BRENDA R. RONHAAR,	)	**AGBCA No. 98-147-1**
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Appellant	)	
	)	
Representing the Appellant:	)	
	)	
Thomas F. Spaulding	)	
Spaulding Cox & Schaeffer, LLP	)	
The Gadsby House	)	
1205 N.W. 25th Avenue	)	
Portland, Oregon 97210-2497	)	
	)	
Representing the Government:	)	
	)	
Owen L. Schmidt	)	
Office of the General Counsel	)	
U. S. Department of Agriculture	)	
1734 Federal Building	)	
1220 S.W. Third Avenue	)	
Portland, Oregon 97204-2825	)	

DECISION OF THE BOARD OF CONTRACT APPEALS

September 27, 1999

OPINION BY ADMINISTRATIVE JUDGE EDWARD HOURY

This appeal arose under Contract No. 53-05K3-5-0013 between the Forest Service, U. S. Department of Agriculture, and Brenda R. Ronhaar of Camas, Washington (Appellant). The contract was for in-house word processing services at the Gifford Pinchot National Forest, in Vancouver, Washington. The base contract period was May 1, 1995, through September 30, 1995, with three 1-year options each from October 1 through September 30.

The Government exercised the first two option periods but failed to exercise the option beginning October 1, 1997. Appellant filed a $40,662 claim representing the contract price of the final option period. The Contracting Officer (CO) denied the claim and Appellant filed this timely appeal. Appellant's position is that the Government was estopped from refusing to exercise the option.

The Board has jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613. The parties had filed cross-motions for summary judgment, but later agreed to have the appeal decided under Rule 11, Submission Without a Hearing. 7 C.F.R. § 24.21, Rule 11.

FINDINGS OF FACT

1. Beginning in 1984, Appellant performed under a series of 1-year contracts for in-house word processing services (Ronhaar Affidavit (Aff.) ¶ 2). The pricing of this series of contracts was not included in the record. Appellant was not the low bidder for the fiscal year (FY) 1992 contract, but worked as the primary operator for the new contractor (Exhibit (Ex.) A to Ronhaar Aff.). During 1994, a new CO replaced the existing one. She became concerned as to whether the contract was for personal services rather than for nonpersonal services. According to the CO, the personal service contracts required special approvals that had not been obtained, and limited contract periods that had not been adhered to. Rather than issuing a solicitation for the entire next fiscal year, the new CO extended the 1994 contract three times, the third through April 1995, while she "struggled" with the Forest Service hierarchy regarding the propriety of the contract. (Ronhaar Aff. ¶ 3; Haluschak Deposition (Dep.) Transcript (Tr.) 36, 39, 40, 45, 46, 52, 53, Dep. Ex. 5-6.)

2. Although the CO continued to have concerns regarding the propriety of the contract, the CO issued a request for bids for a new contract with a base period of May 1-September 30, 1995, plus three option periods each covering the Government's fiscal year starting October 1 and ending September 30. The work was to be performed on the Government's premises using the Government's equipment. (Appeal File (AF) 20-25.) Appellant knew about the CO's concerns as the reason for the contract extensions and the delays prior to the solicitation (Ronhaar Aff. ¶¶ 3-5; Haluschak Dep. Tr. 36).

3. Appellant states that she was "assured that the Forest Service continued to view as fully appropriate the use of a nonpersonal services contract to provide in-house word processing services." Appellant also states that she bid "in reliance on the Government's representation that it fully resolved the appropriateness of using a nonpersonal services contract to provide in-house word processing services." (Ronhaar Aff. ¶¶ 6, 7.) Appellant does not state whom in the Forest Service or Government she specifically relied upon. Appellant states that she submitted a weighted bid under which she would get paid the most during the final option year, and that she "undertook financial obligations of buying a car and new home furnishings." (Ronhaar Aff. ¶¶ 6-9.[1]) There is evidence that Appellant knew the CO had doubts about the appropriateness of the contract, but that the CO nevertheless issued the solicitation in issue. There is no persuasive evidence that Appellant received any overt or specific assurances from the CO, or anyone else regarding the appropriateness of the contract. (Haluschak Dep. Tr. 36, 39-41, 44-46, 49-50.)

[1] Despite her statement, the pricing of the bid reflects yearly increases of $2 per hour (see Finding of Fact (FF) 5). As a percentage of the hourly charge, this reflects a decrease. The alleged "weighted bid" suggests no unbalancing as the phrase often suggests.

4. The solicitation indicated that the clause, Evaluation of Options Exercised at Time of Contract Award, had been included. However, it was not made a part of the record (AF 21). This clause is set forth in Federal Acquisition Regulation (FAR) 52.217-4 and provides that the Government will evaluate the price of the basic requirement together with any option(s) exercised at the time of award, except (referring to FAR 17.206(b)) where there is a reasonable certainty that funds will be unavailable at the time of award for the option(s). Funds were not available for the option years. Only the base period was awarded. The solicitation schedule, which became a part of the contract, included the following provision:

> "Option" means a unilateral right in a contract by which for a specified time, the Government may elect to inact [sic] the option year services called for (See OPTION YEAR 1, 2, 3, 4).[2]

(AF 24 (underlining in original).)

5. Appellant's May 1-September 30, 1995, base year period was priced at $14.25 per hour for 800 "estimated" hours for a total contract price of $11,400. The October 1, 1995-September 30, 1996 option period was priced at $16.25 per hour for 2,008 estimated hours for a total option price of $32,630. The October 1, 1996-September 30, 1997 option period was priced at $18.25 per hour for 2,008 estimated hours for a total option price of $36,646. The final October 1, 1997-September 30, 1998 option period was priced at $20.25 per hour for 2,008 estimated hours for a total option price of $40,662. (AF 23-24.) The CO required that the options be priced in advance to avoid the need to obtain prices when the CO was considering whether to exercise the option (Haluschak Dep. Tr. 49-50). Although the number of hours was "estimated," the contract did not guarantee a minimum number of hours. Only the contract base period was awarded to Appellant March 17, 1995 (AF 20). The Government exercised the FY 96 option on August 18, 1995, and the FY 97 option on August 1, 1996 (AF 7-8).

6. On April 10, 1997, during the FY 97 option period, the Forest Service, Director of Procurement and Property Management, issued a memorandum to all Forest Supervisors, Directors, and Program Managers regarding Personal Services Contracting for Receptionist and Temporary Help (Haluschak Dep. Ex. 2). The memorandum stated in pertinent part:

> Recently, we had two requests for approval to contract for Advisory and Assistance contracts denied. In both cases, the Department's objection was that: (1) the contracts were considered to be for personal services even though the contracting officer believed the contract was formatted for tasks and non-personal services and (2) it appeared that personnel limitations on FTE's [full-time equivalents] were being circumvented. The Department viewed the contractual tasks as identical to those performed by government employees, and given the length of time for the contracts, base-year with three options, determined it a "blatant attempt to circumvent

[2] There were only 3 option years offered by the solicitation. The reference to 4 is an error.

> personnel ceilings." As our workforce has decreased in recent years and we turn to contracting to supplement our programs, the following summary is offered as a reminder of our authorities in the area of personal service contracting:
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> . . . .
>
> - A personal service contract is one where contractor personnel appear to be Government employees, either by the terms of the contract or by the way the services are provided. It is characterized by an employer-employee relationship between the Government and the contractor's personnel with direct, continuous direction or supervision being a primary factor. Six elements that help determine if contract services are personal in nature are contained in the Federal Acquisition Regulations (FAR's) [sic] Part 37.104[.]

7. After receiving the memorandum shortly after April 10, 1997, the CO met with Appellant and showed her the memorandum indicating doubt about the propriety of the present contractual arrangement (Ronhaar Aff. ¶ 10; Haluschak Dep. Tr. 34-36). The CO also brought the memorandum to the attention of the persons who were responsible for preparing the funding document for the FY 98 option. The CO advised these persons that if she received a funding document for the FY 98 option, she would send the matter to the regional office for a determination of whether the contract was truly for nonpersonal services. (Haluschak Dep. Tr. 66-67, 77-79.)

8. The CO stated she did not receive a funding request for the FY 98 option, and that this was the reason she did not exercise the FY 98 option (Haluschak Dep. Tr. 26, 29-30, 77-78). The CO advised Appellant on or about June 23, 1997, that the Forest Service would not be exercising the FY 98 option (Ronhaar Aff. ¶ 10). The reason the Government gave for not exercising the option was "because these contract services were no longer required" (Response to Interrogatory No. 2). The Government procured a new automated system for preparing contract documents. There had been a 20 percent budget cut and some staff persons had to do their own typing. (Haluschak Dep. Tr. 29-32, 54, 66, 68-69.)

9. Appellant filed a claim in the amount of $40,662 representing the contract price of the third option year. This claim was denied by the CO and Appellant filed a timely appeal. (AF 5-7.) In Appellant's Cross-Motion for Summary Judgment, Appellant reduced the amount sought to $19,578 which represents the $9.75 per hour difference between the minimum $10.50 per hour contract rate required by the Service Contract Act and the FY 98 option year rate of $20.25 per hour multiplied by the estimated 2,008 hours for that year (Page 13, fn. 9 of Appellant's motion). Appellant claims to "have not worked outside the home since September 30, 1997" (Ronhaar Aff. ¶ 12).

DISCUSSION

In seeking payment for work not ordered, Appellant relies solely on estoppel. Appellant states:

> Appellant's estoppel claim is based upon the Forest Service's representing to Appellant, when she bid the subject contract, that it was appropriate to continue as a nonpersonal services contract Appellant's long-term arrangement with the Forest Service.

(Appellant's Brief, page 3 ¶ A.)

FAR 17.207(c)(i) provides that the CO may exercise an option only after determining that funds are available. The CO never received a funding request and this was the reason the option was not exercised (FF 8). The fact that the CO might have challenged the funding request, if received, does not confer any rights on Appellant, since the CO acted consistent with the applicable regulation. We, nevertheless, consider the question of estoppel.

At the outset we note that estoppel against the Government is not available where the contract is illegal. Office of Personnel Management v. Richmond, 496 U.S. 414, 110 S. Ct. 2465 (1990); Heckler v. Community Health Services of Crawford, 467 U.S. 56, 60, 104 S. Ct. 2218 (1984). While both parties at times raised questions regarding the propriety of the contractual arrangement, neither party asserted that the contract was "illegal" and neither has placed this issue before the Board.[3]

The law regarding the Government's non-exercise of an option in a contract is clear. Generally, such options are made for the benefit of the Government and absent express limitations in the contract, contractors have no recourse for the Government's failure to exercise an option. Gov't Systems Advisers, Inc. v. United States, 847 F.2d 811, 813 (Fed. Cir. 1988); 7 FPD ¶ 61; see also Wayco Service, Inc., ASBCA No. 10849, 66-2 BCA ¶ 5742; Madison Services, Inc., B-245420, 91-2 CPD ¶ 345; Jantec Inc., B-243192, 91-1 CPD ¶ 289; California Shorthand Reporting, B-236680, 89-2 CPD ¶ 584. The present contract included an option clause giving the Government a unilateral right to exercise the option (FF 4). Therefore, this particular contract did not expressly limit the Government's discretion.

Government bad faith, i.e., specific intention to injure a contractor, could be a reason the Government might incur liability for its failure to exercise an option. Kirk/Marshland Advertising, ASBCA No. 51075, 99-2 BCA ¶ 30,439. Appellant concedes an absence of intent to injure here (Appellant's Response to Respondent's Motion, fn. 1). In any event, there is no evidence of Government bad faith.

It has been held that Government conduct could result in the Government being estopped from

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[3] Although Appellant asserted in its Complaint that the contract was illegal, Appellant retracted this assertion in its Motion for Summary Judgment.

refusing to exercise an option. Law Mathematics & Technology, Inc. v. United States, 779 F.2d 675 (Fed. Cir. 1985); Systems Management American Corp., ASBCA Nos. 45704, 49607, 97-2 BCA ¶ 29,059. In Systems, the Appellant alleged that the Government consistently assured Appellant that the particular option would be funded, and Systems had taken on significantly more debt and additional financial liability preparing to perform the option.

Appellant relies on the test set forth in Law Mathematics, supra, that "a party claiming estoppel of this nature must prove, first, that there was a promise or representation made, second that the promise or misrepresentation was relied upon by the party asserting the estoppel in such a manner as to change his position for the worse, and third, that the promisee's reliance was reasonable and should have been reasonably expected by the promisor." The Government relies on the four element test set forth in Advanced Materials, Inc. v. Perry, 108 F.3d 307, 311-312 (Fed. Cir. 1997).[4] Appellant conceded that either test should give the same result.

At the outset, the evidence does not support a conclusion that Appellant received any overt or specific assurance regarding the appropriateness of the contract and all of its options (FF 3). Therefore, the first element in Appellant's estoppel theory fails.

Regarding the second element of estoppel reliance, Appellant states that she submitted a weighted bid under which she would "get paid the most" during the final option year (FF 3). The record indicates contract price only and does not indicate which year was or would have been Appellant's most profitable. Moreover, it is not apparent why the Government's alleged assurance would have caused Appellant to price the last option year to gain the greatest contract price. If Appellant's position is taken to its logical extreme, had the Government canceled the solicitation prior to performance, Appellant could be entitled to the contract price for the base and option years. Such a conclusion cannot be legally supported.

It is also worthy of note that the solicitation leading to the award was competitive. Although the Government requested that the option years be priced by all bidders, there is no evidence that the option years were actually considered in the award. Therefore, Appellant's lower bid for the base year than the option years helped insure that hers was the low bid that would result in the contract award. Overall, the proof supporting the reliance estoppel element is not persuasive.

The third element of estoppel requires Appellant to show that her reliance was reasonable and should have been reasonably expected by the Government. The "assurance" Appellant asserts, even if it had been given and received, is little more than an opinion. It does not rise to the level of an irrevocable guarantee that the Government would not only award the base contract, but exercise each of the three

[4] These elements are (1) the Government must know the facts, (2) the Government must have intended the conduct, or the contractor must believe its conduct was intended by the Government, (3) the contractor must be ignorant of the facts, and (4) the contractor must rely on the Government's conduct to its detriment.

annual options, thereby committing itself at the time of award to an irrevocable 4-year contract. Further, Appellant was always able to seek professional advice or opinion of her own. Given the plain meaning of the contract granting the Government the unilateral right to exercise options (FF 4), Appellant has not shown that her reliance (whatever reliance there might have been) was reasonable or that it should have been reasonably expected by the Government. Thus, the third element of estoppel has not been met.

As to the quantum aspect of the claim, Appellant has failed as well. Regarding Appellant's alleged damages, the contract was one for services paid for after such services were rendered, on Government property, and using Government equipment (FF 3). Appellant had initially sought $40,662 in damages, the total contract price of the unexercised option. Appellant states that she undertook the financial obligations of buying a car and new home furnishings. However, these expenses have not been shown to have been necessary to perform the work and have not been related to any asserted damages.

Appellant in her Cross-Motion for Summary Judgment requests $19,575, the difference between the Service Contract Act rate for Appellant's work and Appellant's bid rate, multiplied times the 2,008 estimated hours (page 13 fn. 9). It is not apparent how this amount relates to or reflects damages, if any, arising from the Government's not exercising the option. Appellant has failed to prove damages.

In conclusion, Appellant has failed to show estoppel or damages. The appeal must be denied for these reasons.

DECISION

The appeal is denied.

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EDWARD HOURY
Administrative Judge

Concurring:

_____
JOSEPH A. VERGILIO
Administrative Judge

_____
ANNE W. WESTBROOK
Administrative Judge

Issued at Washington, D.C.
September 27, 1999