

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Lucia E. Naranjo) ASBCA No. 52085
)
Under Contract Nos. 8030036000)
9030002700)

APPEARANCE FOR THE APPELLANT: Lester C. Cannain, Esq.
Albuquerque, NM

APPEARANCE FOR THE GOVERNMENT: Tamara M. Ribas, Esq.
Assistant Regional Counsel
Department of Health and Human
Services, Region IX
San Francisco, CA

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

The appeal is taken from a contracting officer's final decision denying Ms. Lucia E. Naranjo's (Ms. Naranjo or appellant) claim her purchase orders (PO) were constructively changed entitling her to an equitable adjustment (EA) in the amount of \$5,616. The Government has filed a motion for summary judgment¹ alleging appellant has not made a sufficient showing of evidence to support her case. The appellant has filed a response in opposition to the Government's motion².

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. Appellant on 10 April 1998 was awarded Purchase Order No. 8030036000 (hereinafter PO 6000) to provide (R4, tab 1; Gov't br. at ¶¶ 1, 2; ex. G-3):

CONSULTATION SERVICES TO THE NURSING DEPARTMENTS
AND THE OUTPATIENT CLINICS [Northern Navajo Medical
Center (NNMC), Shiprock, NM] FROM APRIL 10, 1998
THROUGH SEPTEMBER 30, 1998, [24 weeks at a weekly price
of \$1037.50 and a total contract cost of \$24,900].
CONSULTANT SERVICES INCLUDES: STAFF/LEADERSHIP
EDUCATION, CHANGE IMPLEMENTATION,
POLICY/PROCEDURE DOCUMENTATION UPDATE,

MANAGEMENT, STAFF/ CUSTOMER ADVOCACY AND ENVIRONMENT OF CARE CHANGES.

2. On 8 October 1998 appellant was awarded Purchase Order No. 9030002700 (hereinafter PO 2700) to provide (*id.*; ex. G-4):

CONSULTATION SERVICES TO THE NURSING DEPT. AND THE OUT-PATIENT CLINICS, NORTHERN NAVAJO MEDICAL CENTER, SHIPROCK, NM IN ACCORDANCE WITH THE SCOPE OF WORK AND APPLICABLE CLAUSES. (HOURS NOT TO EXCEED 80 HOURS WITHIN A 2 WEEK PERIOD AND PAYROLL SUBJECT TO THE GOVERNMENT PAYROLL SCHEDULE.) THERE WILL BE NO COMPENSATORY TIME, OVERTIME OR ANNUAL/SICK LEAVE EARNED. THE GOVERNMENT WILL NOT BE RESPONSIBLE FOR CHARGES OVER 560 HOURS PER CONTRACT. SERVICES TO BEGIN OCTOBER 01, 1998 THRU [sic] DECEMBER 31, 1998, [560 hours at a unit price of \$25.94 per hour and a total contract price of \$14,526.40.]

CONSULTANT SERVICES INCLUDE: STAFF/ LEADERSHIP EDUCATION, CHANGE IMPLEMENTATION, POLICY/ PROCEDURES DOCUMENTATION UPDATE, MANAGEMENT, STAFF/ CUSTOMER ADVOCACY AND ENVIRONMENT OF CARE CHANGES.

3. Incorporated by reference into POs 6000 and 2700 were the following Federal Acquisition Regulation (FAR) clauses (exs. G-3, -4): 52.222-41, Service Contract Act of 1965 (MAY 1989); 52.232-1, Payments (APR 1984); 52.233-1, Disputes (MAR 1994); 52.243-1, Changes - Fixed Price (AUG 1987); 52.249-1, Termination for Convenience of the Government (Fixed Price) (Short Form) (APR 1984). FAR 52.243-1, Changes - Fixed Price (AUG 1987) provided in pertinent part:

(b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both and shall modify the contract.

(c) The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer

decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.

4. On 28 October 1998 Ms. Naranjo's PO 2700 was "terminated" for "inappropriate behavior" (ex. A-H).

5. On 15 December 1998 appellant, through her attorney, filed a "CLAIM FOR CONSTRUCTIVE CHANGE UNDER USPHS INDIAN HEALTH SERVICE CONTRACT NO'S 8030036000 and 9030002700 and WRONGFUL TERMINATION OF PURCHASE ORDER (PO) NO. '803002700' (sic)" with the Senior Contracting Officer (SCO), Mr. Jack Tarro. Appellant, in letters to the contracting officer (CO), USPHS Indian Health Service, Mr. Morris Brite, copies of which were provided to the SCO, claimed she was wrongfully terminated and she was entitled to an equitable adjustment of \$5,616 due to the Government's constructive change to the scope of her performance through the direction of the Director of Nursing (DON), Ms. Lavenia Diswood. Appellant contended she was required to be the ambulatory care director where she supervised the daily operations and managed the staff as the RN (registered nurse); that she was placed on the Nurse Executive Team and the Leadership Advisory Council where she actively voted on policy matters; and she was required to devote time to the Ethics Committee and the New Business Development and Marketing Group. (R4, tab 2)

6. On 9 February 1999 the SCO denied appellant's claim for wrongful termination (Bd. corr. file).

7. On 11 February 1999 the SCO denied appellant's claim for an equitable adjustment stating submitted documents and statements "dispute this claim as false"; that the requirement of providing consultation services as noted in both purchase orders "could" include her being a member or devoting time to the Nurse Executive Team, Leadership Advisory Council, Ethics Committee, and New Business Development and Marketing Group; and that her assignment as a member of the Leadership Advisory Council and voluntary membership in other advisory groups does not constitute a change in the scope of the contract. (R4, tab 7)

8. On 2 August 1999 the termination of PO 2700 was converted to a "TERMINAT[ION] FOR CONVENIENCE EFFECITVE [sic] OCTOBER 10-28-98 [sic]" (ex. A-I; Bd. corr. file).³

POSITIONS OF THE PARTIES

The Government moves for summary judgment contending there is no material fact in issue because appellant has failed to provide evidence that participation on the Leadership Advisory Council, the Ethics Committee, the New Business Development Strategic Change Team, the Nurse Executive Team, and to be team leader of 18 strategic teams in the Ambulatory Care Department were outside the scope of her POs or that her serving on these teams and committees was mandated by the Government. (Gov't br. at 4)

Appellant in opposition to the Government's motions avers the Director of Nursing placed her in the position of supervising the daily operations/management of the Ambulatory Care Department; that she was appointed to the Leadership Advisory Council by the Chief Executive Officer; and that she was required to serve on the teams and committees although such duties were over and above the requirement to provide consultant services. (App. br. at 1-7)

DECISION

Summary judgment is properly granted where there are no disputed issues of material fact and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-92 (Fed. Cir. 1987). A material fact is one which will make a difference in the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Factual inferences are to be drawn in favor of the party opposing summary judgment. *United States v. Diebold, Inc.* 369 U.S. 654, 655 (1962); *Hughes Aircraft Co.*, ASBCA No. 30144, 90-2 BCA ¶ 22,847.

The Government, citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and Rule 56 of the Federal Rules of Civil Procedure (FRCP), argues it is entitled to summary judgment because there is an absence of evidence supporting the assertion that appellant was required to serve on the teams and committees for which she is requesting an equitable adjustment. On motions for summary judgment the Board follows Rule 56 as a guideline. *Voices R Us, Inc.*, ASBCA No. 51565, 99-1 BCA ¶ 30,213. Rule 56(e) provides "[w]hen a motion for summary judgment is made and supported as provided by this rule, an adverse party may not rest upon the mere allegations or denials of [the adverse party's] pleading . . . [but] by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

In deciding a motion for summary judgment, we are not to resolve factual disputes, but to ascertain whether disputes of fact are present. *Alvarez & Associates Construction Co., Inc.*, ASBCA No. 49341, 96-2 BCA ¶ 28,476; *General Dynamics Corp.*, ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851. There is no dispute that appellant did serve on

and attend meeting of various boards and committees (findings 5, 7, *supra*). Appellant, in her response to the Government's motion, provided an affidavit and other documentation which she avers supports her contention the POs were constructively changed entitling her to an equitable adjustment of \$5,616. The Government contends that appellant's services on the committees and boards were voluntary. Clearly, to what extent, if any, serving on various committees and boards was over and above the services appellant was to provide under her POs is a material fact in dispute and requires clarification with additional evidence and or testimony.

The Government's motion is denied.

Dated: 28 March 2000

ALLAN F. ELMORE
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
Acting Vice Chairman
Armed Services Board
of Contract Appeals

NOTES

- ¹ The Government's motion, memorandum in support of its motion, and documents supporting the motion are referred to as Gov't motion, Gov't br., and ex. G- respectively.
- ² The appellant's motion, memorandum in support of its motion, and documents supporting the motion are referred to as app. motion, app. br., and ex. A- respectively.
- ³ We are unable to determine from the record if appellant's convenience termination settlement included costs which were included in the appellant's EA claim.

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. 52085, Appeal of Lucia E. Naranjo, rendered in conformance with the Board's Charter.

Dated:

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