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B-226782, Oct 20, 1987

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PROCUREMENT - Payment/Discharge - Letter Contracts - Contract Awards Intent - Cost Reimbursement DIGEST: Claimant expended funds to purchase equipment pursuant to a letter of intent issued by the Department of the Army. At the time the letter of intent was signed, both parties contemplated execution of a formal contract shortly thereafter. However, for a variety of reasons, including uncertainty by the Army of the propriety of a contingent fee arrangement in which claimant was involved, the formal contract was never issued. Nevertheless, the letter constituted a valid agreement for procurement of specified items for the government's account and claimant should be reimbursed for the amounts it expended in conformance with the agreement.

Kavouras, Inc.:

Kavouras, Inc. (Kavouras) has filed a claim with the Department of the Army for reimbursement of $177,779 expended in conformance with a letter of intent. /l/ The Defense Supply Service-Washington (DSS-W) referred the matter to the GAO as a doubtful claim. As explained below, we conclude that there was a valid letter agreement between the Army and the claimant which should be paid in accordance with its terms.

BACKGROUND

Kavouras is an engineering and research firm with expertise in radar and satellite technology. In September 1987, the reports of the House and Senate Appropriations Committees on Department of Defense appropriations for fiscal year 1985 directed the Army to provide funds from available research and development appropriations to test and evaluate a tactical weather intelligence system. H.R. Rep. No. 98 1086, pages 212-213 (1987); S. Rep. No. 98-636, page 157 (1987).

Sometime in 1987, Kavouras developed a mobile demonstration vehicle that could receive and display weather information. The vehicle was shown at a variety of trade shows and was demonstrated for the Army at several locations, including the Pentagon. Following the apparently successful demonstrations, Kavouras prepared and submitted to the Army an unsolicited proposal for a militarized version of its portable system.

In early January 1985, a sole source justification was prepared by unidentified Army officials /2/ and forwarded to DSS-W along with other related documents. Nevertheless, other documents forwarded to us indicate clearly that the procurement process was initiated at this time, and that Kavouras was the

anticipated contractor.

During February and early March 1985, Kavouras and Army contract representatives were in close touch to refine the details of their proposed contract. Kavouras prepared two detailed "statements of work" (SOWs) at the Army's request, describing scope, costs, and responsibilities, including a commitment to deliver the first demonstration unit within 75 days of the signing of a "letter of intent" or a definitized contract, whichever was earlier. Kavouras also set about lining up suppliers to assure availability of generators and other equipment.

The final details were worked out on March 6 by Kavouras representatives and DSS-W contract specialist Glen Moore, who then drafted the letter of intent. On the afternoon of March 7, Dennis Sanford from Kavouras and another DSS-W contracting officer, George Daniels signed the following letter:

Mr. Kavouras:

"This letter hereby serves as notice of the Government's intent to contract with your firm for the provision of services in support of the Tactical Army Weather Collection Analysis and Dissemination System. firm fixed price contract, MDA9O3-85-C-0119, is envisioned.

"Contract performance will be generally in accordance with your company's proposal dated 3 February 1985 (SECRET), which was submitted to the Office of the Assistant Chief of Staff for Intelligence (OACSI). It is anticipated that it will take between 3-7 weeks to prepare a contract. light of this, the Government respectfully requests that your company begin performance on a limited basis, in order to meet the critical acquisition lead times necessary to meet the congressionally mandated performance milestones. Specifically, we request that you acquire and integrate for the account of the Government the following items:

"The equipment purchase represents 6.6% of the overall contract cost. The Government expects to definitize the contract on or before 5 April 1985.

"We respectfully request that you provide written concurrence (in the space provided below) of our offer, if it is found to be acceptable to you. If you have any further questions, please contact Mr. Glen C. Moore of my staff at (202) 697-6257." Throughout March and April, Kavouras made all the purchases specified in the above-quoted letter agreement. When no progress was made by the Army by mid-April in definitizing the contract, Kavouras contacted the Army to warn that it would not be able to deliver the first model in 75 days as previously contemplated, unless there was a firm contract to complete the project. Kavouras' records of telephone conversations with Army officials indicate that the Army continued to assure Kavouras of its commitment to the project. The Army asked Kavouras to continue work and delay billing until the time of project delivery.

Although a draft definitized contract was sent by the Army to Kavouras, with an effective date of July 7, 1985, it was never signed by the Army. On July 30, a contracting officer wrote to Kavouras to advise that the requirement "as it presently exists" was being canceled. According to a letter from Kavouras to Senator Rudy Boschwitz, dated February 27, 1987, Kavouras "sat back" for the next year waiting for a resolicitation. When it never came, Kavouras filed its claim with the Army for the amounts it expended in accordance with the letter

agreement. The Army then forwarded it to the GAO as a doubtful claim.

Army's doubts about the propriety of paying this claim appear /3/ to be based on the following information which we have gleaned from the voluminous documents submitted:

-- The contracting officer who signed the letter agreement on behalf of the DSS-W was unfamiliar with the particular acquisition and, he stated in a November 27, 1986 Memorandum for the Record, he was "unable to fully appreciate the potential consequences" of signing the document. The "potential consequences" apparently include the Army's legal liability for the costs incurred by the contractor. According to the Chief Attorney (Acquisition), DSS-W's "pre-contract cost agreements" normally provide expressly that the government will bear no cost liability if a definitized contract is not executed. The March 7 letter of intent did not contain such language, apparently because the letter was not reviewed by Army legal officers prior to signature.

-- The contracting officer who directed the preparation of the March 7 letter agreement wrote Kavouras on July 30, 1985 that her office "has become aware of other firms capable of fulfilling the TAWCADS requirement. Therefore, the propriety of a sole source award to your company in light of the information now available to the government is highly questionable."

-- One month after the letter agreement was signed, a DSS-W price analyst, who was studying Kavouras, proposed language for the definitized contract, noticed that Kavouras had a contingency fee arrangement with a firm called the Cuyuna Corporation. An investigation ensued to determine whether the arrangement met the complex requirements of the Federal Acquisition Regulation (FAR). In late June, the Army drafted a contract clause making payment of the contingency fee dependent on approval by the GAO. It was later learned (on May 1, 1985), that the same contingency fee arrangement had already been approved by the Air Force in connection with some weather radar units it was purchasing from Kavouras. The whole contingent fee issue then seems to have dissipated. While it is not entirely clear, Army seems to be contending that the purchases under the letter contract were made at a time when the issue was not yet resolved, and, therefore, no payment for the purchases was required.

-- In late May 1985, the Office of the Chief Attorney, DSS-W, became aware that the funds that would have been used to buy the Kavouras weather system, had the definitized contract been executed as planned, were not part of the President's budget request to the Congress. Instead, as mentioned earlier, the FY 1985 appropriation act reports directed the Army to fund the project from appropriations already made available for research and development. Subsequently, the DSS-W office learned that an unregistered lobbyist, who later said he was the Washington area representative for Kavouras, claimed responsibility for "engineering" the inclusion of the language in question in the House Report. Although no congressman or staff member would confirm this information, the Office of the Chief Attorney listed this information in his memorandum recommending against award of the definitized contract as "possible improper conduct."

DISCUSSION

While we have no doubt that if the March 7 letter contract had had legal review prior to signature by the contracting officer, the clause relieving the Army of

all financial liability for purchases made by the contractor on the Army's behalf if the definitized contract was never executed would have been part of the letter contract. If the clause in question had been included, it is equally possible that the contractor would not have signed an agreement that subjected him to such financial risk. In any case, the clause was not part of the letter contract. We do not think that Kavouras was unreasonable in expecting full reimbursement for expenditures he was directed to make "for the account of the government" on an expedited basis "to meet the critical acquisition lead times necessary to meet the congressionally mandated performance milestones."

We take no issue with the Army's finding, nearly 5 months after the letter contract was signed, that there were other competent firms capable of meeting the Army's requirements, and that award to Kavouras of the definitized contract on a sole source basis was therefore unjustified. The issue before us is not the propriety of awarding the definitized contract to Kavouras; we are concerned with the validity of the letter agreement. We do not think that Kavouras can be held responsible for the fact that the letter agreement may not have had the full review and attention it might normally have received before it was signed by an authorized contracting officer on Army's behalf. The claimant fulfilled his obligations under the letter contract long before the sole source issue was raised.

If the contingency fee arrangement had not been disclosed prior to the signing of the letter agreement, its later discovery might justify repudiation of the letter agreement as well as the definitized contract, particularly if the arrangement was also found to be impermissible under the FAR. It is undisputed, however, that the arrangement was fully disclosed to the DSS-W prior to signing the letter agreement as part of the negotiations pertaining to the definitized contract. Kavouras is not responsible for the fact that no Army official raised any question about the arrangement until 1 month after the letter agreement was signed and most of the purchases for Army's account had been made. Moreover, it was reasonable for Kavouras to assume that an arrangement that had already been approved by the Air Force twice before would be equally acceptable to the Army. In any case, even after months of investigation, the Army was never able to conclude that the contingent fee arrangement was illegal. We do not think that the Army's suspicions about the arrangement justify refusal to pay for the purchases made under the letter agreement.

The Chief Legal Officer, DSS-W, says that one of his reasons for recommending against award of the definitized contract to Kavouras is "possible improper conduct." This refers to his suspicion that an agent of Kavouras "engineered" the House and Senate report language that directed the Army to fund a tactical weather intelligence system. Even if Kavouras did lobby for inclusion of this funding directive in the fiscal year 1985 appropriation reports, we see nothing improper or illegal about this action. Neither House nor Senate reports direct Army to make an award to Kavouras in particular to develop the new weather system. (See S. Rep. 98-636, 98th Cong., 2d Sess., Sept. 26, 1987 at page 157; H. Rep. No. 98-1086, 98th Cong., 2d Sess. at pages 212-213.) The fact that the claimant considered his company to be uniquely qualified to develop the weather intelligence system once the Army was persuaded by the Congress to fund the project from available research and development appropriations does not serve to taint any subsequent agreement to pay Kavouras to get started on the project.

In summary, none of the four reasons offered by the Army for rejecting the award of a definitized contract to Kavouras support denial of its claim under the

letter contract.

Throughout this decision, we have used the terms "letter of intent" and "letter contract" or "letter agreement" interchangeably. This is consistent with the definition of the term "contract" in 71 C.F.R. Sec. 1- 1.208, which includes "all types of commitments which obligate the government to an expenditure of funds and which, except as otherwise authorized, are in writing." We also found the legislative history of 31 U.S.C. Sec. 1501(a)(1)-- the statute which prescribes the requirements for obligating appropriated funds by contract-- instructive. Subsection (a)(l) requires, among other things, that there is a "binding agreement" in writing, but, as the Conference Report makes clear, "It is not necessary, however, that the binding agreement be the final formal contract on any specified form . *** A letter of intent accepted by a contractor, if sufficiently specific or definite to show the purposes and scope of the contract finally to be executed, would constitute the binding agreement required." H.R. Rep. No. 2663, 83rd Cong., 2d Sess. 1957, at p.18.

It is evident that the March 7 letter agreement, previously quoted, unequivocally requested the claimant Kavouras "to acquire and integrate for the account of the government" a list of seven specified items, described in minute detail, including amounts, brand names and model numbers where applicable, with a specific price given for each item. The agreement was signed by the Army's contracting officer, and space was left for a concurring signature by the contractor's representative, which he provided. Other terms of performance had previously been set forth in Kavouras' initial proposal and the terms were accepted by the government. Finally, the urgency of acquiring the listed items as quickly as possible "in order to meet the critical acquisition lead times necessary to meet the congressionally mandated performance milestones" was made abundantly clear.

CONCLUSION

We find that the March 7 "letter of intent" constituted a binding commitment on the part of the government to pay the claimant Kavouras the sum of $177,779 for acquiring on the government's behalf the items specified in the letter agreement both parties signed. We also find that the claimant has properly documented the items purchased and is holding the government's property for delivery whenever it is ready to accept it. The agreed-upon price of the items acquired should be considered an obligation of fiscal year 1985, the year in which the letter agreement was executed.

/1/ Early documents from Kavouras suggest that certain other amount were also being claimed. However, documents submitted to this Office indicate that the claim is limited to the amount stated in the text of the letter of intent.

/2/ According to the Office of the Chief Attorney (Acquisition), Army Headquarters Services, no one in the office responsible for preparing funding documents would acknowledge authorship of the sole source justification, although it was submitted on the proper Army form.

/3/ The Army's statement of facts, a letter to GAO dated June 10, 1987, from the Office of the chief Attorney (Acquisition), Headquarters Services, and other documents which accompanied its doubtful claim submission explain why Army declined to definitize the contract with Kavouras. We are not sure whether Army considers all these facts to preclude payment under the letter contract as well.