Office of Dispute Resolution for Acquisition
Federal Aviation Administration
Washington, D.C.

RECOMMENDATION

Matter: Contract Dispute of Initial Security
Under Contract Nos. DTFA14-98-C-33926 and DTFA14-95-P-10137

Docket: 00-ODRA-00153

Appearances:

For the Protester: Roger A. Merrill, Branch Manager

For the Agency: Lynne Adams-Whitaker, Esq., Attorney, Great Lakes Region

I. Introduction

Initial Security ("Initial") filed a contract dispute with the FAA Office of Dispute Resolution for Acquisition ("ODRA') by letter dated February 23, 2000. The contract dispute seeks equitable adjustments relating to health and welfare benefits for Initial employees under two separate guard services contracts entered into by Initial with the FAA Great Lakes Region ("Region"). For the reasons set forth below, the ODRA recommends that the contract dispute be dismissed summarily.

The first contract, Contract No. DTFA14-95-P-10137, for guard services at the Region's Headquarters facility in Des Plaines, Illinois (hereinafter the "Des Plaines Contract"), was executed in August 1995. The second contract, Contract No. DTFA14 – 98-R-33926, pertaining to similar services at the Chicago Terminal Radar Approach Control facility ("TRACON")/System Management Office ("SMO") in Elgin, Illinois

(hereinafter the "Elgin Contract"), was executed in April 1998. The total amount claimed under the Des Plaines contract is $16,830.45. The total amount claimed under the Elgin Contract is $14,060.65.

Upon receipt of the contract dispute, the ODRA Director designated Marie A. Collins, Esq., an ODRA Dispute Resolution Officer ("DRO"), to explore alternative dispute resolution ("ADR") options with the parties. The parties agreed to having Ms. Collins serve as an ADR Neutral for an informal mediation. When the mediation effort failed, the matter proceeded to adjudication under the ODRA's default adjudicative process. On May 18, 2000, the Region submitted the required Dispute File and simultaneously filed an Agency Motion for Dismissal ("Motion"). The Region asserts the following three grounds for its Motion:

(1) portions of the dispute were not timely filed by the contractor;

(2) the contractor has failed to state a matter upon which relief may be had;

(3) the dispute involves a matter not subject to the jurisdiction of the ODRA.

Several documentary exhibits and an affidavit of Lisa Lester, the original contracting officer on the Des Plaines Contract, accompanied the Motion.

By letter dated May 22, 2000, the ODRA's Richard C. Walters, Esq. notified Initial that he had been appointed as the DRO for purposes of adjudication; that the ODRA was in receipt of both the Dispute File and the Region's Motion; and that Initial was required to provide a response to the Motion by close of business, June 2, 2000. The letter advised Initial that "any such response should be supported by appended documents and affidavits."

On June 5, 2000, the ODRA received by Federal Express a letter from Initial dated June 1, 2000 that had been sent to the Office's prior address (pursuant to outdated instructions

in the "Contract Disputes" clauses of both contracts). The letter asserted Initial's "belief" that:

> (1) The dispute was filed in a timely fashion, as soon as we became aware of the problem.
>
> (2) We did state a matter upon which relief could be had, such as only those monies necessary to make the officers whole.
>
> (3) We believe that the ODRA has jurisdiction in this matter as we have dealt and complied with the DOL.

Initial's response was accompanied by copies of a variety of documents, all of which had previously been made part of the record. No counter-affidavit was presented to refute any of the statements presented by Ms. Lester. Neither party sought a hearing for the presentation of live testimony[1], and the ODRA concludes that there are no complex material factual issues in dispute and that the matter can be decided based solely upon the written submissions.

As explained below, because the Des Plaines Contract was not entered into under the FAA's Acquisition Management System ("AMS"), the ODRA finds that the portion of the contract dispute relating to the Des Plaines Contract must be dismissed for lack of ODRA subject matter jurisdiction. The ODRA finds that it would have subject matter jurisdiction as to the Elgin Contract. The ODRA further finds that there may be some question regarding the timeliness of Initial's filing of the dispute regarding the Elgin Contract. However, even assuming a timely filing as to the Elgin Contract, the instant contract dispute nevertheless must be dismissed summarily for failure to state a matter upon which relief may be had.

II. Discussion

The ODRA Procedural Rules, which are published as a regulation in Title 14 C.F.R., Part 17, and which have been incorporated by reference into the AMS (*see* AMS §3.9.4)

[1] The ODRA Rules require the ODRA to conduct an evidentiary hearing whenever one is requested, unless it makes a finding that the lack of a hearing will not be prejudicial to either party. 14 C.F.R. §17.39(h).

expressly exclude from the ODRA's adjudicatory authority disputes under any FAA contract "entered into prior to April 1, 1996," the effective date for the AMS:

> **§ 17.1 Applicability**.
>
> This part applies to all protests or contract disputes against the FAA that are brought on or after the effective date of these regulations, ***with the exception of those contract disputes arising under or related to FAA contracts entered into prior to April 1, 1996.***

14 C.F.R. §17.1 (emphasis added). The Rules define the term "contract dispute" as only relating to claims regarding contracts entered into under the AMS and permit ODRA involvement with pre-AMS contract disputes only in conjunction with the provision of ADR services:

> g) Contract Dispute, as used in this part, means a written request to the Office of Dispute Resolution for Acquisition seeking resolution, under an existing FAA contract subject to the AMS, of a claim for the payment of money in a sum certain, the adjustment or interpretation of contract terms, or for other relief arising under, relating to or involving an alleged breach of that contract. A contract dispute does not require, as a prerequisite, the issuance of a Contracting Officer final decision. Contract disputes for purposes of ADR only may also involve contracts not subject to the AMS.

14 C.F.R. §17.3(g). In the present case, the Des Plaines Contract was executed in August 1995, prior to the effective date of the AMS. Thus, although the ODRA properly was involved in an ADR effort to resolve the dispute under that contract, the ODRA has no jurisdiction over the dispute as a "contract dispute" for purposes of adjudication under its default adjudicative process. Even before the ODRA Rules took effect (*i.e.*, June 28, 1999), the Administrator held adjudication of pre-AMS contract disputes to be outside the ODRA's jurisdiction and dismissed such disputes on that basis. *Contract Dispute of NanTom Services, Inc.*, FAA Order No. ODRA-97-21 (July 16, 1997); and *Contract Dispute of Pro Controls Corporation*, FAA Order No. ODRA-98-68 (Mary 14, 1998). Accordingly, that portion of the instant contract dispute pertaining to the Des Plaines Contract must be dismissed for lack of ODRA subject matter jurisdiction.

The ODRA clearly would have jurisdiction to adjudicate contract disputes arising under or relating to the Elgin Contract, which post-dated the AMS' effective date. The Region argues, however, that the instant contract dispute was not filed with the ODRA on a timely basis and ought therefore be dismissed for lack of timeliness. The Elgin contract contains a clause entitled "Contract Disputes (November 1997)", which reads in pertinent part:

> 3.9.1-1 CONTRACT DISPUTES (NOVEMBER 1997)
>
> * * *
>
> (b) * * * Unless otherwise stated in this contract, a contract dispute by the contractor against the Government shall be filed with the Office of Dispute Resolution for Acquisition within 6 months after accrual of the contract dispute.

Although the ODRA Procedural Rules provide for a longer limitations period of 2 years after accrual within which to file a contract dispute, the Rules state with regard to contracts entered into prior to the effective date of the Rules, that any different limitations period specified in such a contract will govern:

> (c) A contract dispute against the FAA shall be filed with the Office of Dispute Resolution for Acquisition within two (2) years of the accrual of the contract claim involved. A contract dispute by the FAA against a contractor (excluding contract disputes alleging warranty issues, fraud or latent defects) likewise shall be filed within two (2) years after the accrual of the contract claim. ***If an underlying contract entered into prior to the effective date of this part provides for time limitations for filing of contract disputes with The Office of Dispute Resolution for Acquisition which differ from the aforesaid two (2) year period, the limitation periods in the contract shall control over the limitation period of this section.*** ***

14 C.F.R. §17.25(c) (emphasis added). The Elgin Contract was entered into in April 1998, more than a year prior to the effective date of the ODRA Procedural Rules (June 28, 1999). Thus, the 6 month limitations period specified under the above-quote contract clause will take precedence over the longer period permitted by the Rules.

The question then is when did Initial's claim relating to the Elgin contract "accrue" for purposes of the 6-month limitations period? Although the issue of claim "accrual" is a matter of first impression for the ODRA, the Procedural Rules give the term "accrual" the definition afforded to it by United States Court of Federal Claims and its predecessors in addressing disputes under Government contracts. The Agency's response to comments submitted by the American Bar Association ("ABA") regarding the proposed ODRA Procedural Rules indicate as much:

> **"Accrual" of a Contract Dispute**
>
> The ABA believes that the definition of "accrual of a contract dispute" is ambiguous and recommends that the FAA adopt a definition used by the Court of Federal Claims under the Tucker Act, or alternatively, adopt the definition of accrual that is incorporated into FAR §33.201.
>
> FAA Response: The FAA agrees. The FAA has adopted the Court of Federal Claims definition of "accrual of a contract claim" and has included it in §17.3(b) of the final rule. Minor changes have been made to the ABA's proposed language so as to clarify that the determination as to whether there has been "active concealment or fraud" or facts "inherently unknowable" will rest with the ODRA (and, ultimately, with the Administrator).

64 FR 32926, 32931 (June 18, 1999). Accordingly, section 17.3(b) of the ODRA Rules defines "accrual of a contract dispute" in the following manner:

> (b) Accrual of a contract claim means that all events relating to a claim have occurred which fix liability of either the government or the contractor and permit assertion of the claim, regardless of when the claimant actually discovered those events. For liability to be fixed, some injury must have occurred. Monetary damages need not have been incurred, but if the claim is for money, such damages must be capable of reasonable estimation. The accrual of a claim or the running of the limitations period may be tolled on such equitable grounds as where the Office of Dispute Resolution for Acquisition determines that there has been active concealment or fraud or where it finds that the facts were inherently unknowable.

14 C.F.R. §17.3(b). *See also Japanese War Notes Claimants Association v. United States,* 373 F.2d 356 (Ct. Cl. 1966), *cert. denied,* 389 U.S. 971 (1967), *rehearing denied,* 390 U.S. 975 (1968); *Chevron U.S.A. v. United States,* 923 F. 2d 830, 834 (Fed. Cir.

1991), *cert. denied, Phillips Petroleum Co. v. United States*, 502 U.S. 855 (1991) (cause of action accrues when all events necessary to state a claim have occurred).

In the present case, Initial posits that it is entitled to reimbursement for back payments of health and welfare benefits under the Elgin Contract as well as under the Des Plaines Contract, because, when it bid the two contracts, it did so in reliance upon advice allegedly provided it in 1995 by Lisa Lester, the contracting officer for the Des Plaines Contract, advice that purportedly led Initial to believe that the specified wage rates were intended to include fringe benefits and that it would not be required to pay health and welfare benefits in addition to those wage rates. In this regard, Initial provides the following statements as part of a "Sequence of Events" furnished as an addendum to the February 2000 contract dispute letter:

> 7/24/95
> We submitted a proposal for guard service at current market wages to Christine Muszynski of Hiffman Associates, Inc., Manager of the building. * * *
>
> 8/1/95
> Sent letter to Lisa Lester stating a pay rate of $9.32 (at her request) and the corresponding billing rate. No mention or request was made for any other benefits. Lisa Lester advised us to bid the job based on how we normally bid jobs. * * *
>
> 8/4/95
> Prospect/New Account Checklist filled out by Operations Manager, Jeff Scranton, in a meeting with Lisa Lester showing a $9.42/hour wage (should be $9.32/hr.), a union account and nine holidays. This is an internal document used to gather information about new accounts. No other benefits or Health and Welfare payments are listed. * * *
>
> 8/7/95
> Service started with Lisa Lester signing our contract, based on our [*i.e.*, Initial's standard form] terms and conditions. [NOTE: The Government standard form contract was not being utilized at that point.]
>
> An order for Supplies or Services [*i.e.*, on a Government standard form] is received after the start of work for the period of 8/7/95 to 9/30/95. This was not signed by us. A general scope of services was included along

with a copy of the [Department of Labor] wage determination listing. * * * There were no instructions which would have suggested that the Health & Welfare amounts were to be added to the $9.32 per hour wage. Our understanding was that this was a part of the $9.32 per hour wage already, based on conversations with Lisa Lester. As a result, the cost of the Health and Welfare was never included in our billing rates.

* * *

1/30/98
Bid package received for Elgin Tracon. Again, there were no instructions suggesting that the Health and Welfare be added to the prevailing wage so the $1.16 per hour for Health and Welfare was not included in our billing rates. This was consistent with what Lisa Lester told us about the Des Plaines location (Health and Welfare were included in the base wage).

2/19/98
Bid submitted according to previous direction received from Lisa Lester.

* * *

9/7/99
Memo received from Officer Murphy requesting back payment for Health and Welfare and holiday pay. * * * This when we first became aware that the Health and Welfare payment was in addition to the base wage. * * *

* * *

9/22/99
Letter sent [by Initial to Region] detailing cost of new pay and Health and Welfare benefit. * * * This is the first time we included the proper amounts in our billing rates for the Health and Welfare costs. This amount was reduced by the FAA not allowing us to adjust our cost to fully include the $1.63 health and welfare benefit and holiday pay.

A. The Alleged Misrepresentation

Essentially, Initial contends: (1) that, in connection with the bidding of both the 1995 and 1998 contracts, it was somehow misled by alleged misrepresentations of the original contracting officer made in 1995; (2) that, in early September 1999, Initial first learned from the Department of Labor that it was responsible for paying health and welfare benefits in addition to the specified wage rates; and (3) that, later in September 1999, the Region refused to remedy the damages incurred by reason of the alleged misrepresentation. The ODRA Procedural Rules quoted above define "accrual of a

contract claim" in terms of the occurrence of "all events relating to a claim . . . which fix liability . . . and permit assertion of the claim, ***regardless of when the claimant actually discovered those events***." Here, as of the inception of the Elgin Contract in May 1998, all of the events relating to the claim that fixed liability and permitted assertion of some claim had occurred. And although the Procedural Rules permit limited exceptions for delayed discovery of "events," Initial has not alleged with specificity or advanced any evidence that would establish that its non-discovery regarding the CO's alleged misrepresentation was as a result of "active concealment or fraud" or that the facts in this case were "inherently unknowable." *See* 14 C.F.R. §17.25(c). Thus, there is some question here regarding the timeliness of filing of the instant contract dispute.

However, assuming *arguendo* the ODRA were to find that the contract dispute had been filed in a timely manner, the case nevertheless should be dismissed summarily, because it is utterly lacking in factual or legal support. The DOL wage determinations for the two contracts do not indicate that the health and welfare benefit amounts specified were to be part and parcel of the specified minimum wage rates. The following words appear at the end of the wage rate listings in those determinations:

** Fringe Benefits Required For All Occupations Included In This Wage Determination **

In the contract dispute submission, it appears that Initial circled the word "Included" in the above quoted language regarding fringe benefits. DF, Tab 21, DOL Wage Determination, page 6 of 9. Apparently, Initial reads the words as meaning that all fringe benefits were "included" within the wage rates previously listed A proper interpretation would be that the fringe benefits described below such language were required for all of the ***occupations*** that had been included in the previous wage rate listing. For health and welfare payments, the following description is given in both wage rate determinations:

> HEALTH & WELFARE: $0.90 per hour or $36.00 per week or $156 per month.

DF, Tab 6, page 33; Tab 21, pp. 16-17. If anything, the recitation of precise numbers in this way should have conveyed to Smith/Initial that the health and welfare payments were to have been over and above the basic wage rates. Nevertheless, Initial contends that it was misled into a contrary belief. In support of its argument, Initial relies upon the entry in its Sequence of Events for the events of August 1, 1995:

> Sent letter to Lisa Lester stating a pay rate of $9.32 (at her request) and the corresponding billing rate. No mention or request was made for any other benefits. Lisa Lester advised us to ***bid the job based on how we normally bid jobs***. [Emphasis added].

DF, Tab 21, Initial's Contract Dispute Letter of February 23, 2000: " We submit[ted] our bid according to guidelines given to us by then contracting officer Lisa Lester who signed one of our contracts." In fact, according to its own Sequence of Events, Smith/Initial did not receive the wage determination in question until August 7, 1995, and the entry Initial makes for that day is that its "understanding was that this [the Health & Welfare amounts] was part of the $9.32 per hour wage already, based on our [previous] conversations with Lisa Lester." From the ODRA's perspective, an alleged statement by the contracting officer to "***bid the job based on how [Initial] normally bid jobs***" – which the ODRA accepts as true for purposes of the pending Motion – is insufficient to support a charge of misrepresentation. Such a statement certainly is not the equivalent of a direct statement that the $9.32 per hour wage already included any fringe benefits set forth in the DOL wage determination. And Initial furnishes no further details or supporting affidavits of any kind regarding "conversations" with Ms. Lester other than the one on August 1, 1995, where it was told to bid the job based on how it "normally bid jobs."

Moreover, as noted above, Ms. Lester furnished a sworn affidavit, which is in the record in this proceeding. In it, she denied categorically that she even discussed with Initial the issue of fringe benefits, let alone misled the contractor into forming a belief that the health and welfare payments were already included as part of the specified minimum base wage rates. In this regard, Ms. Lester states:

> 3. Prior to the submission of the bid [by Stanley Smith Security – Initial's predecessor in interest], I held a pre-bid meeting with

three employees of our security division and with three employees of Smith.

4. * * *
5. At that meeting, I discussed the wage rates that were to be paid and automatic payment.
6. To the best of my recollection, no one from Smith questioned me about the payment of fringe benefits at that meeting.
7. To the best of my recollection, I did not advise any employee or official of the contractor that fringe benefits were included in the basic wage rate and were not to be paid separately.
8. * * *
9. * * *
10. * * *
11. To the best of my recollection in telephone conversations with [formerly with Smith and later Initial's Branch Manager Roger] Merrill [the individual who filed the instant contract dispute on behalf of Initial], he never asked me about the inclusion of fringe benefits in the basic wage rate.
12. To the best of my recollection in my telephone conversations with Merrill, I never advised him that fringe benefits were included in the basic wage rate. I provided the standard, basic wage rate determination and Service Contract Act information to Smith's employees in their solicitation packages.
13. To the best of my recollection, he and I have never discussed nor did he ask about the Department of Labor and its standards and policies.
14. To the best of my recollection, he never requested any interpretation or clarification of any clauses in the contract that pertain to wage determinations, or DOL laws, and regulations.
15. To the best of my recollection, no contractor ever requested any interpretation or clarification of any standard contract clauses that pertain to wage determinations, or DOL's law or regulations.

Dispute File ("DF") Tab 23. Initial provided no counter-affidavit or other evidence to refute Ms. Lester's sworn statements or to support its allegations that she misled the contractor. Thus, there is no credible evidence in the record that anything was done to mislead Smith/Initial in bidding the Des Plaines and Elgin contracts. Indeed, even if Initial had been misled in 1995, the record indicates that the Region subsequently sent Initial a September 9, 1997 letter notifying it of increases in the health and welfare rates and requesting Initial to advise if a contract price adjustment would be required. *See* DF Tab 21, Sequence of Events, Entry for 9/9/97. This fact alone should have alerted Initial that its earlier misimpression concerning all-inclusive rates had been incorrect.

Based on the record, the most that can be said here is that Initial made a unilateral mistake, both in 1995 in bidding the Des Plaines Contract, and again in 1998, in bidding the Elgin Contract. The rule regarding unilateral mistakes is that a price adjustment by way of contract reformation may only be granted, where the contractor can establish that the Government knew or should have known of the mistake's existence. *E.g.*, *Comspace Corporation*, DOT BCA No. 4034, 99-2 BCA ¶40,373. In certain cases of unilateral mistake, reformation has been allowed where there has been a gross disparity in bid prices that should have alerted the Government to the possibility of a mistake and that should have prompted a pre-award Government inquiry. *Chernick v. United States*, 372 F.2d 492, 496 (Ct. Cl. 1967).

There was no such disparity in the present case that would have "triggered a duty for the CO to verify appellant's bid." *See Kato Corporation*, ASBCA No. 47601, 97-2 BCA ¶27,130. To the contrary, Initial and the next bidder both bid only approximately $5,000 below the Government estimate, whereas the third bidder bid some $25,000 below the estimate. Initial was, in fact, the highest of the three bidders. Motion ¶13. Under these circumstances, it cannot be said that the Government should have known of Initial's mistake.

B. The Specification of "Guard I" Versus "Guard II" Services

In a memorandum dated March 20, 2000 (DF Tab 22), Initial contends that, in bidding the Elgin contract, its proposal was based on the use of Guard I services. Because the DOL wage rate for Guard I was $6.28 per hour and because it paid the guards at Elgin $11.27 per hour, Initial says, the $4.99 difference was "more than enough to cover the required fringe benefits" under the DOL wage determination. In this regard, whereas Initial acknowledges that Solicitation Amendment No. 0001 dated March 20, 1998 had eliminated Guard I services from the contract and had stated: "All guards are to be Guard II, GS-5," it contends in the March 20, 2000 memorandum that, when it executed the Elgin contract, the amendment was never incorporated as part of the contract. In this

regard, it states: “This modification was not included as an amendment to the original solicitation when the award was made on 4/20/98.” DF, Tab 22.

The Elgin contract was executed by both parties on April 20, 1998 on a Standard Form 33, Solicitation, Offer and Award. That form had been distributed by the Region on January 30, 1998 as the cover of the Solicitation. The form was then returned by Initial on February 19, 1998 with Initial’s proposal. At that time, which pre-dated Amendment No. 0001 by 1 month and 1 day, Initial understandably had left blank Block 14, Acknowledgment of Amendments, since, as of February 19, 1998, no amendments had been issued. Initial did, however, acknowledge and execute Amendment No. 0001 when it was issued on March 20, 1998. That amendment, in addition to eliminating Guard I services, called for a shorter base contract period of 5 months, rather than the original 7 month base period. Initial, on March 25, 1998 at 11:35 A.M. and 11:36 A.M., respectively, faxed to the Region: (1) the cover of Amendment No. 0001 with a signature of Initial’s Branch Manager, Mr. Roger A. Merrill; and (2) an amended schedule of prices showing a 5 month base contract period and an aggregate total price of $695,163.84 for the base period and the four option years. DF Tab 9. Subsequently, it appears that Initial caught a minor mathematical error in the extension price for the 5-month base contract period. In lieu of the $67,045.44 figure used on the amended price schedule, the extended price should have been $67,056.40. It appears that Mr. Merrill corrected the schedule by lining out the incorrect extension and writing in the correct figure. Opposite the interlineations and corrected figure, Mr. Merrill placed his initials. Also, at the bottom of the schedule, Mr. Merrill wrote the words “Mathematical error made on Item 001” and initialed those words as well. Finally, Mr. Merrill appears to have corrected the total. Below the $695,163.84 figure, he wrote “$695,174.80” and again initialed the correction.

Initial faxed the corrected amended price schedule to the Region at 9:40 A.M. on April 20, 1998. DF, Tab 10. That same corrected amended schedule was physically appended to and made part of the contract, which the contracting officer signed on the same date, April 20, 1998. DF, Tab 11. Therefore, even without Block 14 indicating the inclusion

of Amendment No. 0001, it is clear that the amendment had been incorporated as an integral part of the Elgin Contract at the time of its execution. It was not Initial's February 1998 proposal, with its bid for a 7-month base period, but rather the Amendment No. 0001 proposal of March 25, 1998 that was included in the contract. This being the case, the assertion that Amendment No. 0001 was not a part of the contract and that the contract had been bid based on the use of Guard I services is plainly unsupported by the record. In sum, then, Initial has no factual or legal basis here for claiming a contract price adjustment.

III. Conclusion and Recommendation

For the foregoing reasons, the ODRA recommends that the Region's Motion be granted and that the contract dispute be dismissed summarily, pursuant to 14 C.F.R. §17.29, with respect to the Des Plaines contract, by reason of a lack of ODRA subject matter jurisdiction, and with respect to the Elgin contract, by reason of its failure to state a matter upon which relief may be had.

_____/s/_____
Richard C. Walters
Dispute Resolution Officer
FAA Office of Dispute Resolution for Acquisition

APPROVED:

_____/s/_____
Anthony N. Palladino
Associate Chief Counsel and Director
FAA Office of Dispute Resolution for Acquisition