Further, under the terms of the RFQ, the Government could satisfy its requirements from sources other than those who had signed a PNIETA. Thus, there is no mutuality of obligation and no requirements contract under the present facts.

Similarly, in Ace-Federal, the Government was obligated to satisfy its requirements from the group of contractors on the "multiple awards" schedule that included the regulatory provisions and clauses of a requirements contract. There, the Government satisfied certain of its requirements from contractors not on the schedule, thus breaching the Government's obligations to the contractors on the schedule. Again, under the present facts, the Government could satisfy its requirements from sources not holding a PNIETA, and the holders of the PNIETA, unlike the contractors in Ace-Federal, had no obligations to accept an order by the Government.

One other aspect of the appeal is that Appellant might have incurred unrecouped expenses to secure approval of equipment and ensure that personnel had been adequately trained. However, in this regard, the RFQ itself provides that:

> The request does not commit the Government to pay any costs incurred in the preparation of the submission of this quotation or to contract for supplies or services.

Further, the expenditure of resources to qualify for contracts is not without precedent in the FAR. Businesses that desire listing as "qualified manufacturers," or the suppliers of "qualified products" generally bear the expenses of such listings. See FAR § 9.200. Some amount of expense is almost always needed to evaluate the decision to quote and to prepare a quote. Under the present facts, the need for a contractor to incur expenses to qualify for a Government order is not sufficient, by itself, to create a contract, where, as here, the terms of the RFQ are explicitly clear that no contract would result, and that such expenses are not recoverable.

RULING

The Government's Motion to Dismiss is granted. The appeal is dismissed.

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EDWARD HOURY
Administrative Judge

Concurring:

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HOWARD A. POLLACK
Administrative Judge

Dissenting Opinion by Administrative Judge VERGILIO.

I write separately because I disagree with the conclusion reached by the majority. As defined in the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, as amended (CDA), contracts exist here. The Board has jurisdiction over the breach of contract claims.

The Government inappropriately equates the underlying requests for quotations (RFQs) and Ridge Runner's quotations with the agreements. The agreements came into existence after the RFQs. Ridge Runner bases its claims upon breach of the agreements.

These agreements (only one is in the record, the Government represents that all are similar) are contracts. See A-Transport Northwest Co. v. United States, 36 F.3d 1576 (Fed. Cir. 1994) and Ace-Federal Reporters, Inc. v. Barram, 226 F.3d 1329, 1332 (Fed. Cir. 2000) ("To be valid and enforceable, a contract must have both consideration to ensure mutuality of obligation, and sufficient definiteness so as to 'provide a basis for determining the existence of a breach and for giving an appropriate remedy.'" (citations omitted). Ridge Runner expended time and money to enter into and remain ready to accept orders pursuant to the agreements. The agreements require the Government to take particular action which would benefit Ridge Runner. Under the agreements, the Government promises to place Ridge Runner on a list of responsive, responsible contractors for engines and tenders that government agencies may use for wildland fire activities within Oregon and Washington, with the list to be distributed to Government dispatch offices. Moreover, the "Government will dispatch equipment in accordance with established procedures in the Northwest Mobilization Guide. The Government will dispatch contract equipment based on several factors such as closest available resource to the fire, cost and capability." The agreements obligated the Government to take the specified actions, even though the agreements did not obligate the Government to place an order with Ridge Runner. Although a requirements-type agreement may not exist, the Government must undertake actions which are not inconsequential and are of some benefit to Ridge Runner. There was a mutuality of consideration; enforceable contracts resulted. (The majority miscasts Ridge Runner's claims, when it raises the notion of implied contracts and suggests that the disputes should have been taken to a different forum.) If Ridge Runner can establish the alleged breaches, to recover, it must demonstrate, at a minimum, that had the Government complied with the contract requirements Ridge Runner was in a position to receive some orders.

The Federal Acquisition Regulations (FAR) expressly provide for use of basic agreements and basic ordering agreements, each of which the regulations state is not a contract. 48 C.F.R §§ 16.702(a), 16.703(a) (1999). Neither the RFQs nor agreements reference these provisions or otherwise attempt to disclaim the contractual aspect of the agreements. The test is not in the language of the regulation but rather the language of the agreements, as indicated in Ace-Federal.

The agreements served as instruments for the Government to obtain services, equipment, and supplies. Contracts for the procurement of goods or services underlie this dispute. This Board has jurisdiction under the CDA, 41 U.S.C. § 602(a).

JOSEPH A. VERGILIO
Administrative Judge

Issued at Washington, D.C.
February 13, 2001