

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
APAC-Southeast, Inc.) ASBCA No. 58057
n/k/a Oldcastle Southern Group)
)
Under Contract No. FA2823-04-D-0001)

APPEARANCE FOR THE APPELLANT: Sarah T. Brooks, Esq.
Oldcastle Law Group
Atlanta, GA

APPEARANCES FOR THE GOVERNMENT: Alan R. Caramella, Esq.
Acting Air Force Chief Trial Attorney
Skye C. Mathieson, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PAGE

APAC-Southeast, Inc. n/k/a Oldcastle Southern Group (APAC) appeals from the denial of its claim for additional costs. The government has moved for summary judgment (gov't mot.). The motion is granted.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. The government awarded firm fixed-price (FFP) requirements Contract No. FA2823-04-D-0001 to APAC on 23 January 2004. APAC had executed the contract on 22 January 2004. Under the contract, APAC was to construct various types of concrete targets. (R4, tab 1)

2. The contract provided for a base year and two option years. Firm fixed-prices for each type of target were set out for each of the three years. (R4, tab 1 at 4-11)¹ Supplies and services furnished under the contract were to be ordered by means of delivery or task orders (R4, tab 1 at 21).

¹ References to pages numbers in the findings are to those numbers on the upper right corner of Rule 4 pages.

3. The contract included FAR 52.217-8, OPTION TO EXTEND SERVICES (NOV 1999) which provides as follows:

The Government may require continued performance of any services within the limits and at the rates specified in the contract. These rates may be adjusted only as a result of revisions to prevailing labor rates provided by the Secretary of Labor. The option provision may be exercised more than once, but the total extension of performance hereunder shall not exceed 6 months. The Contracting Officer [CO] may exercise the option by written notice to the Contractor within **30 days before contract expiration.**

(R4, tab 1 at 22) (Emphasis in original)

4. Included in the contract was FAR 52.217-9, OPTION TO EXTEND THE TERM OF THE CONTRACT (MAR 2000). This clause states the following:

(a) The Government may extend the term of this contract by written notice to the Contractor within **30 days before contract expiration**; provided that the Government gives the Contractor a preliminary written notice of its intent to extend at least **60 days before contract expiration.** The preliminary notice does not commit the Government to an extension.

(b) If the Government exercises this option, the extended contract shall be considered to include this option clause.

(c) The total duration of this contract, including the exercise of any options under this clause, shall not exceed **36 months.**

(R4, tab 1 at 22-23) (Emphasis in original)

5. Attached to the contract were the relevant wage rates established by the Department of Labor in General Decision No. FL030058 dated 13 June 2003 (R4, tab 1 at 33-35). In June 2007, the CO noted that a new General Decision, No. FL070058 dated 9 February 2007, had been issued, but that wage rates had not been changed (R4, tab 11 at 93).

6. On 14 March 2005 in bilateral Modification No. P00003, the government exercised the first option year on the contract in accordance with FAR 52.217-9.

The period of contract performance was extended from 23 January 2005 to 22 January 2006 and the funded contract amount was not changed. (R4, tab 2 at 41-43)

7. Through Modification No. P00004, the government exercised the second option year on the contract in accordance with FAR 52.217-9 on 21 December 2005. A memorandum notifying appellant that the second option year had been exercised was sent to APAC on the same day. The period of contract performance was extended from 23 January 2006 to 22 January 2007 and the funded contract amount was not changed. (R4, tab 2 at 44-46)

8. In the 21 December 2006 Modification No. P00009 and relying on FAR 52.217-8, the government extended the period of performance of the second option year by three months (22 January 2007 to 22 April 2007). The contract amount was not changed. (R4, tab 3 at 58-59) By Modification No. P00011 dated 15 March 2007, the second option year was further extended, again pursuant to FAR 52.217-8, from 23 April 2007 to 22 July 2007. The contract amount was not changed. (R4, tab 5 at 72-73)

9. It appears that the government issued a number of delivery orders during the six-month extension of the second option year and that APAC filled those orders (*see, e.g.*, R4, tab 29 at 152-53).

10. In March and June 2007, appellant and the government corresponded concerning APAC's assertion that it should be entitled to an equitable adjustment for work done after 21 January 2007 (R4, tabs 7, 8, 11).

11. Appellant submitted a claim on 23 August 2011 (R4, tab 29). Appellant argued that FAR 52.217-9(c) limited the duration of the contract to 36 months and contended that it was entitled to recover increased costs for targets provided after 21 January 2007. The amount sought was \$291,317.45. The claim included a proper CDA certification. (R4, tab 29 at 153, 155)

12. The CO issued a final decision denying APAC's claim on 4 January 2012. She determined that the issue was governed by contract clause FAR 52.217-8 which allows the government to extend contract performance by written notice to the contractor within 30 days of expiration of the contract. She went on to find that the first option year had been exercised 31 days before contract expiration and the second option year 38 days before expiration. Finally, she noted that although the clause allows the adjustment of labor rates, this would only be done when the Secretary of Labor had revised the prevailing rates and the relevant rates had not been revised. (R4, tab 34)

13. APAC filed a timely appeal which has been docketed as ASBCA No. 58057. Following submission of the pleadings and Rule 4 file, the government filed a motion for

summary judgment seeking denial of the appeal. Appellant was given the opportunity to respond to the government's motion but has chosen not to do so.

DECISION

In its complaint, APAC asserts that it is entitled to the costs it incurred in providing targets, above what it received under the contract, for work done after 21 January 2007. It argues that the contract duration was limited by FAR 52.217-9 to 36 months. It reasons that the contract therefore expired on 21 January 2007, based on its execution date of 22 January 2004, that it could not be further extended, and that the government's two three-month extensions were invalid. (Compl. at 2-3) Essentially, appellant contends that compensation for the work it did in the six months after 21 January 2007 was not limited to the firm fixed-prices in the contract. The government, in moving for summary judgment, says that it extended the contract past 21 January 2007 pursuant to FAR 52.217-8, which is not limited by FAR 52.217-9 (gov't mot. at 8-13). On that point, appellant first says that as "an initial matter, upon review of the Contract, the Government excluded the provision incorporating FAR 52.217-8" (compl. at 2). It then argues that, in any event, an extension under FAR 52.217-8 could not extend the contract beyond the 36 months allowed in FAR 52.217-9 (compl. at 2).

Summary judgment is appropriate where there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987); *Arko Executive Services, Inc. v. United States*, 553 F.3d 1375, 1378 (Fed. Cir. 2009); see also FED. R. CIV. P. 56(a). A material fact is one that might affect the outcome of an appeal. *Revenge Advanced Composites*, ASBCA No. 57111, 11-1 BCA ¶ 34,698 at 170,883 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). In deciding a motion for summary judgment, the Board does not resolve factual disputes, but only ascertains whether material disputes of fact are present. *Conner Bros. Construction Co.*, ASBCA No. 54109, 04-2 BCA ¶ 32,784 at 162,143, *aff'd*, *Conner Bros. Construction Co. v. Green*, 550 F.3d 1368 (Fed. Cir. 2008) (quoting *John C. Grimberg Co.*, ASBCA No. 51693, 99-2 BCA ¶ 30,572 at 150,969). "Furthermore, summary judgment is appropriate where the sole dispute concerns the proper interpretation of a public contract," which is a matter of law. *Olympus Corp. v. United States*, 98 F.3d 1314, 1316 (Fed. Cir. 2000).

The government's motion and appellant's submissions do not raise genuine issues of material fact. The government frames the question before us as whether its extensions beyond the second option year complied with the contract and that it is purely a question of law (gov't mot. at 7). APAC has chosen not to respond to the motion so we have no direct indication that appellant believes there are disputed factual issues. As noted above, however, appellant's complaint seems to assert that FAR 52.217-8 was not made a part of the contract. We do not view that as raising a genuine issue of material fact because

APAC does not explain or support the contention. More importantly, the solicitation and contract award document in the Rule 4 file clearly contains the full text of FAR 52.217-8 (SOF ¶ 3).

The legal issue before us, which is a matter of contract interpretation, has been decided by the Federal Circuit in *Arko Executive Services, Inc. v. United States*, 553 F.3d 1375 (Fed. Cir. 2009). The case involved a contract for security guard services at the United States Embassy in Cyprus; the controversy centered on how FAR 52.217-8 and 52.217-9 are to be applied. The State Department had exercised the contract's four option years, which extended the contract to 31 March 2005. In early November 2004, the government issued a solicitation for a new contract. Because the new contract could not be finalized by 31 March 2005, the government extended Arko's contract for 60 days under FAR 52.217-8. After completing its contract under protest, Arko submitted a claim and later sued in the Court of Federal Claims asserting that the CO had improperly extended the contract beyond 31 March 2005. Arko also sought reimbursement, under FAR 52.237-3(d), CONTINUITY OF SERVICES, for the extension. *Arko*, 553 F.3d at 1377.

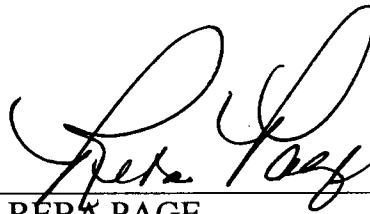
On appeal, the Federal Circuit affirmed the trial court's grant of summary judgment for the government. It differentiated limits on contract duration (base plus any option years) set forth in FAR 52.217-9 from the government's right to add short extensions outside that period in accordance with FAR 52.217-8. "We hold that the limitation of the contract duration to five years by [FAR 52.217-9] does not preclude extensions beyond five years pursuant to FAR 52.217-8." *Arko*, 553 F.3d at 1381. The court of appeals found it significant that the contract duration in FAR 52.217-9 was limited to extensions of the base period by options exercised under that clause, but not to extensions under FAR 52.217-8. The court also noted that its interpretation was consistent with the purpose of FAR 52.217-8, which "allows the government to extend services without negotiating short extensions to existing contracts." The circumstances involved in the case appeared to be "exactly the situation FAR 52.217-8 was written to address; it would be an odd result if FAR 52.217-8 did not allow the government to require Arko to continue its services here." *Arko*, 553 F.3d at 1380.

The government's motion in the instant appeal does not raise genuine issues of material fact nor has APAC shown there to be any such dispute in regard to the motion; the government is entitled to judgment as a matter of law. APAC has provided us with no reason to ignore the language of FAR 52.217-8, its purpose, or to not apply the precedential interpretation of this clause by the United States Court of Appeals for the Federal Circuit. The government properly extended appellant's contract under FAR 52.217-8, and appellant is not entitled to additional compensation as a result of the extensions.

CONCLUSION

For the reasons set out above, the government's motion for summary judgment is granted and the appeal is denied.

Dated: 27 September 2012



REBA PAGE
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur



MARK N. STEMPLER
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. 58057, Appeal of APAC-Southeast, Inc. n/k/a Oldcastle Southern Group, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals