

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
International Maintenance Resources, Inc.) ASBCA No. 50162
)
Under Contract No. DABT31-94-D-0009)

APPEARANCE FOR THE APPELLANT: Rupert A. Hall, Jr., Esq.
Moorestown, NJ

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
MAJ Joseph A. Pixley, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

International Maintenance Resources, Inc. (IMR) appeals the denial of its claim for breach of a requirements contract. The alleged breach is the failure of the Government to schedule performance of all work on the delivery orders issued under the contract. Reading the terms of the contract as a whole, and considering the practice of the parties on a prior contract with substantially the same terms, we find no breach and deny the appeal.

FINDINGS OF FACT

1. On 31 March 1994, IMR was awarded a requirements contract for grass mowing at Fort Leonard Wood, Missouri. The contract was for one “base” year (1994) with options for two additional years. The contract included, among other provisions, the FAR 52.216-18 ORDERING (APR 1984) clause and the FAR 52.216-21 REQUIREMENTS (APR 1984) clause. (R4, tab 1 at 1, B-12, B-23, I-12, I-13)

2. Section B of the contract listed 90 line-item areas for which mowing might be required in each contract year. Each line-item area had a unit-priced quantity (*e.g.*, number of mowings, acres or miles) for each year. These quantities were clearly marked “ESTIMATED.” The total contract price for the 1994 estimated quantities was \$343,474.75. (R4, tab 1 at B-1 to B-12)

3. The contract specifications stated in relevant part:

C.5.1. . . . The majority of the mowing will be required during the period 1 April through 30 October of each year. Areas designated on the contract mowing maps shall be mowed on an as required basis as ordered and specified by the Government. Specific areas will be designated by schedule provided by the QAE . . . on a weekly basis on the Wednesday prior to Monday when work will commence. All scheduled mowing maps shall be completed by the end of the week following the issuance of the schedule.

(R4, tab 1 at C-6)

4. During the April-October 1994 mowing season, the Government issued monthly delivery orders pursuant to the Requirements and Ordering clauses in an aggregate amount of \$306,994.50 (R4, tabs 3-6, 8-10). The weekly schedules issued pursuant to specification section C.5.1 ordered an aggregate amount of \$262,853.50 for the 1994 mowing season. IMR in fact completed only \$256,468.50 of the scheduled work. The monthly orders were amended at the end of each month to show the work actually performed by IMR. (Ex. G-1; supp. R4, tabs 6, 9-15, 16; tr. 182-83)

5. By letter dated 31 March 1995, IMR submitted a claim in the amount of \$89,270 for "Government Default" (R4, tab 12). This claim, as subsequently revised in amount to \$87,006.25, was for the difference between the contract price of the work actually performed (\$256,468.50) and the contract price for the total estimated 1994 requirement (\$343,474.75) on the contract schedule (R4, tab 14).

6. A second revised claim was submitted on 20 May 1996 in the amount of \$50,526 for the difference between the total contract price of the delivery order quantities (\$306,994.50) and the total contract price of the mowings actually performed (\$256,468.50) (R4, tab 16). The evidence does not show what the cost of performing the claimed additional mowing would have been. The second revised claim was denied by the contracting officer on 19 August 1996 (R4, tab 17). This appeal followed on 9 September 1996.

7. While the appeal was pending, the contracting officer determined that a shortage of funds had caused a reduction in the scheduling of work during the period April-June 1994, and that IMR was entitled to compensation for the funding shortfall as a "constructive partial Termination for Convenience." By unilateral Modification No. P00005, dated 25 September 1998, IMR was awarded \$16,678.87 for the partial termination. (Supp. R4, tabs 5, 7; tr. 145-52) There is no evidence that the difference between the delivery orders

as initially issued and the scheduled mowings after June 1994 was due to any reason other than a reduction in mowing requirements.

8. The practice of issuing monthly delivery orders to obligate funds for the mowing, and using the weekly schedules to order the actual requirements was followed in the 1993 mowing season contract at Fort Leonard Wood on which IMR was also the contractor. IMR was on notice of this practice when it bid on and was awarded the contract with substantially the same relevant terms for the 1994 mowing season. *See International Maintenance Resources, Inc.*, ASBCA Nos. 48157, 48158, 96-2 BCA ¶ 28,436, Finding 22 at 142,051.

DECISION

IMR contends that the Government's failure to schedule the full amount of mowings that were on the monthly delivery orders for 1994 was a breach of contract.* We do not agree. Paragraph (b) of the Requirements clause stated that the monthly delivery orders were subject to any limitations "elsewhere in this contract." *See FAR 52.216-21(b)* (APR 1984). Paragraph (b) of the Ordering clause stated that the delivery orders were "subject to the terms and conditions of this contract," and that in the event of conflict "the contract shall control." *See FAR 52.216-18(b)*(APR 1984). Section C.5.1 of the contract specifications provided that areas would be mowed "as ordered and specified by the Government," and that the specific areas to be mowed "will be designated by schedule provided by the QAE . . . on a weekly basis." *See Finding 3* above. Under these terms, the monthly delivery orders were not an unconditional commitment by the Government, but subject to the weekly scheduling of requirements pursuant to specification section C.5.1.

The practice of issuing monthly delivery orders to obligate funds, and then scheduling the actual work to be performed on a weekly basis was followed by the parties in the 1993 mowing contract, and was known by IMR when it bid on the 1994 contract. *See Finding 8* above. Moreover, IMR has failed to show that it could have performed any additional work in the 1994 mowing season over and above the scheduled work which it did not in fact complete. *See Finding 4* above. IMR has also failed to prove its damages. The evidence does not indicate what it would have cost IMR to perform the unscheduled work for which it is claiming the full contract price. *See Finding 6* above.

The appeal is denied.

Dated: 5 June 2002

* In its post-hearing brief, IMR also claims a similar breach with respect to the 1995 contract year (app. br. at 1). Since a claim for 1995 has not been submitted for decision to the contracting officer, it is not within our jurisdiction under the present appeal.

MONROE E. FREEMAN, JR.
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. 50162, Appeal of International Maintenance Resources, Inc., rendered in conformance with the Board's Charter.

Dated:

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