NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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February 6, 2020

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Re: *Iron Bow Technologies, LLC v. Agile Defense, Inc., CL-2019-13561*

Dear Counsel:

This matter is before the Court on Defendant Agile Defense, Inc.'s demurrer to Count I of Plaintiff Iron Bow Technologies, LLC's complaint, alleging breach of contract. On demurrer, this case presents one central issue:

> Whether the contract between the parties obligates Defendant to pay Plaintiff $11,140,356.00 for performance under the agreement?

After considering the pleadings and oral arguments presented by Counsel, the Court finds that the contract is clear – the agreement on its own terms does not obligate Agile Defense, Inc. to pay a minimum of $11,140,356.00 for Iron Bow Technologies, LLC's performance. The contract's invoicing scheme sets forth Defendant's payment obligation. Therefore, the Court sustains the demurrer to Count I with prejudice.

OPINION LETTER

BACKGROUND

Although the damages sought in Count I are significant, the underlying facts of this case are straightforward. In 2017, the United States General Services Administration issued a Task Order Request to provide Windows 10 migration services to the U.S. Airforce. The task involved "migrating or converting the operating system software on office IT systems across approximately 267 USAF bases both within the U.S. and abroad." Compl. ¶ 10. After issuance of the Task Order Request, defendant Agile Defense, Inc. ("Agile"), a Maryland corporation, began negotiations with subcontractors – Agile sought to subcontract out the actual migration services and serve as a project manager for the contract. Among the subcontractors was Iron Bow Technologies, LLC ("Iron Bow"), a Virginia corporation.

On September 27, 2017, Agile won the Task Order, and entered into a prime contract. On October 25, 2017, Agile and Iron Bow executed a subcontract, attached as Exhibit 4 to the complaint. Under the subcontract, Iron Bow would provide Windows 10 migration services at specific United States Air Force locations. The contract set forth a "Minimum Value" clause, calculated to $11,140,356.00. The parties subsequently executed a written modification to the subcontract on January 10, 2018, increasing the "Maximum Value" of the contract from $11,140,356.00 to $17,641,356.00. Iron Bow, along with two other subcontractors, performed the Windows 10 migration. Agile served as project manager and administrated the project.

As alleged, Iron Bow performed all subcontracting services under the subcontract, and from January 22, 2018, to April 20, 2018, invoiced a total of $11,140,356.00 – an amount consistent with the "Minimum Value" set forth in the contract. As of the date of filing, Agile had only paid $3,037,792.40, "apparently calculated on units actually migrated." Compl. ¶ 38.[1] Iron Bow thereafter brought this action, alleging in Count I that "Agile has materially breached the subcontract and injured Iron Bow by failing to remit the full Minimum Value payment due to Iron Bow under the Contract." Moreover, it alleges that "Iron Bow is entitled to receive from Agile the entire Minimum Value amount due under the Subcontract, including all interest accrued thereon." Compl. ¶¶ 52-53.

STANDARD OF REVIEW

A demurrer tests whether the pleadings have stated a cause of action upon which the requested relief may be granted. Va. Code § 8.01-273(A); *Tronfeld v. Nationwide Mut. Ins. Co.*, 272 Va. 709, 712 (2006). In doing so, the court must accept all pleaded facts and all fairly drawn inferences from those facts. *Glazebrook v. Board of Supervisors*, 266 Va. 550, 554 (2003). Only

[1] According to Iron Bow, "Agile's payment of $3,037,792.40 also was not a full payment for all units migrated by Iron Bow even under a 'by the unit' payment methodology. Thus, without regard to the Subcontract's Minimum Value, Agile still owes Iron Bow the sum of $529,990.00 based on the per unit price alone." Compl. ¶ 43. Iron Bow alleges a separate breach of contract count capturing this deficiency in Count II. These allegations are not before the Court.

those grounds stated specifically in the demurrer may be considered by the court. Va. Code § 8.01-273(A).

"On demurrer, a court may examine not only the substantive allegations of the pleading attacked but also any accompanying exhibit mentioned in the pleading." *CaterCorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 22 (1993). "Furthermore, . . . a court considering a demurrer may ignore a party's factual allegations contradicted by the terms of authentic, unambiguous documents that properly are a part of the pleadings." *Ward's Equipment, Inc. v. New Holland North America, Inc.*, 254 Va. 379, 382 (1997).

"Contracts are construed as written, without adding terms that were not included by the parties. . . . [C]ontracts must be considered as a whole . . . . [and] no word or clause in a contract will be treated as meaningless if a reasonable meaning can be given to it, and parties are presumed not to have included needless words in the contract." *TM Delmarva Power, L.L.C. v. NCP of Virginia, L.L.C.*, 263 Va. 116, 119 (2002) (internal quotation marks and citations omitted).

"The question whether the language of a contract is ambiguous is a question of law . . . . Contract language is ambiguous when it may be understood in more than one way or when it refers to two or more things at the same time. However, a contract is not ambiguous merely because the parties disagree as to the meaning of the terms used. When an agreement is plain and unambiguous on its face, the Court will not look for meaning beyond the instrument itself." *Robinson-Huntley v. George Washington Carver Mut. Homes Ass'n, Inc.*, 287 Va. 425, 429 (2014) (internal quotation marks and citations omitted).

ANALYSIS

Agile advances a single argument in favor of demurrer – the written contract between the parties is plain on its face, dictating that Iron Bow would be paid on a per-unit basis. In contrast, Iron Bow argues that the Court adopt its interpretation of the plain terms of the contract, which would require payment of the Minimum Value set forth in the contract – $11,140,356.00. In the alternative, Iron Bow also suggests that parol evidence should be considered – chiefly because the contract could be considered ambiguous. Iron Bow attached both the original contract and the January 10, 2018, amendment to its complaint – these documents are thus available to the Court in considering the demurrer.

To resolve the issue before the Court, the exact contractual language governing the relationship between the parties requires examination. Iron Bow's argument in favor of a base Minimum Value payment stems from Section 1.6 of the agreement. In its unamended form, it reads:

> **1.6 <u>Total Anticipated Value:</u>** The Minimum Value of this Subcontract is the value of the initial number of units identified in Subcontractor's estimated Work Share as detailed in **Exhibits C & D**. Any number of units identified by Subcontractor in excess of the number of units identified in **Exhibit D** may be the basis for a

> subcontract modification. However, the Maximum Value Agile may issue under this Agreement is estimated to be **Eleven Million, One Hundred Forty Thousand, Three Hundred Fifty-Six Dollars ($11,140,356).** This amount does not include Travel costs which are **TBD** and cost reimbursable. This amount represents the estimated value based upon anticipated work and Subcontractor's proposal and is not a guarantee of any work. Subcontractor shall not be reimbursed in excess of this amount unless the Total Ceiling Value is modified in writing by Agile's Contract/Subcontract Administrator. The Subcontractor shall notify Agile at least (30) days in advance if it anticipates that the work performed under this Agreement shall reach the Total Ceiling Value.

Compl. Exhibit 4. Reviewing Exhibits C and D to the contract reveal a Minimum Value figure of $11,140,356.00.[2]

Despite Iron Bow's urging to the contrary, Section 1.6 does not serve as a guarantee to pay the Minimum Value figure. Nowhere in the language is the Minimum Value stated to be guaranteed upon performance. Moreover, the value set forth in Section 1.6's Total Anticipated Value is not definite: "This amount represents *the estimated value based upon anticipated work* and Subcontractor's proposal and *is not a guarantee of any work.*" (emphasis added). Standing alone, Section 1.6 cannot, as a matter of law, obligate Agile to pay Iron Bow $11,140,356.00.

Nevertheless, Section 1.6 cannot be read in isolation. Were the Section to create an ambiguity as to payment owed under the contract, the demurrer would be overruled. Review, however, reveals an invoicing scheme based upon units actually migrated. The following Sections are applicable:

> **1.8 Rates:** Agile has no obligation to compensate Subcontractor for any amount exceeding the funded value, unless this Subcontract is modified in writing by the Parties. **Exhibit B** reflects the **FFP Unit Rates** for the current period of performance and options, if applicable. . . .
>
> **2.2 Invoices:** Subcontractor will invoice Agile by CLIN element as detailed in **Exhibit I – Payment Instructions.** Not to Exceed (NTE) Cost Reimbursable CLINs 0013, 0014, and 0015 invoiced on monthly basis. CLINs 0002 through 0012 invoiced upon subtask completion, in accordance with the Final Deployment Inventory per MAJCOM as specified in the PWS and **Exhibit D**. Agile shall pay the Subcontractor invoices no later than five (5) business days after Agile's receipt of the related Client payment made to Agile under the Prime Contract for each specific CLINs, but not later than (NLT) One Hundred Twenty (120) calendar days.

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[2] The contract, modified through Exhibit 5, introduced the following amended language: "However, the Maximum Value Agile may issue under this Agreement is estimated to be Seventeen Million, Six Hundred Forty-One Thousand, Three Hundred Fifty-Six Dollars ($17,641,356.00)." The sentence "This amount does not include Travel costs which are **TBD** and cost reimbursable" was deleted.

Compl. Exhibit 4.

The rate and invoicing scheme set forth above is instructive. Exhibit B sets forth specific Unit Rates for four separate tasks, subcategorized by task and type. Exhibit D, congruent with the four tasks set forth by Exhibit B, identifies the task, unit cost type, *estimated number of units*, and *estimated cost*. Iron Bow was to invoice "by CLIN element." Each CLIN for 0002 through 0012 (represented by Defendant to mean "contract line item number" in brief) was to be invoiced "upon subtask completion, in accordance with . . . the PWS and **Exhibit D**." Thus, the invoicing scheme anticipates invoicing and payment based upon units completed.

A walkthrough of the exhibits demonstrates the payment scheme. Exhibit D, Task 2 – Avon Park Air Force Range – Avon Park, Florida (Task x.2) indicates a Unit Cost Type: Small, with 12 estimated units and an estimated cost of $108. From Exhibit B, Task (x.2) Small rates are set at $9.00. For 12 estimated units at a rate of $9.00, the estimated cost comes to $108 – the estimated cost set forth in Exhibit D for Task (x.2) in Avon Park. Clearly, the estimated values set forth in Exhibit D are directly tied to the estimated number of units completed. Thus, based upon completion of each CLIN element and subtask as applicable, Iron Bow was to invoice based upon actual units completed, and arrive at an actual cost to invoice. To hold otherwise would give new meaning to the word "estimate."

Given the clear operation of Exhibits B, D, Section 1.8, and Section 2.2, the contract cannot be read as ambiguous. Section 1.6 makes clear the fact that at the time of contracting, the amount due under the contract was an estimate, ultimately calculable upon the actual number of units migrated. The Section is unambiguous: "This amount represents *the estimated value based upon anticipated work* and Subcontractor's proposal and *is not a guarantee of any work.*" (emphasis added). Such a provision would be meaningless if the estimated value was a fixed payment obligation, and the Court cannot read it as such. "[N]o word or clause in a contract will be treated as meaningless if a reasonable meaning can be given to it, and parties are presumed not to have included needless words in the contract." *TM Delmarva Power, L.L.C. v. NCP of Virginia, L.L.C.*, 263 Va. at 119. "There is a temptation, regrettably natural to the adjudicative task, to allow complex draftsmanship to discourage the search for the plain meaning of words used in technical agreements. But complexity should not be confused with convolution, and agreements are not ambiguous simply because they deal with a technical subject that may be considered complex to the uninformed lay person who is not familiar with the topic." *Babcock & Wilcox Co. v. Areva NP, Inc.*, 292 Va. 165, 180 (2016) (citations and internal quotation marks omitted). This Court will not "be deprived of [its] control over contracts" merely because the subject matter at issue – government contracting – may be unfamiliar. *Id.* (quoting John L. Costello, Virginia Remedies § 18.11[3] (4th ed. 2012)).

At the heart of every breach of contract claim, there must be "(1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation." *Filak v. George*, 267 Va. 612, 619 (2004). The terms of the agreement between the parties shows that there is not a legally enforceable obligation for Agile to pay Iron Bow $11,140,356.00 for performance

under the contract. Iron Bow has thus failed to meet the first element of its breach of contract claim – the demurrer to that claim must be sustained.

CONCLUSION

For the reasons previously discussed, the demurrer is sustained with prejudice as to Count I. An order consistent with this Court's opinion is enclosed.

Sincerely,

[redacted]

Daniel E. Ortiz
Circuit Court Judge

OPINION LETTER

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

IRON BOW TECHNOLOGIES, LLC	)	
	)	
Plaintiff,	)	
	)	
v.	)	CL No. 2019-13561
	)	
AGILE DEFENSE, INC.	)	
	)	
Defendant.	)	

ORDER

THIS CAUSE came to be heard on December 19, 2019, on Defendant's Demurrer to Count I of Plaintiff's complaint.

IT APPEARING for the reasons set forth in the Court's Opinion Letter dated February 6, 2020, that Count I fails to state a cause of action for breach of contract in light of the contract attached to the complaint;

it is therefore

ORDERED that the Defendant's Demurrer to Count I is sustained with prejudice.

ENTERED this 6 day of Feb., 2020.

[redacted]

Judge Daniel E. Ortiz

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.