

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Bluebird Communications, Inc. ) ASBCA No. 58379  
 )  
Under Contract No. FA4861-04-C-B004 )

APPEARANCE FOR THE APPELLANT: Daniel J. Frisk, Esq.  
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Air Force Chief Trial Attorney  
W. Michael Rose, Esq.  
Skye Mathieson, Esq.  
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE CLARKE ON THE GOVERNMENT'S  
MOTION FOR SUMMARY JUDGMENT

The Air Force filed a motion for summary judgment challenging Bluebird Communications, Inc.'s (Bluebird), \$2.5 million claim for reformation based on mutual mistake relating to its contract to provide cable television services at Nellis Air Force Base (Nellis AFB) and Indian Springs Air Force Auxiliary Field (ISAFAF). Bluebird opposes the motion. We have jurisdiction pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109.<sup>1</sup> We grant the Air Force's motion and deny the appeal.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 1 July 2003, 99<sup>th</sup> Contracting Squadron, Nellis AFB, NV, (99CONS/LGCB) issued Solicitation No. F26600-03-R-B009 for the construction, installation, operation and maintenance of a cable television system on Nellis AFB and ISAFAF (R4, tab 1 at 1, 2).

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<sup>1</sup> The contract is also funded in part with nonappropriated funds derived from the sale of cable services to the residents of Nellis AFB and ISAFAF.

2. On 7 August 2003, Bluebird submitted its initial proposal wherein it agreed to install new fiber optic cable and associated equipment utilizing its existing infrastructure<sup>2</sup> (R4, tab 3 at 1, 5).

3. On 1 September 2004, 99CONS/LGCB awarded Bluebird Contract No. FA4861-04-C-B004 (B004) (R4, tab 14). The requirements contract required Bluebird to “construct, install, operate and maintain a cable television system” on Nellis AFB and ISAF (R4, tab 14 at 3, 22, 30). As awarded, the contract called for an initial one month performance period, but included five option periods extending the contract through 31 July 2009 (R4, tab 14 at 3-13). The contract included clause A.11. that reads:

**A.11. Government Liability Upon Amendment, Termination, or Expiration of This Franchise.**

(a) In the event of a change requiring removal or relocation of Franchisee’s CATV systems or facilities, a termination, or the expiration of this Franchise, the Government assumes no liability and the Franchisee shall hold the Government harmless from any liability for recovery of any costs or expenses incurred by the Franchisee in constructing, installing, operating, maintaining, or removing the cable system and for any other cost or expense incurred by the Franchisee in the exercise of its privileges under this Franchise or as a result of the expiration or termination of the Franchise (including termination due to deactivation in whole or in part of the Installation). The fact that some appropriated funds are used to pay subscriber fees for official business under separate contracts or purchase orders does not entitle the Franchisee to recover lost anticipated profits or any of the costs mentioned in this section or any other compensation.

(b) In the event of expiration or termination of this Franchise, where feasible and where the equipment of the CATV system has continued utility for providing CATV service to the Installation community, the Franchisee may be permitted by the Government to offer its equipment and facilities, installed in accordance with its separate license, for sale to those who also hold a CATV Franchise or intend to obtain a CATV Franchise. The Government is not obligated

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<sup>2</sup> Bluebird had operated the TV service since 1986 and had, among other things, existing buried conduit that the new fiber optic cable could be “pulled” through (R4, tab 3 at 1).

to purchase the existing system or to effectuate or allow a sale for the benefit of the Franchisee nor grant a Franchise to another to promote or enable a sale.

(R4, tab 14 at 73-74) The contract included an "ALTERNATE A.11" that was to be used "when cable services cannot be negotiated using the standard clause above" (R4, tab 14 at 74). This version of the clause included blanks (that were not filled out) that provided for reimbursement in the event that the franchise was terminated for convenience before the end of the "Amortization Period over which the cable operator expects to recover its capital investment" (*id.*).

4. Contract B004, bilateral Modification No. P00002, 8 October 2004, exercised the first option period for a period of performance of 1 October 2004 to 30 September 2005 (R4, tab 16 at 1, 5-6 of 19). Unilateral Modification No. P00009, 27 August 2005, exercised the second option period for a period of performance of 1 October 2005 to 30 September 2006 (R4, tab 23 at 1, 3 of 7). Unilateral Modification No. P00015, 31 August 2006, exercised the third option period of 1 October 2006 to 30 September 2007 (R4, tab 29 at 1).

5. On 24 October 2006, the Air Force Nonappropriated Fund Purchasing Office (AFNAFPO) issued Request for Proposals/Solicitation No. F41999-06-R-0001 (R-0001) for an indefinite quantity contract that would provide internet and local telephone service at lodging facilities at Air Force bases in the continental United States (CONUS) (R4, tab 62 at 3, 4, 36). On 8 March 2007, AFNAFPO awarded Contract No. F41999-07-D-6082 to MidAtlantic Broadband Hospitality Services (MidAtlantic) for the CONUS-wide internet and telephone services solicited in R-0001 (R4, tab 63). On 7 September 2007, AFNAFPO entered into Purchase Agreement No. F41999-07-D-6108 with MidAtlantic describing telecommunications equipment and services that could be ordered from MidAtlantic (R4, tab 64 at 2). On 23 January 2008, AFNAFPO issued Order No. F41999-08-F-0384 to MidAtlantic calling for the installation of high speed internet services at Nellis AFB (R4, tab 65 at 1).

6. Contract B004, unilateral Modification No. P00020, 9 November 2007, exercised "Part of Option 4 1 Oct – 31 Dec 2007" (R4, tab 34 at 1). Bilateral Modification No. P00022, 11 January 2008, added funding for January, February and March 2008 (R4, tab 36 at 1). Bilateral Modification No. P00024, 18 April 2008, added funding for the third and fourth quarters of FY08 (R4, tab 38 at 1). Unilateral Modification No. P00026, 2 September 2008, exercised option number 5 for the period of 1 October 2008 to 31 July 2009 (R4, tab 40 at 1, 8). Bilateral Modification No. P00032, 4 August 2009, added funding for August and September 2009 (R4, tab 46 at 1). Unilateral Modification No. P00033, 28 September 2009, added funding for the period of 1 October 2009 to 31 December 2009 (R4, tab 47 at 1). Modification No. P00035, 31 December 2009, added funding for the month of January 2010 (R4, tab 49 at 1).

7. On 29 January 2010 99CONS/LGCB awarded Bluebird Contract No. FA4861-10-C-B007 for eight months of cable television service for "Official Requirements at various locations at Nellis AFB and Creech AFB" (R4, tab 51 at 1, 3). Bilateral Modification No. P00002, 27 August 2010, extended service from 30 September 2010 to 31 December 2010 (R4, tab 53 at 1). Bilateral Modification No. P00005, 29 December 2010, extended service from 1 January 2011 to 31 March 2011 (R4, tab 56 at 1).

8. On 12 October 2010, the AFNAFPO issued Order No. F41999-11-F-0025 to MidAtlantic calling for "recabling" of various buildings at Nellis AFB (R4, tab 66 at 1).

9. In a letter dated 2 April 2012 to the contracting officer (CO) requesting "an equitable contract adjustment and reformation of contract number FA4861-04-C-B004," Bluebird's attorney included the following:

Beginning in late 2005 and early 2006, with coordination from the contracting officer, Bluebird Communications, the incumbent provider, undertook the substantial capital improvements, in excess of \$2.5 Million dollars, necessary to provide the improved cable and Internet services required under the contract.

(R4, tab 57 at 2, 3 of 118)

Had either party been aware of the impending contract to replace the upgraded CATV system in its entirety, the existing system could have been utilized or the parties could have compensated Bluebird for the required system upgrades using the alternative contracting provisions clearly contemplated in the contract.

(R4, tab 57 at 7 of 118) The request sought \$2.5 million and included certification signed by Mr. David A. Ramage, president (of Bluebird) (*id.* at 9 of 118).

10. On 31 July 2012, CO Leo Rodgers, issued a final decision denying Bluebird's certified claim (R4, tab 58). On 31 October 2012, Bluebird filed a notice of appeal with the Armed Services Board of Contract Appeals indicating a claim amount of \$2.5 million.<sup>3</sup> The appeal was docketed as ASBCA No. 58379 on 7 November 2012.

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<sup>3</sup> The Air Force initially moved to dismiss the appeal as untimely but later, after reviewing case law cited by the judge, withdrew its motion to dismiss. The appeal was timely filed.

## DECISION

### *Contention of the Parties*

Bluebird argues that it is entitled to reformation based on mutual mistake and states in its complaint:

- Neither Bluebird nor the contracting officers at Nellis/Indian Springs were aware of Central Air Command's decision [to enter into a national CONUS contract] until *after* the expiration of the initial term.
- Mid-Atlantic installed a superfluous fiber-optic network over the existing infrastructure rather than using/purchasing the existing system.
- Had the parties to the Cable Service Franchise Agreement been aware of the decision to replace the individual service providers with one national provider, recoupment in the form of rate increases or an infrastructure purchase could have been facilitated during the contract term.

(Compl. at 2)

The Air Force argues that Bluebird is not entitled to reformation because mutual mistake can only be based on information in existence prior to award.

### *Discussion*

It is well settled that summary judgment is appropriate where no material facts are in dispute and the moving party is entitled to judgment as a matter of law. *Riley & Ephriam Construction Co. v. United States*, 408 F.3d 1369, 1371-72 (Fed. Cir. 2005); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In order to counter a motion for summary judgment, the nonmovant must show evidence of disputed material fact. A party's failure to show any evidence to support a *prima facie* case may be grounds for summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Mere arguments, speculation or reliance upon the pleadings is insufficient to defeat such a motion. *T & M Distributors, Inc. v. United States*, 185 F.3d 1279, 1285 (Fed. Cir. 1999); *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626 (Fed. Cir. 1984). We draw all justifiable inferences in favor of the party opposing the motion. *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010). We apply these principles in this decision.

The reason for this appeal is that Bluebird contends it was not able to recover (amortize) its \$2.5 million in capital investment costs before it was replaced by MidAtlantic (SOF ¶ 9). The problem for Bluebird is that it failed to price the contract to ensure it would recover its investment during the period of performance or negotiate a provision providing such protection. The alternate version of Clause A.11 providing for relief if the contract was terminated for convenience before the end of the amortization period was not used (SOF ¶ 3), however, it would not help Bluebird because the contract was not terminated.

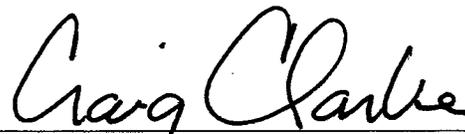
Bluebird points to no material disputed facts that would justify denying the Air Force's motion. Accordingly, we agree with the Air Force that a mutual mistake justifying contract reformation must exist before award of the contract. *AECOM Government Services, Inc.*, ASBCA No. 56861, 11-1 BCA ¶ 34,667 at 170,773. Bluebird's contract was awarded on 1 September 2004 (SOF ¶ 3). AFNAFPO's contract with MidAtlantic was awarded on 8 March 2007 and the order for high speed internet services at Nellis AFB was issued on 23 January 2008 (SOF ¶ 5). By that time Bluebird's contract was in its third option period (SOF ¶ 4). Contract B004 was fully performed in January 2010 (SOF ¶ 6) and there was a follow-on contract extending Bluebird's services through March 2011 (SOF ¶ 7).

Bluebird's argument that because the changes clause allows modification during performance, it is somehow entitled to reformation during performance is misplaced (app. resp. at 7). The ability to change the contract is a discretionary right given to the government and has nothing to do with a contractor's right to reformation based on mutual mistake.

#### CONCLUSION

For the reasons stated above the Air Force's motion is granted. Bluebird's appeal is denied.

Dated: 16 July 2013



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CRAIG S. CLARKE  
Administrative Judge  
Armed Services Board  
of Contract Appeals

(Signatures continued)

I concur



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

I concur



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. 58379, Appeal of Bluebird Communications, Inc., rendered in conformance with the Board's Charter.

Dated:

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