UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED IN PART FOR LACK OF JURISDICTION AND
IN PART FOR FAILURE TO STATE A CLAIM: March 7, 2023

CBCA 7385

TRUE EXCELLENCE GROUP, LLC,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

John M. Manfredonia of Manfredonia Law Offices, LLC, Cresskill, NJ, counsel for Appellant.

Ekta Patel and Bruce M. James, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **GOODMAN**, **SHERIDAN**, and **ZISCHKAU**.

SHERIDAN, Board Judge.

True Excellence Group, LLC (TEG) has appealed the denial of its certified claim arising under its indefinite-delivery, indefinite-quantity (IDIQ) contract with the Federal Emergency Management Agency (FEMA) to provide earthquake relief services in the form of Mobile Disaster Recovery Centers (MDRCs) on the island of Puerto Rico. TEG seeks $2,768,036.70 in costs associated with option periods under the contract and for the failure by FEMA to order the guaranteed minimum under the contract.

FEMA moves to dismiss the above-captioned appeal on two primary grounds: (1) that the Board lacks jurisdiction over the guaranteed minimum claim because it was never presented to a contracting officer for a final decision, and (2) that appellant has failed to state a claim upon which relief can be granted with regard to the remaining claims. TEG opposes FEMA's motion. For the reasons set forth below, FEMA's motion is granted.

Background

On January 27, 2020, FEMA entered into a fixed-price IDIQ contract with TEG. Appeal File, Exhibit 1.[1] The contract was to provide MDRCs for delivery of FEMA's disaster relief services to survivors of an earthquake in Puerto Rico. The initial period of performance under the contract was six months with three one-month option periods (the IDIQ options).

Under the statement of work (SOW), TEG was required to provide, mobilize, and demobilize ten double-wall insulated tent shelters and "wraparound services." Exhibit 2, Attachment 1. The SOW additionally provided that the MDRCs would be placed in ten locations within Puerto Rico. Under the contract, TEG was required to respond within three hours of notification to proceed for each task order and to be on site within twenty-four hours of the notification. The MDRCs were to be operational within twelve hours of TEG arriving on site.

Beginning on January 29, 2020, FEMA issued nine task orders for MDRC sites in nine of the identified locations. Exhibit 4. Each task order included a three-month base period and three one-month option periods to be exercised at the discretion of FEMA (task order options). The base period for the ninth task order was set to expire on May 27, 2020. On March 26, 2020, FEMA suspended all task orders because of the spread of COVID-19.

On April 22, 2020, FEMA exercised the first option to extend the base contract for three months. FEMA likewise exercised the second and third options on May 26 and June 18, 2020, respectively. On July 26, 2020, FEMA asked TEG to submit its final invoices so that contract closeout could occur. TEG submitted invoices for the task order option periods, which FEMA refused to pay. On October 13, 2021, TEG submitted to the contracting officer a certified claim in the amount of $2,264,757.30. The contracting officer denied the claim in its entirety on January 25, 2022. TEG appealed to the Board on April 22, 2022.

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[1] All exhibits are found in the appeal file, unless otherwise noted.

Discussion

Standard of Review

FEMA moves to dismiss the appeal on two primary grounds: (1) that the Board lacks jurisdiction over TEG's claim regarding the guaranteed minimum, and (2) that TEG fails to state a claim for breach of contract upon which relief may be granted with regard to TEG's remaining claims. TEG conversely argues that the Board does have jurisdiction over FEMA's alleged failure to meet the guaranteed minimum and that it has stated a claim upon which relief may be granted.

"A tribunal usually considers a motion to dismiss on jurisdictional grounds before any other motion because without jurisdiction, the tribunal cannot examine the additional matters placed before it." *Flux Resources, LLC v. Department of Energy*, CBCA 6208, 19-1 BCA ¶ 37,338, at 181,588. The appellant bears "the burden of establishing subject matter jurisdiction by a preponderance of the evidence." *Selrico Services, Inc. v. Department of Justice*, CBCA 3084, 13 BCA ¶ 35,268, at 173,132 (quoting *Ron Anderson Construction, Inc. v. Department of Veterans Affairs*, CBCA 1884, et al., 10-2 BCA ¶ 34,485, at 170,070).

In deciding a motion to dismiss for failure to state a claim, the Board does not determine whether the appellant will ultimately prevail but rather looks to where the appellant "is entitled to offer evidence to support the claims." *Integhearty Wheelchair Van Services, LLC*, CBCA 7318, 22-1 BCA ¶ 38,156, at 185,311 (citations omitted). While the Board must assume the veracity of well-pleaded factual allegations in analyzing plausibility, *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), we "must not mistake legal conclusions presented in a complaint for factual allegations." *Extreme Coatings, Inc. v. United States*, 109 Fed. Cl. 450, 454 (2013); *see Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (Tribunals need not "accept as true a legal conclusion couched as a factual allegation.").

The Type of Contract at Issue

As TEG's complaint raises serious questions about the type of contract at issue, we must first address whether there is a proper IDIQ contract in place under which relief may be granted. As the determination of the type of contract is a matter of law and the contract is an essential document that is implicitly incorporated into appellant's complaint, we may address this integral question in a motion to dismiss. *Integhearty*, 22-1 BCA at 185,311.

FEMA claims that the contract is an IDIQ contract. However, the contract did not incorporate any of the typical Federal Acquisition Regulation (FAR) clauses that FAR Part 16 requires for IDIQ contracts. *See* 48 CFR 16.506 (2021) (FAR 16.506). The only mention of the contract being an IDIQ contract comes from the contract schedule, which states in

pertinent part: "This is a single-award firm-fixed price Indefinite Delivery/Indefinite Quantity (IDIQ)." Nonetheless, since there is no exclusivity language present in the contract to make this a requirements contract, we find that appellant and FEMA entered into an IDIQ contract.

We then turn to whether the IDIQ was illusory since it lacks the guaranteed minimum clause. "An IDIQ contract requires that 'the buyer . . . agree to purchase from the seller at least a guaranteed minimum quantity of goods or services.'" *OWL, Inc. v. Department of Veterans Affairs*, CBCA 7183, 22-1 BCA ¶ 38,012, at 184,612 (quoting *Mason v. United States*, 615 F.2d 1243, 1346 n.5 (Ct. Cl. 1980)). "An indefinite quantity contract that lacks a guaranteed minimum is illusory and unenforceable because the Government has not made a binding promise regarding the minimum amount it will purchase." *Id.* (quoting *MLB Transportation, Inc. v. Department of Veterans Affairs*, CBCA 7019, 21-1 BCA ¶ 37,919, at 184,159).

While the contract at issue does not contain the typical guaranteed minimum in the contract schedule, there is sufficient information included with the contract from which a guaranteed minimum can be derived. The SOW, which was attached to the solicitation and the contract, states: "[the] [c]ontractor **shall** provide ten (10) – 50' x 50' x 8' x 12' sidewalls, double wall insulated tent[s] with side panels, A/C ductwork connections and two (2) 48" doors for entrance and exit." Exhibit 2, Attachment 1 (emphasis added). The mandatory nature of the word "shall" required the contractor to be on notice to provide ten tents as a guaranteed minimum under the contract.

FEMA argues that the SOW "simply disclosed what FEMA understood about this requirement at the time" and that ten tents was just an estimate. *See* Respondent's Motion to Dismiss at 14. FEMA's citation to *Womack v. United States*, 389 F.2d 793 (Ct. Cl. 1968), in support of its argument, is misplaced. In *Womack*, the agency was clear in the specifications document that the number of mounted aperture and cross-reference cards was an estimate. *Womack*, 389 F.2d at 796 ("The specifications, referring to the Control Document Index, stated: 'There are an **estimated** sixty-five thousand (65,000) mounted aperture and cross-reference cards for the State of Utah.'" (Emphasis added.)). Here, FEMA's use of "shall" impresses upon an objective reader that ten was not merely an estimate but was rather a guaranteed minimum requirement that the contractor was expected to fulfill.

We find that, even though the contract was lacking the typical FAR clauses, it is a proper IDIQ contract with a guaranteed minimum, and so we proceed to the two primary arguments before us: (1) that the Board lacks jurisdiction over the question of whether FEMA failed to meet the mandatory minimum of the contract, and (2) that appellant fails to state a claim upon which relief may be granted.

Jurisdiction Over TEG's Mandatory Minimum Claim

Regarding whether FEMA met the mandatary minimum of the contract, we must dismiss the claim for a lack of jurisdiction. For the Board to have jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018), a contractor must first submit a written claim to the contracting officer demanding payment and requesting a final decision. *See Primestar Construction v. Department of Homeland Security*, CBCA 5510, 17-1 BCA ¶ 36,612, at 178,329. Appellant raised the claim of $500,579.40 for the first time in its complaint with this Board. *See* Complaint at 17. As this claim for relief was not included in appellant's original claim to the contracting officer, it was not subject to the final decision of a contracting officer. We, therefore, have no jurisdiction over this claimed amount.

The Merits of TEG's Remaining Counts

We turn next to whether appellant has failed to state a claim upon which relief can be granted. Appellant's remaining counts in the complaint come in four arguments: (1) that FEMA breached the contract by not paying for the exercised task order options; (2) that FEMA failed to disclose superior knowledge; (3) that FEMA breached the implied duty of good faith and fair dealing; and (4) that FEMA violated the Small Business Act, 15 U.S.C. § 632, and the Prompt Payment Act, 31 U.S.C. § 3903.

We first discuss the option periods. Appellant argues that FEMA's exercise of options under the base IDIQ contract effectively caused the exercise of the task order options. As this determination is a matter of law and the options were essential documents attached to the complaint, we may address this question in a motion to dismiss. *Integhearty*, 22-1 BCA at 185,311; *see also Amec Foster Wheeler Environment & Infrastructure, Inc. v. Department of the Interior*, CBCA 5168, et al., 19-1 BCA ¶ 37,272, at 181,366 (citing *Systems Management & Research Technologies Corp. v. Department of Energy*, CBCA 4068, 15-1 BCA ¶ 35,976, at 175,789-90). The Board does not, and need not, accept appellant's legal conclusion that FEMA's exercise of the IDIQ option periods resulted in an automatic exercise of the task order options. *Bell Atlantic Corp.*, 550 U.S. at 555.

The law is clear that in exercising an option, the Government must strictly comply with the terms of the contract. *Freightliner Corp. v. Caldera*, 225 F.3d 1361, 1366 (Fed. Cir. 2000); *see* FAR 17.207(a) ("When exercising an option, the contracting officer shall provide written notice to the contractor within the time period specified in the contract."). Therefore, the exercise of the options of the base IDIQ contract is not an exercise of options of the task orders issued under that contract unless the option clearly indicated it was.

The relevant options here all indicated that they were solely being exercised under the base contract. Exhibits 3, 6, 7. While the task orders did contain option periods themselves, appellant can point to no document in which FEMA expressly exercised the task order options. Instead, appellant relies solely on the argument that exercise of the IDIQ's options trickled down to the task order options. Taking appellant's factual assertions as true, FEMA, as a matter of law, did not exercise the option periods of the task orders.

According to its allegations, TEG has been paid fully for the base periods of each of the task orders. *See* Complaint at 23-24. The $2,264,757.30 in appellant's complaint derives from unpaid expenses associated with the alleged task order options. *Id.* As the options on the task orders were never exercised, appellant has failed to state a claim upon which relief may be granted.

Regarding appellant's argument that FEMA failed to disclose superior knowledge, appellant has failed to allege factual support for its claim. TEG's allegations that FEMA did not know what type of contract it intended to issue have no factual basis, as we have already found FEMA contracted for a valid IDIQ contract which it has maintained was the contract type throughout its briefing. Additionally, any remedy that appellant would have against FEMA for using the wrong contract type would be through the bid protest process. As we have stated before:

> The CDA limits our jurisdiction to contracts between the Government and a contractor. . . . We do not have jurisdiction over bid protests because bid protests, by definition, involve disputes between the Government and disappointed bidders.

Innovative (PBX) Telephone Services, Inc. v. Department of Veterans Affairs, CBCA 12, et al., 07-2 BCA ¶ 33,685, at 166,765 (internal citations omitted).

Appellant also alleges that FEMA violated the implied duty of good faith and fair dealing. While we understand that appellant incurred costs while waiting on task orders due to the potential quick turn around required under the IDIQ contract, these costs are not recoverable. The entire purpose of an IDIQ contract is to provide the Government with the "purchasing flexibility for requirements that it cannot accurately anticipate." *Travel Centre v. Barram*, 236 F.3d 1316, 1318 (Fed. Cir. 2001). If FEMA's need turned out to be thirty tents, appellant would have had to provide each and every one under the time line set forth in the contract. The contractor assumed the risk regarding these costs and should have ensured its risks were covered by the guaranteed minimum.

Finally, as we have found that FEMA did not exercise the task order options and therefore did not owe appellant the $2,264,757.30 associated with those options, we also find

that FEMA did not violate the Small Business Act and the Prompt Payment Act in refusing to pay that amount to appellant.

Decision

FEMA's motion is granted. Appellant's claim for $500,579.40 is **DISMISSED FOR LACK OF JURISDICTION**. Appellant's claim for $2,264,757.30 is **DISMISSED FOR FAILURE TO STATE A CLAIM**.

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

We concur:

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge