

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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Griffin Services, Inc.) ASBCA Nos. 52280, 52281
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Under Contract No. SP4700-97-D-0007)

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Fort Belvoir, VA

OPINION BY ADMINISTRATIVE JUDGE KIENLEN
ON
APPELLANT' S MOTION FOR SUMMARY JUDGMENT

This case involves a contract for electrical operations and maintenance services. After an ineffective attempt to exercise the first option year, the Government exercised successive options for continued performance of services, for a total of six months.

During the base period the contractor incurred costs for extra work required by the Government. The contractor filed a claim for those costs. It was the subject of ASBCA No. 51544. That dispute was settled. During the six month option period, the contractor continued to incur costs for identical extra work. Instead of filing a claim for those costs the contractor filed a constructive change claim for all costs incurred during the option period. That constructive change claim is the subject of ASBCA No. 52280.

The contractor filed additional claims covering all periods of performance. These claims included \$4,048 for the "maintenance and repair of the motorized blinds" and \$12,500 for the "inaccurate and misleading nature of the equipment inventory." They are the subject of ASBCA No. 52281. Some of these costs would be subsumed by the constructive change claim in ASBCA No. 52280.

On 21 December 2001, the appellant filed this motion for summary judgment in favor of its constructive change. The motion applies to the claim in ASBCA No. 52280, but it subsumes most of the claimed costs in ASBCA No. 52281. The Government agrees that services were provided by the appellant pursuant to the Government's direction after the

base period. However, the Government argues that it validly exercised options to extend the performance of contract services, and thus the contractor is only entitled to contract prices. In its motion, the appellant argues that the Government did not properly exercise such options. Appellant supported the motion with the affidavit of its president, Richard Rushton.

The Government was ordered to respond to the motion for summary judgment and, as to each statement of undisputed fact, was directed to “state specifically what is being denied and cite to material in the record, or to an attached affidavit or other document, which supports the denial. Failure of the respondent to submit a response shall be deemed an admission.” (Order of 11 March 2002) The Government has responded to the appellant’s motion, but has not filed affidavits or other additional documents. Although the Government requested that the motion be denied, it has not filed a cross motion for summary judgment. We grant the motion in part.

STATEMENT OF UNDISPUTED FACTS

On 21 February 1997 the Government awarded Contract No. SP4700-97-D-0007 to Griffin Services, Inc., the appellant, for the operation, maintenance, and repair of electrical distribution systems, fire detection systems, and security and sound systems, at the Defense Logistics Agency Headquarters Complex at Fort Belvoir, Virginia (ans., ¶ 3; R4, tabs 3, 4).

The contract was for a base period of 1 April to 30 September 1997. There were four one-year option periods. Part of the work was firm fixed priced and part of the work was hourly indefinite quantity work. The monthly fixed price for the base period services was \$26,071. The monthly fixed price for the first option year services was \$24,712. (Ans., ¶ 4; R4, tabs 1, 3)

The contract incorporated in full text the clause found at FAR 52.217-9 and entitled, OPTION TO EXTEND THE TERM OF THE CONTRACT (MAR 1989) (R4, tab 2, amendment 0005 at 2, clause B.26). The contract also incorporated in full text the clause found at FAR 52.217-8 and entitled, OPTION TO EXTEND SERVICES (AUG 1989), which read:

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 [sic] of performance hereunder shall not exceed 6 months. The Contracting Officer may exercise the option by written notice to the Contractor within the period specified in the Schedule.

(R4, tab 1, solicitation SP4700-96-R-0032, clause B.20) The Schedule did not provide for a specific separate period during which this option could be exercised. The only time periods in the Schedule were the base and option periods.*

By letter of 19 August 1997, the contracting officer provided a preliminary written notice of intent to renew the contract for the first option year (ans. ¶ 5; R4, tab A7). By letter of 28 August 1997, Griffin replied that the notice was not provided at least 60 days before the contract was to expire; and therefore, the right to exercise the option had expired. Griffin wrote that it “does not waive” the requirement for a timely notice of intent to exercise the option. Griffin also asserted that the actual requirements, and the cost of performance, were significantly more than it expected. (Ans. ¶ 6; R4, tab A8; *see* aff. of Richard Rushton at ¶ 3)

In its 28 August letter, Griffin offered to waive the notice requirement if the parties could agree on an equitable adjustment. It offered to prepare a proposal for an equitable adjustment. On 8 September 1997, the contracting officer requested Griffin to submit an equitable adjustment request by 11 September 1997. (Ans. ¶¶ 6, 7; R4, tabs A8, A9) On 11 September 1997, Griffin submitted an equitable adjustment request of \$160,293.51 per year -- an increase in the fixed price contract revenue from \$26,071 to \$39,428.79 per month (R4, tab A10).

By letter of 23 September 1997, the Government rejected Griffin’s equitable adjustment proposal and advised Griffin that the Government intended to re-solicit the contract (ans. ¶¶ 8, 11; R4, tabs A10, A11). That 23 September 1997 letter enclosed Modification No. P00003, which unilaterally extended the contract through 31 October 1997, pursuant to Clause B.20 entitled Option to Extend Services. The copy of the original letter in the Rule 4 file reflects that it was received on 26 September 1997, four days prior to the expiration of the current base contract period. The contractor does not contend that it was received on a later date. (R4, tabs 4, A11)

Griffin objected by letter of 6 October 1997 that the extension to 31 October 1997 had been improperly exercised, because the preliminary notice was sent late and the option was not exercised within 15 days of contract expiration. Griffin maintained that the extension under Clause B.20 had to be exercised “within the period specified in the Schedule,” and the only time set forth in the Schedule was that set forth in Clause B.26, requiring exercise 15 days before contract expiration. Griffin reiterated that it would “continue performance for as long as the Defense Logistics Agency should so require,”

* More recent versions of the Option to Extend Services clause provided for the insertion of a specific number of days prior to contract completion for the exercise of this option. These have also been the source of litigation. *See American Contract Services, Inc.*, ASBCA No. 46788, 94-2 BCA ¶ 26,855, *aff’d on recon.*, 94-3 BCA ¶ 27,025.

and would prepare an equitable adjustment request for all the services provided after the contract expired on 30 September 1997. (Ans. ¶ 12; R4, tab A12) We note that Clause B.26 was not part of the Schedule.

On 24 October 1997 the Government unilaterally extended the contract through 31 December 1997, by unilateral Modification No. P00004. The record does not reflect when this extension was received by the contractor, but the contractor does not contend that it was received after 31 October 1997. (R4, tab 4)

By letter of 31 October 1997, Griffin submitted its proposed equitable adjustment for the extended services provided after 30 September 1997. The adjustment involved a monthly increase in fixed price from \$26,071 to \$39,428.79. The Government responded to Griffin in a letter dated 6 November 1997, asserting that the option had been properly exercised under Clause B.20 and refusing to adjust the monthly price for services. (Ans. ¶ 13; R4, tabs A13, A15)

On 30 December 1997, one day before the second extension expired, the Government signed unilateral Modification No. P00005 which extended the contract through 31 March 1998 (R4, tab 4). Griffin asserts that notice of the option exercise was not received until 2 January 1998, and then only by Griffin's on-site personnel, who were not authorized to receive contract modifications. The Government admits that it has no information to dispute the contractor's assertion that the modification was not received until 2 January 1998, and then only by on-site personnel who did not have authority to receive contract modifications.

Following expiration of the base contract period, Griffin continued to provide electrical operations and maintenance services from 1 October 1997 through 31 March 1998. Griffin had actual costs higher than the monthly fixed price provided by the contract. On 28 January 1999, Griffin filed a claim for actual costs incurred during the extended period of performance, requesting \$123,699.70 over and above the amount of compensation provided by the contract. (R4, tab A17)

DECISION

Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 327 (1986); *Armco, Inc. v. Cyclops Corp.*, 791 F.2d 147, 149 (Fed. Cir. 1986); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987).

The appellant contends that the Government ordered it to provide contract and other services after the expiration of the basic contract period, that such orders were constructive changes, and that it was entitled to an equitable adjustment for the changed work. The Government admits that those services were ordered by the Government and performed by

the appellant. Thus, the appellant is entitled to an equitable adjustment for its constructive change claim, except to the extent the Government establishes that it timely exercised an option right to extend the contract services during the period 1 October 1997 through 31 March 1998. *International Telephone and Telegraph, ITT Defense Communications Division v. United States*, 453 F.2d 1283, 1293 (Ct. Cl. 1972); *General Dynamics Corporation*, ASBCA No. 20882, 77-1 BCA ¶ 12,504 at 60,622-23; *J.E.T.S. Inc.*, ASBCA No. 26135, 82-2 BCA ¶ 15,986 at 79,275.

Since the Government is seeking to enforce the terms of the option, the Government has the burden of proving that the option was properly exercised. *USD Technologies, Inc.*, ASBCA No. 31305, 87-2 BCA ¶ 19,680 at 99,618, *aff'd*, 845 F.2d 1033 (Fed. Cir. 1988) (table) (Government has burden to prove that it timely exercised an option); *Star Contracting Co.*, ASBCA Nos. 27848 *et al.*, 89-2 BCA ¶ 21,587 at 108,700 (Government failed to establish timely exercise); *The Boeing Company*, ASBCA No. 37579, 89-3 BCA ¶ 21,992 at 110,597 (exercise of a disputed right to exercise an option is a Government claim). *See Wabol v. Camacho*, 4 N.M.I. 388 (1996) (party seeking specific performance of an option bears burden of proving existence of a valid, enforceable, and properly exercised option); *All-Flow, Inc. v. Fruehauf Corp.*, Nos. 94-CV-0134E(F), -0135E(F), -0136E(F), 1995 WL 591142 (W.D.N.Y. September 11, 1995) (party seeking to enforce the option has the burden of proving that it was validly exercised); *City of Newark v. Lindsley*, 114 A. 794, 795 (N.J. Ch. 1921).

The Government's exercise of an option must be unconditional and done in strict accordance with its terms. Any attempt by the Government offeree to alter the conditions of the option will render the exercise of it ineffective. *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1275 (Fed. Cir. 1999); *Contel Page Services, Inc.*, ASBCA No. 32100, 87-1 BCA ¶ 19,540 at 98,734. Thus, in order to exercise its option to extend performance of contract services the Government was required to exercise the option in strict accordance with its terms. In this case, option clause B.20 required that the option be exercised in writing "within the period specified in the Schedule." The appellant admits that in each of the three option exercises the Government acted in writing.

However, the appellant contends that (1) the option exercises were not authorized for this purpose, (2) they were not timely exercised because they did not comply with the time limits in clause B.26, and (3) the third exercise was not timely received.

The appellant first argues that the "regulatory enunciated and common-sense reasons for the 'Option to Extend Services' clause" does not permit the Government to use that clause in the circumstances of this case. The appellant correctly notes that FAR § 37.111 provides for the use of this clause, because the "[a]ward of contracts for recurring and continuing service requirements are often delayed due to circumstances beyond the control of contracting offices." That provision recognizes that the circumstances which cause such delays include "bid protests and alleged mistakes in bid." It then goes on to

provide that “to avoid negotiation of short extensions to existing contracts” the contracting officer “may include an option clause” which will enable the Government to require continued performance of contract services.

Essentially, the appellant argues that the short term extension option was misused by the Government. The appellant argues:

No procurement dispute delayed the award of a contract to succeed Griffin’ [s] contract. The reason that an extension was required in this case was because the Contracting Officer failed to timely extend the Contract. This was not a circumstance beyond the control of the contracting office. This option does not apply to the facts here. By using the short term extension clause, the Contracting Officer is attempting to nullify the notice requirements in the Contract for exercising options. . . . These [contract] services require a transition period between contractors and the option notification period is entirely reasonable so that Griffin may orderly demobilize its operations and not wait until the last minute to determine whether the Government may or may not exercise a short term option for some undetermined period of time not to exceed six months. Griffin never agreed to or bargained for an option clause that was so open-ended as to negate the original notice provisions in the yearly option clauses in the contract which provided for an orderly transition to the new contractor and allowed Griffin to orderly plan, with sufficient time, the conclusion of its work and demobilization from the project.

(App. br. on mot. for summ. judgment at 4-5) The simple answer is that the contractor did agree to precisely what it now argues it did not agree to. *See American Contract Services, Inc.*, ASBCA No. 46788, 94-2 BCA ¶ 26,855, *aff’d on recon.*, 94-3 BCA ¶ 27,025.

The longer answer begins with the observation that the appellant seems to confuse what may have motivated the Government to provide for a standard clause extending contract services, and the expression of contractual intent which the language conveyed. As the Supreme Court has recently reminded in a unanimous opinion, when the Government enters the marketplace by way of contract and does business with its citizens, its rights and duties are governed generally by the law applicable to contracts between private individuals. *Franconia Associates v. United States*, 122 S. Ct. 1993, 2001 (U.S. 2002). Thus, we look to contract rules, not regulatory rules, for the interpretation of this clause.

The plain, objective, language of the Option to Extend Services clause is not limited as to the reasons for its use. The “intention of a party entering into a contract is

determined by an objective reading of the language of the contract, not by that party's statements in subsequent litigation." *Varilease Technology Group, Inc. v. United States*, 289 F.3d 795, 799 (Fed. Cir. 2002). The appellant's argument that the contractor "never agreed to or bargained for an option clause that was so open-ended" is just that, mere argument. There is no evidence, by affidavit, contemporaneous writing, or otherwise, that anyone, for either the contractor or the Government, had such a limiting intention. This first contention fails for lack of proof.

The second contention concerns the timeliness of the option exercise. While acknowledging that clause B.20 authorized the exercise of an option "within the period specified in the Schedule," the appellant argues that the only contract provision providing for the period within which an option could be exercised was found in clause B.26. Therefore, argues the appellant, those time provisions must apply. This also is merely argument. It ignores the performance time periods provided in the Schedule for the base period and the option years. The question of the time within which the option must be exercised is a question of contract interpretation. Although neither party cited case law on this question, we have answered this question before.

When the option is to be exercised "within the period specified in the Schedule" and the Schedule does not require any specific number of days for advance notice or exercise of the option, the option may be exercised at any time during the period of contract performance specified in the Schedule then in effect. *Moore's Cafeteria Services, Inc.*, ASBCA No. 28441, 85-3 BCA ¶ 18,187 at 91,326; *Contel Page Services, Inc.*, ASBCA No. 32100, 87-1 BCA ¶ 19,540 at 98,735. *See also*, 15 LORD, WILLISTON ON CONTRACTS § 46:12 at 459-60 (4th ed. 2000):

The principle that time is of the essence of an option contract is just as true of options embodied in other contracts, such as leases with an option to renew, as it is of a pure option. Thus, where a lease or contract contains an option to renew it for a further term but fails to provide a time limit within which the option must be exercised, the time for giving notice of renewal does not usually extend beyond the last day of the original term.

In all three exercises of the option the Government timely executed the writing during the then current period of contract performance. The appellant's second contention fails.

With respect to appellant's third contention, it is not enough that the Government timely signed the written document exercising the option. The Government must also deliver the written exercise of the option to the appellant before the expiration of the option period, in order for the option to be timely exercised. *Dynamics Corporation of America v. United States*, 389 F.2d 424, 431-32 (Ct. Cl. 1968); *International Telephone*

and Telegraph, ITT Defense Communications Division v. United States, 453 F.2d 1283 (Ct. Cl. 1972); *General Dynamics Corporation*, ASBCA No. 20882, 77-1 BCA ¶ 12,504 at 60,622-23; *Cessna Aircraft Company*, ASBCA No. 43196, 96-1 BCA ¶ 27,966 at 139,697. Moreover, delivery of the written notice of option exercise must be to a person authorized to accept it on behalf of the contractor. *Western States Management Services, Inc.*, ASBCA Nos. 37490, 38237, 92-2 BCA ¶ 24,921 at 124,259-60.

As to the date when the first two option exercises were delivered to the contractor, the contractor has not alleged that those exercises were untimely; and, drawing all inferences in favor of the Government as the nonmovant, we conclude for purposes of this motion that the first two options were timely exercised. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Thus, at least for purposes of the appellant's motion for summary judgment, we hold that the appellant has failed to show that it is entitled to judgment as a matter of law with respect to the first two option exercises.

The appellant does contend that the third option exercise, covering the 90-day period from 1 January through 31 March 1998, was not delivered to any employee of the contractor until 2 January 1998. The Government has not disputed this fact with any evidence. It is the Government's burden to establish that the option was timely exercised; thus, when challenged in a motion for summary judgment that there is no evidence to support a material fact which is an element of its burden of proof, the Government must come forward with some evidence to establish that material fact in order to survive a motion for summary judgment. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 321-23 (1986); *C. Sanchez and Son, Inc. v. United States*, 6 F.3d 1539, 1541 (Fed. Cir. 1993); *White Sands Construction, Inc.*, ASBCA No. 51875, 02-2 BCA ¶ 31,858.

The Government has not provided any evidence that the third option was timely exercised by delivery of the written option exercise to the contractor prior to the end of the then current period of performance, *i.e.*, 31 December 1997. The Government's assertion that it has no information -- to dispute the appellant's contention that delivery did not occur until 2 January 1998 -- is not sufficient to create a genuine dispute of that material fact. As the Federal Circuit said in *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987), "the party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient." *Eurovan Movers, S.A.*, ASBCA No. 53302, 02-1 BCA ¶ 31,843 at 157,343 (statements based on "information and belief" are not sufficient to raise a factual dispute); *Ver-Val Enterprises, Inc.*, ASBCA No. 49892, 01-2 BCA ¶ 31,518 at 155,597-98.

As we said in *Tecom, Inc.*, ASBCA No. 51880, 00-2 BCA ¶ 30,944 at 152,740, quoting from *Celotex, supra* at 322, "Rule 56(c) [of the Federal Rules of Civil Procedure] mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case[.]" Accordingly, we grant in part the appellant's

motion for summary judgment, because the Government failed to produce any evidence that it timely exercised the option for the period 1 January through 31 March 1998 by delivery thereof to the appellant before 1 January 1998.

CONCLUSION

The appellant's motion for summary judgment is granted with respect to the period between 1 January and 31 March 1998; it is otherwise denied. The parties are to resolve the quantum. If they fail to agree, either party may return to this Board for determination

of the amount of the equitable adjustment. The entitlement issues with respect to prior periods of performance are still before the Board in ASBCA Nos. 52280 and 52281.

Dated: 2 August 2002

RONALD A. KIENLEN
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 Nos. 52280, 52281, Appeals of Griffin Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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