

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Mid-Eastern Industries, Inc.) ASBCA No. 53015
)
Under Contract No. N00189-94-D-0324)

APPEARANCE FOR THE APPELLANT: Mr. Thomas Nixon
President

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
Benjamin M. Plotkin, Esq.
Assistant Counsel
Davis Young, Esq.
Trial Attorney
Fleet and Industrial Supply
Center
Norfolk, VA

OPINION BY ADMINISTRATIVE JUDGE LIPMAN
ON MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

This is an appeal from a contracting officer's deemed denial of appellant's \$50,000 claim resulting from the Government's alleged failure to order the minimum guaranteed amount in the fourth option year of an indefinite delivery, indefinite quantity contract. The Government moved to dismiss the appeal on grounds that the Board lacks subject matter jurisdiction over the dispute and, in the alternative, seeks summary judgment. Because the motion refers to matters outside of the pleadings, we treat it as a motion for summary judgment. The record consists of documents included in the Rule 4 file and those which accompanied the notice of appeal. Neither party submitted affidavits.

FINDINGS OF FACT

1. On 15 July 1994, the Government, by the Department of the Navy, Fleet and Industrial Supply Center, Norfolk, Virginia (FISC Norfolk), awarded appellant the captioned contract for specified ship repair services aboard Navy vessels. The contract was awarded pursuant to section 8(a) of the Small Business Act as an indefinite delivery, indefinite quantity contract. (R4, tab 1)

2. The solicitation and contract contained a clause B.3, entitled EXERCISE OF OPTIONS (EXTENSION OF CONTRACT), which states:

a. The extension of the contract under the option, if exercised, shall be for the term of one year.

b. Such option shall be exercised by contract modification, 30 days prior to expiration of contract.

(R4, tab 8)

3. The contract had a base performance period of one year beginning on 15 July 1994, and options to extend the period of performance for four additional one-year periods, as follows:

Lot I - Base Year (15 July 1994 through 14 July 1995)

Lot II - Option Year 1 (15 July 1995 through 14 July 1996)

Lot III - Option Year 2 (15 July 1996 through 14 July 1997)

Lot IV - Option Year 3 (15 July 1997 through 14 July 1998)

Lot V - Option Year 4 (15 July 1998 through 14 July 1999)

(R4, tab 1)

4. The Government exercised the first two option years by Modification Nos. P00002 and P00003, respectively (R4, tabs 3, 4).

5. In a letter to appellant dated 29 April 1997, the contracting officer included the following:

Your attention is invited to the FAR clause 52.217-9, entitled, "Option to Extend the Term of the Contract"

The government hereby gives preliminary notice of its intention to exercise that [15 July 1997 to 14 July 1998] option. It should be noted that this is a preliminary notice only and shall not be deemed to commit the government to renewal. If the government exercises its option for renewal, notice shall be given at least 30 days prior to contract expiration.

In addition, the minimum guarantee for the Lot IV fourth year option [15 July 1998 to 14 July 1999], if exercised, shall be \$50,000.00.

(R4, tab 6)

6. By Modification No. P00004, dated 12 June 1997, the Government exercised the option for the third option year, which was stated in the modification to expire on 14 July 1998 (R4, tab 5).

7. By letter of 19 May 1998 to the Commanding Officer, FISC Norfolk, the Government's end-user client, the Supervisor of Shipbuilding, Conversion and Repair, Portsmouth, Virginia, requested that the fourth-year option not be exercised because the latter office had recently awarded another contract for the ship repair services (R4, tab 7).

8. On 8 July 1999, appellant invoiced the Government for \$50,000, the minimum guaranteed amount for the fourth option year (Notice of Appeal attach.).

9. On 24 August 1999 the contracting officer sent appellant a DD Form 1593, entitled "Contract Administration Completion Record," which (a) stated that the captioned contract was "listed as being physically completed," (b) requested that appellant provide "final payment information," and (c) identified the "contract end date" as 14 July 1999. In the portion of the form later filled in by appellant, appellant answered "no" to the question "[a]re all deliveries and payments complete." (R4, tab 9)

10. By letters dated 8 October 1999 and 29 February 2000, appellant again submitted invoices to the Government for \$50,000. The 29 February 2000 letter stated that it was appellant's "official notification of claim" to the Government for payment of the \$50,000. (Notice of Appeal attach.; R4, tab 9)

11. In the absence of a contracting officer's decision, on 3 August 2000 appellant appealed the contracting officer's deemed denial of its claim.

DECISION

Summary judgment is properly granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The moving party bears the burden of establishing the absence of any genuine issue of material fact and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment. However, the party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). The nonmovant must "present definite, competent evidence to rebut the motion." *Mesnick v. General Electric Co.*, 950 F.2d 816, 822 (1st Cir. 1991), *cert. denied*, 504 U.S. 985 (1992); *Al Maweed Marine Services PTE, Ltd.*, ASBCA No. 48124, 98-1 BCA ¶ 29,455.

The exercise of an option is within the broad discretion of the Government, and the presence of an option clause does not create a legal obligation upon the Government to exercise the option and require the work. *Government Systems Advisors, Inc. v. United*

States, 847 F.2d 811, 813 (Fed. Cir. 1988); *Plum Run, Inc.*, ASBCA Nos. 46091 *et al.*, 97-2 BCA ¶ 29,193 at 145,230. Absent contractually prescribed limitations, the Government's discretion not to exercise an option is nearly complete. *Id.* For an option to be effective, the Government must exercise the option in exact accord with the terms of the contract. *Freightliner Corp. v. Caldera*, 225 F.3d 1361, 1366 (Fed. Cir. 2000), *aff'g Freightliner Corp.*, ASBCA No. 42982, 98-2 BCA ¶ 30,026.

Here, appellant asserts that the Government never gave it notice that the fourth year option would not be exercised and, supported by no evidence, alleges (a) that appellant continued to maintain its readiness and ability to perform the contract "several months" into the fourth option year and (b) that the Government knew that the contract had not been closed out and "kept it as a vehicle to use in case there were problems with other contracts." As we have indicated, in opposing summary judgment appellant must present more than just arguments. Appellant's bare allegations and contentions here are not persuasive.

The contract included an option clause giving the Government a unilateral right to exercise the options. The clause, while requiring option exercises to meet certain requirements including the issuance of contract modifications, contained no provision requiring the Government to notify appellant in the event it decided not to exercise an option. The Government exercised the options for three years in the manner prescribed by the contract. Appellant has offered no evidence that the Government exercised the fourth year option; nor does appellant even allege that the Government took any action which could be construed as hinting at the exercise of the option. It merely points to a Certificate of Contract Completion Record DD Form 1593, dated 24 August 1999, after the end of the fourth option year, reflecting the contract completion date to have been 14 July 1999, which, it implies, indicates that the Government kept the contract open through the fourth-year option period. We must conclude, however, in view of the requirements for the exercise of options, that a contract administration document, prepared after the time period in question, is insufficient to constitute evidence to even raise as an issue of material fact whether the fourth-year option had been exercised.

We conclude that the Government did not extend performance by exercising the fourth-year option and that the contract expired at the conclusion of the third option year. Accordingly, there is no basis upon which appellant can recover for the lack of Government orders beyond that time.

The Government's motion for summary judgment is granted and the appeal is denied.

Dated: 11 June 2001

RONALD JAY LIPMAN

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. 53015, Appeal of Mid-Eastern Industries, Inc., rendered in conformance with the Board's Charter.

Dated:

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