

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Basic Marine, Inc.) ASBCA No. 53256
)
Under Contract No. N00033-00-D-1025)

APPEARANCE FOR THE APPELLANT: Ms. Terrie Peters
Controller and Secretary

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
Charna Jaye Swedarsky, Esq.
Associate Counsel
Robert M. Elwell, Esq.
Assistant Counsel

OPINION BY ADMINISTRATIVE JUDGE DELMAN
ON MOTION FOR SUMMARY JUDGMENT

The Government has filed a motion for summary judgment with respect to this appeal, contending that the material facts are undisputed and that it is entitled to judgment as a matter of law. For reasons stated we agree with the Government, and we grant the motion.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. On 10 May 2000, the Government awarded the captioned indefinite-quantity contract to Basic Marine, Inc. (appellant) for "Tug Services (Great Lakes Cruise 2000)." Indefinite quantity contracts are used "when the Government cannot predetermine, above a specified minimum, the precise quantities of supplies or services that will be required during the contract period, and it is inadvisable for the Government to commit itself for more than a minimum quantity." FAR 16.504(b). The guaranteed minimum was \$25,000, and the estimated total value of services to be ordered was \$115,800. The contract contemplated appellant providing various tug services, *i.e.*, assistance in docking, shifting, etc., for two Navy ships at eleven ports around the Great Lakes region during the period from 12 May 2000 through 15 August 2000 (R4, tab 1 at 1-3, 5-7, 9-10, 22, 26).

2. The contract incorporated the following provisions which are relevant to the present dispute:

a. FAR 52.216-18 ORDERING (OCT 1995)

(a) Any supplies and services to be furnished under this contract shall be ordered by issuance of delivery orders or task orders

(b) All delivery orders or task orders are subject to the terms and conditions of this contract.

(c) If mailed, a delivery order or task order is considered “issued” when the Government deposits the order in the mail. Orders may be issued orally, by facsimile, or by electronic commerce methods only if authorized in the Schedule.

(R4, tab 5 at 2)

b. FAR 52.216-22 INDEFINITE QUANTITY (OCT 1995)

(a) This is an indefinite-quantity contract for the supplies or services specified, and effective for the period stated, in the Schedule. The quantities of supplies and services specified in the Schedule are estimates only and are not purchased by this contract.

(b) Delivery or performance shall be made only as authorized by orders issued in accordance with the Ordering clause. The Contractor shall furnish to the Government, when and if ordered, the supplies or services specified in the Schedule up to and including the quantity designated in the Schedule as the “maximum.” The Government shall order at least the quantity of supplies or services designated in the Schedule as the “minimum.”

(R4, tab 5 at 22)

c. Paragraph 10(a), METHOD OF ORDERING, provided that orders could be issued by either “(i) DD Form 1150 (via facsimile, harcopy [sic] or electronically); or (ii) Orally (To be confirmed in writing within 48 hours).” (R4, tab 5 at 7)

3. The Government issued a number of orders for services to appellant under the contract. In its reply to the motion, appellant states, “No written orders were being issued as stated would be done in the contract. In fact, Basic Marine did not receive any written orders until specifically requested for billing purposes” (app. reply at 2). Assuming that the statement is true, it is neither relevant nor material for purposes of this motion. Oral

orders were specifically authorized by the contract. (R4, tab 3 at 7)¹ All of the ordered services were for the USS Defender, one of the two ships identified in the contract. No orders were ever issued for services in support of the second ship, the USS Kingfisher. The total value of services ordered under the contract was \$34,410. (R4, tabs 6, 10) Appellant performed and invoiced for the services and the Government paid the full amount, plus some interest (R4, tabs 7, 8).

4. Attached to the contract was an “Estimated Usage/Schedule” which showed that the USS Kingfisher expected to arrive at Port Huron, Michigan, on 25 May 2000 (R4, tab 5 at 24, 26). According to appellant, it attempted without success to contact the Kingfisher and the contracting officer to arrange to provide the services in accordance with the ship’s itinerary. Without having made contact or having received an oral or written order for services, appellant dispatched the tug ERIKA to Port Huron. The ERIKA established contact with the Kingfisher in the vicinity of Port Huron. The Kingfisher informed the ERIKA that no assistance was needed. Nevertheless, the ERIKA stood by while the Kingfisher docked. The ERIKA then departed. (R4, tab 9)²

5. On 25 August 2000, appellant filed a \$5,000 claim for its fee related to the tug services rendered in support of the Kingfisher’s Port Huron visit. As a second claim, appellant alleged that the Government had solicited bids for services it never intended to use and that, as a result, appellant “was deluded into expending resources to compete on virtual work instead of actual work which it could have bid competitively and performed successfully.” (R4, tab 9) As a remedy, appellant requested that the contract be modified to cancel the services for all other scheduled Kingfisher port calls envisioned under the contract, and to pay appellant the cancellation fees prescribed under the contract, paragraph 7(a)(iii), Rate Structure, Cancelled Orders. (R4, tab 5 at 6-7)

6. By decision dated 21 November 2000, the contracting officer denied both of appellant’s claims. The denial of the \$5,000 claim was based upon the lack of any Government order for any services for the Kingfisher. The request for a contract modification was denied on the basis that the Government had met the minimum guarantee

¹ It appears that some of the written orders, confirming prior oral orders, may not have been issued within the contractually-mandated 48 hours; however, appellant has not shown this to be germane to the present dispute or motion.

² Tab 9 is a copy of appellant’s claim; appellant requested and we granted permission to designate its claim as its complaint. Other than a copy of some telephone records, appellant has submitted no evidence, documentary or testimonial, in support of its opposition to the Government’s motion. The Government has not disputed any of the factual statements in appellant’s submissions; therefore, solely for purposes of the motion, we treat appellant’s statements as true.

and had no obligation to issue any additional orders. (R4, tab 10) Appellant filed an appeal only with respect to its claim for \$5,000 (R4, tab 11).

DECISION

Summary judgment is appropriate where no material facts are in dispute, and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Inferences are to be drawn in favor of the party opposing summary judgment. *Hughes Aircraft Company*, ASBCA No. 30144, 90-2 BCA ¶ 22,847. In deciding a motion for summary judgment, we do not resolve factual disputes; rather, we ascertain whether material disputes of fact are presented. *General Dynamics Corporation*, ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851. The movant has the burden of showing the absence of a genuine issue of material fact. *Adickes v. Kress & Co.*, 398 U.S. 144, 157 (1970); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986). The nonmovant must respond by setting forth specific facts demonstrating that there is a genuine and material issue for trial. *Algernon Blair, Inc.*, ASBCA No. 45369, 94-2 BCA ¶ 26,638.

In the present case there is no dispute concerning any facts surrounding appellant's dispatch of the ERIKA to Port Huron in anticipation of the Kingfisher's arrival. Appellant never received any order, oral or written, to provide tug services for the Kingfisher at Port Huron. Appellant acted on its own initiative in dispatching its tug, and decided to stand-by while the Kingfisher completed docking at Port Huron. Under these circumstances, appellant acted as a volunteer. "Regardless of how public spirited appellant's motives may have been for its decision, arrived at without Government direction or influence, . . . it has no cause to look to the Government to underwrite the costs which flowed from that decision." *Sancolmar Industries, Inc.*, ASBCA No. 16193, 74-1 BCA ¶ 10,426, at 49,264. *See also Services Alliance Systems, Inc.*, ASBCA No. 37864, 89-3 BCA ¶ 22,002 (performance beyond that ordered is voluntary); *Quiller Construction Company, Inc.*, ASBCA No. 14964, 72-1 BCA ¶ 9322 (a contractor acting as a volunteer cannot be paid for unordered work which it furnished on contractor's own initiative). We believe the Government is entitled to judgment as a matter of law.

CONCLUSION

Respondent's motion for summary judgment is granted, and appellant's appeal is denied.

Dated: 7 December 2001

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 53256, Appeal of Basic Marine, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals