

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Glasgow Investigative Solutions, Inc.) ASBCA No. 58111
)
Under Contract No. W912R1-09-C-0004)

APPEARANCE FOR THE APPELLANT: Richard Carnell Baker, Esq.
Baker Simmons
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
MAJ Todd J. Hanks, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES
ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

This appeal arises from the contractor's appeal from the deemed denial by the contracting officer (CO) of the contractor's 17 November 2011 claim which alleged that the government exercised options under the captioned contract improperly. The Board docketed the appeal as ASBCA No. 58111. The Board has jurisdiction of the appeal under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109. Respondent has moved for summary judgment. Appellant opposed the motion and submitted a declaration of Mr. Rudolph Glasgow, its President and CEO. Each party submitted a reply brief.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 27 February 2009, effective 1 March 2009, the U.S. Property & Fiscal Office (USPFO), Army National Guard, Washington, DC, awarded Contract No. W912R1-09-C-0004 (the contract) to Glasgow Investigative Solutions, Inc. (GIS) for armed security guard services at the National Guard Armory, Washington, DC (R4, tab 1 at 1, 3).

2. The contract had six contract line item numbers (CLINs) of security guard services, each priced on a firm fixed-price, monthly basis. CLIN 0001 specified 3 months at \$90,000.00 per month amounting to \$270,000.00 for the performance period 1 March 2009 to 31 May 2009. CLINs 0002-0006 all were designated "OPTION." CLINs 0002-0005

were for Option Years 1, 2, 3 and 4. Each such CLIN specified 12 months at \$85,158.69 per month for an amount of \$1,021,904.28 for the following performance periods:

<u>CLIN</u>	<u>Option Year</u>	<u>Performance Period</u>
0002	1	1 October 2009 - 30 September 2010
0003	2	1 October 2010 - 30 September 2011
0004	3	1 October 2011 - 30 September 2012
0005	4	1 October 2012 - 30 September 2013

CLIN 0006 was an option to extend the base period for 3 months at \$90,000.00 per month amounting to \$270,000.00 for the period 1 June 2009 to 30 September 2009 (4 months). The contract included the FAR 52.232-18, AVAILABILITY OF FUNDS (APR 1984) clause. (R4, tab 10 at 1, 25-29)

3. Bilateral contract Modification No. (Mod.) P00001, effective 9 June 2009, exercised the government’s option CLIN 0006 for base year performance through 30 September 2009, added the FAR 52.217-6 Option for Increased Quantity and 52.217-8 Option to Extend Services clauses (R4, tab 11 at 1-3).

4. Bilateral contract Mod. P00002, effective 28 August 2009, added CLIN 0007 which increased CLIN 0006 funding by \$90,000 to fully fund option period 1 June through 30 September 2009 and provided the full text of the clauses added by Mod. P00001:

52.217-6 OPTION FOR INCREASED QUANTITY (MAR 1989)

The Government may increase the quantity of supplies called for in the Schedule at the unit price specified. The [CO] may exercise the option by written notice to the Contractor within 1 day....

52.217-8 OPTION TO EXTEND SERVICES (NOV 1999)

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 [CO] may exercise the option by written notice to the Contractor within 1 day.¹

(R4, tab 12 at 2-5)

5. By bilateral contract Mod. P00003, effective 29 September 2009, the parties agreed to modify the contract as follows:

A. The purpose of this modification is to extend Option Line Item 0006 and extend the beginning dates for the remaining option years.

B. The Government hereby extends exercised Option Line Item 0006 for the period 01 Jun 2009 – 31 Jan 2010.

C. Line item 0008 is hereby increased...(\$360,000) to fully fund the option period 01 Jun 2009 – 31 Jan 2010 as exercised on Line Item 0006. This line item funds the increased period of 4 months which represents 01 Oct 2009– 31 Jan 2010.

Mod. P00003 also changed the performance periods for CLINs 0002 through 0005 as follows:

<u>CLIN</u>	<u>Option Year</u>	<u>Revised Performance Period</u>
0002	1	1 February 2010 - 31 January 2011
0003	2	1 February 2011 - 31 January 2012
0004	3	1 February 2012 - 31 January 2013
0005	4	1 February 2013 - 31 January 2014

(R4, tab 13)

6. Bilateral contract Mod. P00004 of 31 January 2010 exercised Option Year 1 (1 February 2010 - 31 January 2011) CLIN 0002 (R4, tab 14 at 2-3).

7. CO MSgt Leslie A. Riffey's 31 January 2011 email to Mr. Rudolph Glasgow stated: "[T]omorrow morning I am going to process the modification to exercise Option Year 2 (1 Feb 2011 – 31 Jan 2012) subject to availability of funds. As of right now we have funding for 1 month (February)." (App. supp. R4, tab 31)

¹ Since the timeliness of subsequent modifications extending services is not in issue, we need not determine to what period of time "1 day" refers in the 52.217-8 clause.

8. On 1 February 2011 CO Riffey sent Mod. P00007 to GIS (app. supp. R4, tab 32 at 1). Concerning this modification Mr. Glasgow declared:

On Monday January 31, 2011, I talked with the [CO], MSgt. Riffey regarding exercising the annual option for the period of February 1, 2011 through January 31, 2012 under my contract. Our understanding was that the government would exercise the option for one year. I informed the [CO] that my Company expected that the option would run for an entire year. On February 1, 2011, the [CO] informed me that they would only exercise the option for a two month period. I informed her that that is not what we talked about before. I therefore disagreed with that action, but would proceed as directed for modification P00007, with the expectation that the [CO] would follow the modified annual contract periods....

(App. opp'n, Glasgow decl. ¶ 4)

9. Bilateral contract Mod. P00007 of 1 February 2011, effective 31 January 2011, extended Option Year 1 for two months, from 1 February 2011 to 31 March 2011² (R4, tab 17).

10. Unilateral contract Mod. P00008, effective 22 March 2011, and bilateral contract Mods. P00009, effective 29 April 2011, and P00010, effective 31 May 2011, extended Option Year 1, CLIN 0002, from 1 April 2011 through 30 June 2011 (R4, tab 18 at 2, tab 19 at 2-3, tab 20 at 1-2).

11. GIS' 1 June 2011 letter to CO Riffey stated apparently with respect to Mod. P00010:

This morning, we received a proposed Amendment of Solicitation/Modification of Contract (the "Proposed Amendment") to the...contract...from your office for our review and signature. We comment and notify the Government as follows.

² At one place the modification states it is extending Option Year 1 by six months, but this is clearly a mistake given the totality of the modification.

As you know, the Contract contains five (5) – one (1) year option provisions. We are troubled because the Proposed Amendment intends to exercise a one (1) month option, which is inconsistent with the option clause of the original Contract. This deviation in Contract terms places Glasgow...in a great and significant financial predicament, as Glasgow's business plan respecting the performance of this solicitation was based upon one (1) year option provisions versus contingent month-to-month transactions. Therefore, we will execute the Proposed Amendment (which we are attaching hereto) and perform pursuant to the terms imposed thereby; however, we are doing so under protest with the specific intent upon submitting a claim stemming from this substantial change in Contract terms.

(R4, tab 21)

12. CO Riffey's 28 June 2011 letter to GIS stated in pertinent part:

1. This memorandum is to provide notice that the Government received Glasgow's modification inquiry on June 28, 2011.
2. Due to limited funding, the Government is unable to exercise a one (1) year option to the contract at this time. However, if you agree I am prepared to extend the contract for an additional 30 days, taking the period of performance to July 31, 2011.
3. Request your response no later than 1400 hrs on June 29, 2011. If you agree, a modification will be prepared for your signature on June 30, 2011.

(R4, tab 22)

13. GIS' 30 June 2011 email to CO Riffey stated in pertinent part:

Based upon the content of your memorandum [dated 28 June 2011], I am in agreement to a contract modification extending the performance period of the contract to July 31, 2011. However, I maintain my position that this modification is in contrary [sic] to the terms of the original transaction. I

hereby reserve all rights and claims that I may have regarding this modification.

(R4, tab 23) Bilateral Mod. P00011 of 5 July 2011, effective 29 June 2011, extended Option Year 1, CLIN 0002, for one month, ending 31 July 2011 (R4, tab 24 at 2, 3). Mods. P00007-P00011 did not include any contractor release of claims (R4, tabs 17-20, 24).

14. Mr. Glasgow declared:

It was still my understanding in February 2011, that the options would be handled on an annual basis. I therefore objected to modifications P00008, P00009, P00010 and P00011, which extended the contract on a monthly basis.^[3]

(App. opp'n, Glasgow decl. ¶ 5)

15. Baker Simmons' 17 November 2011 letter submitted GIS' uncertified claim to CO Riffey. GIS alleged that Mod. P00003 "fundamentally changed all of the option periods [including option CLIN 0006].... Except for the base contract period, all option periods were annual options. No monthly options were included in the CLIN[s]." GIS alleged that the Army exercised contract options improperly because Mods. P00007-P00011 added "option CLINs" 0009-0013 for a two-month and one-month extensions not included in the original contract, resulting in constructive changes entitling GIS to \$99,833.04.⁴ (R4, tab 27 at 1, 5-10)

³ For the purposes of this motion, the government does not dispute appellant's assertion that it objected to Mods. P00007 through P00011 (gov't reply br. at 8).

⁴ GIS' claim stated that its claimed amount of \$99,833.04 was "exclusive of attorney's fees, cost of claim preparation and interest." Attorney's fees and interest are statutory costs requiring no contractor claim. Claim preparation costs, however, must be the subject of a CDA claim. Therefore, we examine this statement in light of the requirement that monetary claims be in a sum certain to determine our jurisdiction. FAR 52.233-1(c); *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1565 (Fed. Cir. 1995) (valid CDA claim "must include a sum certain"). GIS' complaint makes no mention of claim preparation costs. In light of this, we conclude that the proper interpretation of GIS' claim statement is that no claim was being made for claim preparation costs in the claim which is the subject of this appeal and consequently there is a sum certain stated in the claim. In the event GIS submits any claim in the future for claim preparation costs, we express no opinion here whether GIS' failure to include claim preparation costs in the claim now before us results in the impermissible splitting of the claim, since that question is not before us.

16. CO Riffey's 21 November 2011 memorandum to Baker Simmons acknowledged receipt of GIS' 17 November 2011 claim and stated that her final decision would be given not later than 16 January 2012 (app. supp. R4, tab 39). GIS received no CO's decision. On 27 April 2012 Baker Simmons filed its notice of appeal to the ASBCA.

DECISION

A tribunal shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). To survive the motion, GIS must come forward with specific facts showing that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

I.

We address first whether there is any genuine issue of material fact. GIS argues that "there are indeed genuine issues of material fact in dispute, which can only be resolved through further development of this record" (app. opp'n at 11; app. reply br. at 1). However, GIS does not identify any specific disputed material facts. *Cf.* FED. R. CIV. P. 56(c)(1); *Matsushita*, 475 U.S. 574. Respondent argues that "[t]here are no genuine issues of material dispute contained in Appellant's Proposed Finding of Fact (PFF) that would preclude the Board from granting the government's motion for summary judgment. [Its PFF] contains unsupported argument that should not be considered for the purposes of this motion." (Gov't reply br. at 2-3) (citations omitted)

Our SOF does not repeat the parties' statement of facts *in haec verba*, but is taken from such statements which, though articulated differently, are essentially alike in substance (gov't mot. at 1-8; app. opp'n at 2-7). Our SOF corrects the parties' misstatements of record facts, disregards their legal arguments and contract interpretations, and sets forth undisputed material facts which need no further development to permit us to decide this motion for summary judgment.

II.

We turn to whether movant is entitled to judgment as a matter of law. Movant argues that contract Mods. P00007-P00011 were valid exercises of FAR 52.217-8, OPTION TO EXTEND SERVICES. Contract Option Year 1 (as modified by Mod. P00003) ended 31 January 2011. Mods. P00007-P00011 extended Contract Option Year 1 from 1 February to 31 July 2011, a total of six months. FAR 52.217-8 options may be exercised prior to exercising all contract option years. (Gov't mot. at 10-21) Movant

also argues that the ASBCA lacks CDA jurisdiction to decide GIS' assertion (in its opposition) that Mod. P00003 "exhausted" respondent's FAR 52.217-8 extension rights, since its pleading had no such assertion (gov't reply br. at 9-16).

GIS argues that the FAR 52.217-8, OPTION TO EXTEND SERVICES clause, is designed to extend the contract term after all options have been exercised, and cannot be used to create month-to-month option periods. It is only appropriate to invoke FAR 52.217-8 when there is a follow-on contract and the government needs to bridge performance between the incumbent and the new contractor. Hence, respondent's actions are a series of constructive changes. Any additions to the contract's period of performance are counted against the six months contemplated by FAR 52.217-8. Before Mods. P00007 through P00011 were issued, on 29 September 2009 Mod. P00003 used all of the extensions permissible under FAR 52.217-8. Thus, all FAR 52.217-8 clause options were exhausted. (App. opp'n at 7-8)

We address first the issue of whether respondent had the right to exercise the FAR 52.217-8, OPTION TO EXTEND SERVICES clause before the expiration of all contract option years, as movant contends, or could exercise such extensions only after the CO had exercised all contract options and the government requires an extension to continue performance between the incumbent and a successor contractor, as GIS argues.

The Board has studied carefully the decisions GIS cited in its opposition and reply brief. None of those decisions, including *Overseas Lease Group, Inc. v. United States*, 106 Fed. Cl. 644, 650-51 (2012) and *Arko Executive Services, Inc. v. United States*, 553 F.3d 1375, 1380 (Fed. Cir. 2009), held that the FAR 52.217-8 OPTION TO EXTEND SERVICES clause may be used *only or exclusively* when all contract options have expired and the government needs to extend the incumbent contractor's performance until a successor contract was awarded.

In *Griffin Services, Inc.*, ASBCA Nos. 52280, 52281, 02-2 BCA ¶ 31,943, the contract had a six-month base period ending 30 September 1997, and four one-year option periods. The CO did not timely notify the contractor of exercise of the first option year, nor did he exercise any of the four option years. The CO sent Griffin three unilateral modifications citing the FAR 52.217-8 clause and extending performance successively to 31 October 1997, to 31 December 1997 and to 31 March 1998. Griffin received the first two extensions before the pertinent period expired, but the government did not prove that Griffin received the third extension timely. Accordingly, the Board denied Griffin's motion for summary judgment with respect to the first two FAR 52.217-8 extensions and granted it for the third extension. 02-2 BCA ¶ 31,943 at 157,804-05. Moreover, FAR 37.111 lists delays due to bid protests and alleged mistakes in bid as appropriate circumstances for FAR 52.217-8 extensions. Thus, post-option extensions are not the only

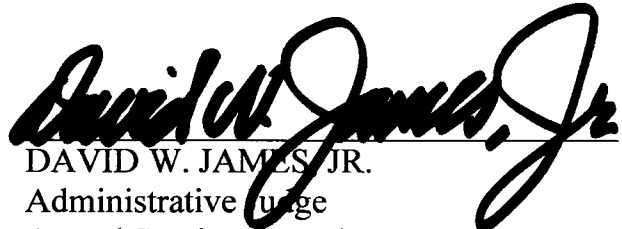
circumstances for use of the FAR 52.217-8 clause, and are dispositive of this issue in movant's favor.

We address next whether we have CDA jurisdiction to consider GIS' assertion that Mod. P00003 exhausted the government's FAR 52.217-8 OPTION TO EXTEND SERVICES clause rights. CDA jurisdiction is determined by the sufficiency of a party's claim submitted to the CO, not its pleading. *See T.W.M. Inc.*, ASBCA No. 37583, 89-2 BCA ¶ 21,698 at 109,091. "[A] claimant is free to change the legal theory...from what was described in the claim...if the action continues to arise from the same operative facts that were relied upon in the submittal to the [CO], and essentially seeks the same relief." *American General Trading & Contracting, WLL*, ASBCA No. 56758, 12-1 BCA ¶ 34,905 at 171,639. "If the court will have to review the same or related evidence to make its decision, then only one claim exists." *Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990). GIS' November 2011 claim alleged that Mod. P00003 "changed all of the option periods" including option CLIN 0006 (SOF ¶ 15). Mod. P00003 extended option CLIN 0006 (SOF ¶ 5). To decide this motion, we need not review new or unrelated evidence to determine undisputed material facts. GIS' new theory does not alter its claim for relief based on the alleged invalidity of Mods. P00007-P00011. It simply responds to the government's argument that those modifications were valid. We hold that the Board has CDA jurisdiction to decide GIS' new theory.

Turning to the merits of GIS's assertion, FAR 52.217-8 provides: "The option provision may be exercised more than once, but the total extension of performance hereunder shall not exceed 6 months" (SOF ¶ 4). GIS ignores the fact that the FAR 52.217-8 clause expressly gives the government the unilateral right to extend contract performance. FAR 2.101 defines "Option" as "a unilateral right in a contract by which, for a specified time, the Government may elect to...extend the term of the contract." Mod. P00003 bilaterally amended the contract to restructure its base contract and option performance periods. Because it was a bilateral restructuring of the contract, it did not rely on FAR 52.217-8 and modified the contract in respects that do not rely on the authority provided in FAR 52.217-8 (SOF ¶ 5). We hold that Mod. P00003 did not exhaust, or use up any of the government's FAR 52.217-8 extension rights. The government retained the ability to extend performance for six months when it did so through Mods. P00007 through P00011. Hence, they were valid.

Accordingly, we grant respondent's motion for summary judgment. The appeal is denied.


Dated: 9 April 2013




DAVID W. JAMES, 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



MARK A. MELNICK
Administrative Judge
Acting 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. 58111, Appeal of Glasgow Investigative Solutions, Inc., rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals