

ORIGINAL

FILED
JUN 2 2009
U.S. COURT OF
FEDERAL CLAIMS

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Kellogg Brown & Root Services, Inc.,

Plaintiff,

vs.

United States of America,

Defendant.

Case No. _____

09-351 C

COMPLAINT

Plaintiff, Kellogg Brown & Root Services, Inc. ("KBR"), files its complaint against the United States of America (the "government").

INTRODUCTION

This complaint results from the government's attack, based upon an erroneous application of law and fact, on the reasonableness of the price KBR paid to a subcontractor performing services to assist KBR in performing certain requirements under a contract with the United States Army. This contract required KBR to provide logistics support, including dining facility services, to combat soldiers in Iraq since 2003 without interruption because interruption could have a significant negative impact on war-fighter capability. As part of its contract performance, KBR subcontracted with Tamimi Global Company, Ltd. to provide dining facility services to United States combat soldiers in Iraq at Camp Anaconda, located north of Baghdad.

KBR modified its subcontract with Tamimi Global Company to ensure continued dining facility services at Camp Anaconda and to reduce costs to the government. KBR

negotiated the price of this modification in a contingency support environment never before encountered by contractors supporting United States armed forces, in a country that had few safely usable roads and lacked significant infrastructure, and in the midst of some of the worst violence of Operation Iraqi Freedom. In these circumstances, KBR, using sound business judgment, negotiated the modification so that it not only permitted the continuation of the needed dining facility services without interruption, but resulted in significant price reductions. Nevertheless, the government believes that KBR should have accomplished more.

The government's position is simply wrong because it completely ignores KBR's exercise of reasonable business judgment in very unique and difficult circumstances. The government's position results from the Defense Contract Audit Agency's evaluation of KBR's efforts in Iraq on an after-the-fact basis, rather than on the contemporaneous facts, so as to maximize cost disallowances.

STATEMENT OF THE CASE

For its complaint, KBR alleges as follows:

I. PARTIES

1. Plaintiff is KBR, a corporation organized under the laws of the State of Delaware, with its principal place of business located at 4100 Clinton Drive, Houston, Texas 77020.

2. The government is acting by and through the Department of the Army, Army Sustainment Command (the "Army").

II. JURISDICTION

3. This Court has jurisdiction over this claim pursuant to 28 U.S.C. § 1491(a) and the Contract Disputes Act, 41 U.S.C. § 609(a)(1).

4. On July 17, 2008, KBR filed a certified claim with Ms. Kristan Mendoza, the relevant Procurement Contracting Officer (“PCO”), pursuant to the Contract Disputes Act, 41 U.S.C. § 605(a).

5. The certified claim complied with the certification requirements of the Contract Disputes Act, 41 U.S.C. § 605(c)(1).

6. On August 26, 2008, the PCO, pursuant to 41 U.S.C. § 605(c)(2)(B), notified KBR that a decision on the certified claim would be issued in “November 2008.”

7. On November 26, 2008, the Administrative Contracting Officer (“ACO”), who had been delegated authority from the PCO to review the claim, notified KBR that a final decision would be issued on February 28, 2009.

8. On February 23, 2009, the ACO notified KBR that a final decision would be issued on March 27, 2009.

9. On March 25, 2009, the ACO notified KBR that a final decision would be issued on June 27, 2009.

10. The government’s failure to render a decision on or before November 30, 2008, the time within which a decision was required to be issued pursuant to 41 U.S.C. § 605(c)(2)(B), constitutes a deemed denial of KBR’s certified claim pursuant to 41 U.S.C. § 605(c)(5).

III. FACTS

A. CONTRACT NUMBER DAAA09-02-D-0007

11. On December 14, 2001, Brown and Root Services, a division of Kellogg Brown and Root Inc., and the Army entered into Contract Number DAAA09-02-D-0007 (“the Contract”), in support of the Army’s Logistics Civil Augmentation Program (“LOGCAP”). The Contract is informally known as LOGCAP III.

12. On August 1, 2003, the Contract was novated and transferred to KBR.

13. The Contract requires KBR to provide logistics support services including, but not limited to, dining facility (“DFAC”) services, morale and welfare services, laundry services, and fuel delivery services, to the Army during contingency operations.

14. The Contract incorporates Federal Acquisition Regulation (“FAR”) § 52.216-7 in Section I.

15. Specific requirements for services in a particular contingency environment are set forth through task orders, which are issued to KBR by the Army, consistent with the Army’s needs.

B. TASK ORDER 59

16. On August 12, 2003, the Army issued Task Order 59 under the Contract, with an effective date of June 13, 2003.

17. Task Order 59 required KBR to provide logistics services to the Army in a number of named locations in Iraq in support of Operation Iraqi Freedom.

18. Performance under Task Order 59 ended on April 30, 2005.

19. During the effective period of Task Order 59, KBR was required to perform in an environment that consisted of open hostilities between the coalition forces in Iraq and insurgents.

20. During the effective period of Task Order 59, roads were often closed due to these hostilities, contractors were targets of insurgent violence, and all work under the Contract and Task Order 59 had to be performed consistent with the Army's operational and security requirements.

21. During the effective period of Task Order 59, the number of combat soldiers and other personnel to be supported and the number of DFAC sites to be operated increased significantly.

22. Task Order 59 is a Cost Plus Award Fee agreement which incorporates FAR § 52.216-7.

23. Pursuant to FAR § 52.216-7, KBR is entitled to be reimbursed for all costs it incurs performing its contractual requirements, including its payments to subcontractors, as long as those costs are reasonable, allocable to the Contract, allowable under the Contract, and otherwise reimbursable.

24. KBR is also entitled under FAR § 52.216-7 to be paid for its overhead costs, general & administrative costs ("G&A"), and capital costs on money ("FCOM"), plus fee.

25. Task Order 59 incorporated a Statement of Work ("SOW") which identified the specific services that KBR was required to provide under Task Order 59.

26. On August 22, 2003, the Army issued an oral notice to proceed (“NTP”) for KBR to modify its services provided under Task Order 59 in accordance with revised SOWs entitled “V Corps LOGCAP SOW Change 3,” dated June 24, 2003, and “V Corps LOGCAP SOW Change 4,” dated July 22, 2003.

27. The August 22, 2003 oral NTP was subsequently incorporated into Task Order 59 through Modification 3 to Task Order 59, which was issued on September 19, 2003, with an effective date of August 22, 2003.

28. The SOW entitled “V Corps LOGCAP SOW Change 4” required KBR to, among other things, “provide, emplace, operate and maintain food service facilities [and] provide food service management operations” at a site in Balad, Iraq, located 68 miles north of Baghdad, Iraq, identified as the A Site or Camp Anaconda (“Anaconda”). The site name has since been changed to Joint Base Balad.

29. The SOW, entitled “V Corps LOGCAP SOW Change 4,” required KBR to serve four meals per day and to provide sufficient DFAC services at Anaconda to maintain a camp population in excess of 18,000, divided between four DFAC sites within the camp, and to do so without any interruption in meal services.

30. In order to provide DFAC services at four sites within Anaconda, KBR had to provide four facilities.

31. Based upon information and belief, the Army initially prohibited KBR from taking title to equipment or facilities provided by DFAC subcontractors under Task Order 59.

32. In late 2003 or early 2004, the Army reversed its position on the acquisition of title to equipment and facilities furnished by DFAC subcontractors and effectively required KBR to take title to these items on behalf of the government.

C. THE TAMIMI SUBCONTRACT

33. KBR recognized that the scope of the Contract was increasing substantially and determined that it would be required to subcontract the provisioning of DFAC services in order to satisfy the requirements of the Contract generally and Task Order 59 specifically.

34. In order to ensure the subcontractor capacity required to perform Task Order 59, KBR awarded Master Agreements (“MA”) to various subcontractors. These MAs were Blanket Ordering Agreements that did not obligate performance by the subcontractors absent KBR issuing a Work Release under the MA.

35. On June 16, 2003, KBR awarded a MA, known as Master Agreement 3 (“MA3”), to Tamimi Global Company, Ltd. (“Tamimi”).

36. MA3 required Tamimi, upon the issuance of a Work Release under MA3, to provide “turn-key” DFAC services to combat soldiers and other personnel, which required Tamimi to provide the facilities, kitchen equipment, electricity generators, refrigeration units, laborers, food and consumables necessary to providing these services without interruption.

37. On August 25, 2003, KBR issued Work Release 3 (“WR3”) under MA3 to Tamimi, which required Tamimi to provide a DFAC at one site within Anaconda, identified as site A-3.

38. On December 6, 2003, KBR issued a revised WR3 which consolidated all Tamimi requirements at Anaconda and required Tamimi to provide DFAC services at a total of four sites at Anaconda.

39. MA3 and WR3, along with any change orders issued, defined the contractual relationship between KBR and Tamimi (the "Tamimi Subcontract").

40. The Tamimi Subcontract provided that KBR would pay Tamimi based upon a fixed per person per day ("PPPD") rate.

41. On January 8, 2004, MA3 was modified to provide that the PPPD rate would be multiplied by either the projected headcount for Anaconda or the actual headcount at Anaconda, whichever was greater.

42. As awarded, the Tamimi Subcontract provided for a period of performance until March 1, 2004.

43. In order to provide four DFAC sites at Anaconda, two facilities had to be constructed for KBR's use, one at site A-1 and one at site A-4. These two facilities were constructed by Prime Projects International ("PPI").

1. **Administration of the Tamimi Subcontract**

44. Beginning in early 2004, the government effectively required KBR to take title to the facilities at Anaconda and to eliminate PPPD pricing.

45. As a result, KBR initiated negotiations with Tamimi in an effort to modify the Tamimi Subcontract in a manner that would address these title and pricing issues.

46. During these negotiations, a dispute arose between KBR and Tamimi regarding ownership of the DFAC facilities at sites A-1 and A-4 that were constructed by PPI during the performance of the Tamimi Subcontract at Anaconda.

47. On March 1, 2004, KBR and Tamimi executed Change Order 1, a bilateral modification, that extended the period of performance of the Tamimi Subcontract through March 31, 2004.

48. During the period between March 1 and March 31, 2004, KBR and Tamimi continued to negotiate regarding the ownership of the facilities at sites A-1 and A-4 and revision to the PPPD pricing.

49. On April 10, 2004, KBR and Tamimi executed Change Order 3, a bilateral modification that extended the period of performance of the Tamimi Subcontract through June 12, 2004. During the Change Order 3 period, the parties continued to negotiate regarding the ownership of the facilities at sites A-1 and A-4 and the PPPD price.

50. While the ownership of the facilities at sites A-1 and A-4 remained unresolved, KBR was unable to award the subcontract to another vendor.

51. Anticipating a resolution of the ownership issue, on July 15, 2004, KBR circulated a Request for Proposals ("RFP") to various vendors seeking competitive proposals for the provisioning of DFAC services at Anaconda beginning on September 15, 2004, stating that award would be made based upon several factors, including price.

52. Tamimi and other offerors submitted competitive proposals to KBR in response.

2. Change Order 6

53. On August 12, 2004, KBR and Tamimi executed Change Order 6 ("CO 6"), a bilateral modification.

54. CO 6 extended the period of performance of the Tamimi Subcontract from June 12, 2004 to September 14, 2004.

55. CO 6 also revised the pricing of the Tamimi Subcontract to provide that KBR would pay Tamimi a fixed monthly amount for the facilities, kitchen equipment, electricity generators, refrigeration units, and laborers and a fixed PPPD rate for food and consumables multiplied by the maximum average daily headcount at Anaconda.

56. The revised pricing in CO 6 was retroactive to March 2, 2004 and resulted in a five percent price reduction for the months of March and April 2004, and a 10 percent price reduction for May through June 2004, resulting in a total savings to KBR and the government of approximately \$4,907,319.00.

57. CO 6 also outlined the parties' intention to continue to negotiate regarding the ownership of the facilities at A-1 and A-4, with the goal of resolving the ownership dispute by September 14, 2004.

3. KBR Self-Performance at Anaconda

58. After receipt of competitive pricing proposals in the summer of 2004 submitted in response to the July 2004 RFP for DFAC services at Anaconda, KBR elected to self-perform providing DFAC services at Anaconda beginning on September 15, 2004 because KBR determined that self-performance would result in significant savings to the government.

59. To permit self-performance at Anaconda, on July 29 and 30, 2004, KBR solicited and received competitive proposals from vendors to recruit and transport laborers to Anaconda.

60. On August 21, 2004, KBR awarded a subcontract to Euresst Support Services International Limited ("ESS") to provide the labor (hereinafter "the ESS Labor Subcontract") KBR needed to staff the DFACs at Anaconda in order to self-perform.

61. Beginning in August 2004, it became apparent that due to the sovereign acts of several countries, including orders precluding their citizens from entering Iraq and a state funeral in Dubai that delayed transit visas, ESS would be unable to provide the labor necessary to allow KBR to begin self-performance at Anaconda.

62. In order to ensure there was not a disruption in DFAC services at Anaconda, on September 10, 2004, KBR and Tamimi executed Change Order 7, a bilateral modification, that extended the period of performance of the Tamimi Subcontract through November 30, 2004.

63. In the period between September 10 and November 30, 2004, ESS worked to overcome the obstacles it faced, due to the sovereign acts of various countries, in recruiting and transporting laborers to Anaconda.

64. By mid-November 2004, it became evident to KBR that ESS would be unable to perform the ESS Labor Subcontract in order for KBR to begin self-performance by December 1, 2004, and KBR terminated the ESS Labor Subcontract.

65. KBR again sought a brief extension of the Tamimi Subcontract in order to prevent a disruption to DFAC services at Anaconda and to allow KBR to compete the Anaconda DFAC services.

66. Tamimi would not agree to an extension of the Tamimi Subcontract unless the extension was for at least one year.

4. **Change Order 9**

67. In order to avoid disruption to the provisioning of DFAC services to nearly 20,000 troops and other personnel at Anaconda, and to support the Army's mission in Iraq, KBR began negotiating with Tamimi to extend the period of performance of the Tamimi Subcontract for one year, conditioned upon Tamimi's agreement to a retroactive discount of the price of the Tamimi Subcontract, as well as resolution of the ownership of the facilities at sites A-1 and A-4.

68. KBR and Tamimi reached an agreement in principle that the Tamimi Subcontract would be extended through December 31, 2005. Tamimi continued to perform while the parties negotiated the terms of the extension.

69. KBR used Tamimi's July 2004 competitive proposal, submitted in response to KBR's July 15, 2004 RFP, as its baseline for negotiating price.

70. On April 2, 2005, after a protracted period of negotiations, KBR and Tamimi executed CO 9, a bilateral modification that, among other things, resulted in reduced prices under the Tamimi Subcontract from March 2004 through December 31, 2005.

71. CO 9's terms included a 10 percent reduction to the Tamimi Subcontract price for March 2004 through November 2004 from the already discounted prices achieved by KBR in CO 6.

72. The price for December 2004 through December 2005 was based substantially upon the pricing Tamimi offered in its July 2004 competitive proposal, which was submitted in response to KBR's July 15, 2004 RFP.

73. CO 9 also resolved the ongoing dispute over the ownership of the facilities at A-1 and A-4, providing that effective November 30, 2004, the two facilities became the property of KBR/government.

74. CO 9 was negotiated and executed in accordance with KBR's procurement policies which, among other things, required management review and approval.

75. CO 9 was negotiated and executed using prudent business judgment.

76. Despite the war time circumstances and Tamimi's superior bargaining position, KBR negotiated significant cost savings for the government in CO 9.

77. KBR achieved cost savings through its use of a skilled and seasoned negotiator who aggressively pursued price concessions and a favorable resolution of the issue of ownership of the two facilities through diligent and prudent negotiations with Tamimi.

78. The price of CO 9 was reached as a result of arms length bargaining with Tamimi, reflected KBR's sound business practices and was fair and reasonable, satisfying KBR's contractual obligations to the government.

D. KBR'S INCURRED COSTS

79. KBR paid Tamimi for the DFAC work performed under the Tamimi Subcontract and CO 9 in accordance with the applicable terms.

80. KBR included the amounts it paid Tamimi pursuant to CO 9 in vouchers submitted to the government in accordance with Task Order 59 and the Contract.

81. The government paid KBR's vouchers that included KBR's costs for its payments to Tamimi in accordance with CO 9, as well as applicable, overhead costs, G&A costs, FCOM, plus fee.

E. DCAA FORM 1

82. The Defense Contract Audit Agency ("DCAA") performed an audit of KBR's incurred costs in relation to KBR's payments to Tamimi under CO 9.

83. The DCAA has issued an audit report questioning KBR's incurred costs in relation to KBR's payments to Tamimi under CO 9.

84. As a result of the DCAA audit of KBR's incurred costs related to the Tamimi Subcontract, on January 29, 2008, the DCAA issued a Form 1 suspending payment of KBR's costs of paying Tamimi, including KBR's overhead costs, G&A costs, and FCOM allocable to its Tamimi costs, plus fee, in the total amount of \$41,070,624.00.

85. In the Form 1, the DCAA alleges that the prices included in CO 9 were unreasonable, rendering KBR's incurred costs for payments to Tamimi for work performed under the Tamimi Subcontract during the period July 1, 2004 through December 31, 2004 unreasonable and, therefore, not subject to reimbursement under the Contract and Task Order 59.

86. The Form 1 alleges that CO 9 prices applicable to the July through December 2004 period were unreasonable because they exceeded an average DFAC services price that DCAA unilaterally calculated.

87. The average DFAC services price that DCAA unilaterally calculated is irrelevant and it is also wrong because DCAA did not account for variations between DFAC requirements, differing site conditions within Iraq, or circumstances specific to Anaconda.

88. Based upon the conclusion that certain costs relating to CO 9 of the Tamimi Subcontract were unreasonable, the Form 1 found these costs unallowable, and therefore not reimbursable, under FAR § 52.216-7.

89. Based upon the Form 1, the PCO has withheld \$41,070,624.00 from payments due and owing to KBR under the Contract.

COUNT I - BREACH OF CONTRACT

90. KBR alleges and incorporates each of the foregoing paragraphs of this Complaint as if fully set forth herein.

91. KBR's payments to Tamimi for the services provided at Anaconda under the Tamimi Subcontract are KBR costs incurred under the Contract and Task Order 59.

92. Pursuant to the terms of the Contract and Task Order 59, the government is obligated to reimburse KBR for all KBR costs reimbursable under FAR § 52.216-7 plus fee.

93. FAR § 52.216-7 states that KBR's costs are reimbursable when the costs are: (a) reasonable; (b) allocable to the contract; (c) accounted for appropriately; (d) not prohibited by the contract; and (e) not prohibited by FAR Part 31.2.

94. KBR's costs incurred as a result of its payments to Tamimi under CO 9 to the Tamimi Subcontract, as well as KBR's allocable overhead costs, G&A costs, and FCOM (together the "Tamimi Costs") are reimbursable under FAR § 52.216-7.

95. KBR is entitled to payment of fee in addition to reimbursement of the Tamimi Costs.

96. The government has withheld \$41,070,624.00 from payments under the Contract in an effort to recoup a portion of KBR's Tamimi Costs that KBR incurred under CO 9, plus fee, based solely on the conclusion that the Tamimi Costs are unreasonable.

97. The Tamimi Costs that the government has failed to reimburse, plus fee, are reasonable under FAR § 52.216-7 and FAR § 31.201-3 because they result from KBR's reasonable business judgment in negotiating CO 9 prices as shown by, among other things: (a) KBR's obligation to provide DFAC services to combat soldiers without interruption; (b) the circumstances regarding DFAC services at Anaconda in 2004, including KBR's efforts to save the government money; (c) the wartime conditions in Iraq in 2004; (d) KBR's use of competitive prices to negotiate CO 9; and (e) the significant discounts KBR obtained from Tamimi under CO 9.

98. The government's failure to pay KBR the \$41,070,624.00 that is due and owing, in accordance with the terms of the Contract and Task Order 59, is a breach of the Contract by the government.

99. The government's breach of contract has damaged KBR in the amount of \$41,070,624.00.

100. KBR is entitled to recover breach of contract damages in the amount of \$41,070,624.00.

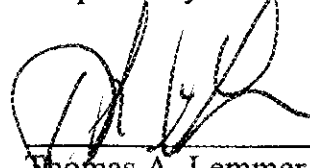
PRAYER FOR RELIEF

WHEREFORE, KBR respectfully requests that this Court award the following relief:

- A. That this Court enter judgment under Count I, Breach of Contract, that the government's failure to pay KBR \$41,070,624.00 due and owing to KBR is a breach of the Contract and Task Order 59, entitling KBR to breach of contract damages in the amount of \$41,070,624.00;
- B. That this Court award to KBR such other relief as the Court deems proper, including interest, fees and costs.

Respectfully submitted this 1st day of June, 2009.

Respectfully submitted,



Thomas A. Lemmer

McKENNA LONG & ALDRIDGE LLP

1400 Wewatta Street

Suite 700

Denver, Colorado 80202-5556

(303) 634-4000

(303) 634-4400 (facsimile)

tlemmer@mckennalong.com

OF COUNSEL:

Sandra B. Wick Mulvany

Jennette C. Roberts

Joseph G. Martinez

McKENNA LONG & ALDRIDGE LLP

1400 Wewatta Street

Suite 700

Denver, Colorado 80202-5556

(303) 634-4000

(303) 634-4400 (facsimile)

swickmulvany@mckennalong.com

jroberts@mckennalong.com

jgmartinez@mckennalong.com

ATTORNEY FOR PLAINTIFF

KELLOGG BROWN & ROOT

SERVICES, INC.

DN:32153435.12

ORIGINAL
COVER SHEET

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U.S. COURT OF FEDERAL CLAIMS

In The United States Court of Federal Claims

Cover Sheet

Plaintiff(s) or Petitioner(s)
Kellogg Brown & Root Services, Inc.

If this is a multi-plaintiff case, pursuant to RCFC 20(a), please attach an alphabetized, numbered list of all plaintiffs.

Name of the attorney of record (See RCFC 83.1(c)): Thomas A. Lemmer
Firm Name: McKenna Long & Aldridge, LLP
Post Office Box: 09-351 C
Street Address: 1400 Wewatta, Suite 700
City-State-Zip: Denver, CO 80202
Telephone & Facsimile Numbers: (P) 303-634-4000; (F) 634-4400

Is the attorney of record admitted to the Court of Federal Claims Bar? Yes No

Does the attorney of record have a Court of Federal Claims ECF account? Yes No
If not admitted to the court or enrolled in the court's ECF system, please call (202) 357-6402 for admission papers and/or enrollment instructions.

Nature of Suit Code: 1 1 4
Select only one (three digit) nature-of-suit code from the attached sheet and if numbers 118, 134, 226, 312, 356, or 528 are used, please explain.

Agency Identification Code: A R M
See attached sheet for three-digit codes.

Amount Claimed: \$ 41,070,624.00
Use estimate if specific amount is not pleaded.

Disclosure Statement:
Is a RCFC 7.1 Disclosure Statement required? Yes No
If yes, please note that two copies are necessary.

Bid Protest:
Indicate approximate dollar amount of procurement at issue: \$ _____
Is plaintiff a small business? Yes No

Vaccine Case:
Date of Vaccination: _____

Related Cases:
Is this case directly related to any pending or previous case? Yes No
If yes, you are required to file a separate notice of directly related case(s). See RCFC 40.2.

COVERED