

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
)  
Petchem, Inc. ) ASBCA No. 53792  
)  
Under Contract No. N00033-00-D-1017 )

APPEARANCE FOR THE APPELLANT: Sam Zalman Gdanski, Esq.  
Pomona, NY

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.  
Navy Chief Trial Attorney  
Charna J. Swedarsky, Esq.  
Associate Counsel, Litigation  
Military Sealift Command

OPINION BY ADMINISTRATIVE JUDGE FREEMAN  
ON MOTIONS FOR SUMMARY JUDGMENT

Petchem, Inc. appeals the denial of its claim for the government's alleged failure to order the full guaranteed minimum quantity in an option period of a services contract. Both parties move for summary judgment. Pursuant to our order of 12 August 2002, we decide entitlement only. There are no genuine issues of material fact on entitlement. We grant Petchem's motion and sustain the appeal.

The contract was awarded on 6 April 2000 (R4, tab 6 at 1). The contract required Petchem to provide and operate a Personnel Transfer Vessel (PTV) for movements as ordered by the government in the Port Canaveral, Florida area (R4, tab 6 at 3-5). The contract designated two periods of performance -- a "Firm Period" from 10 April to 10 August 2000, and if exercised, a "First Option Period" from 11 August 2000 to 11 February 2001 (R4, tab 6 at 3). Payment was to be made at a fixed PTV Service Rate of \$2,500 per movement order during the Firm Period and \$1,800 per movement order during the First Option Period (R4, tab 6 at 2, 6).

The contract included the following clauses governing the exercise of options extending performance beyond the Firm Period:

OPTION TO EXTEND SERVICES (NOV 1999)  
[FAR 52.217-8]

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 Contracting Officer may exercise the option by written notice to the Contractor within 30 days.

OPTION TO EXTEND THE TERM OF THE CONTRACT  
(NOV 1999) [FAR 52.217-9]

(a) The Government may extend the term of this contract by written notice to the Contractor within 30 days; provided that the Government gives the Contractor a preliminary written notice of its intent to extend at least 60 days before the contract expires. The preliminary notice does not commit the Government to an extension.

(b) If the Government exercises this option, the extended contract shall be considered to include this option provision.

(c) The total duration of this contract, including the exercise of any options under this clause, shall not exceed 60 months.

(R4, tab 6 at 11)

The contract was an indefinite quantity contract. As initially solicited, the contract had a guaranteed minimum of 40 movements at the PTV Service Rate (R4, tab 1 at 7). Amendment 0002 to the solicitation provided that the guaranteed minimum “shall be per period” (R4, tab 5 at 2-3; tab 6 at 7).

On 10 July 2000, the government issued unilateral Modification P00001 exercising the option for the First Option Period beginning on 11 August 2000 and ending on 11 February 2001. Modification P00001 cited as its authority the FAR 52.217-8 OPTION TO EXTEND SERVICES (NOV 1999) clause of the contract. (R4, tab 11 at 1) The government does not allege, and the record on the motions does not show, that it

issued the 60-day notice that would have allowed it to extend contract performance pursuant to the OPTION TO EXTEND THE TERM OF THE CONTRACT (NOV 1999) clause. During the First Option Period, the government ordered 29 PTV movements (gov't br. at 8). This was 11 movements less than the guaranteed minimum of 40 movements for that period.

On 6 February 2001, the contracting officer issued unilateral Modification P00003. This was the first of a series of unilateral modifications purporting to extend the contract for an additional six months from 12 February through 10 August 2001 pursuant to the OPTION TO EXTEND SERVICES (NOV 1999) clause. (R4, tabs 18, 29, 32, 36, 38) By letter dated 9 February 2001, Petchem stated that it was not legally obligated to perform the PTV contract after 11 February 2001 but would do so under protest and reserving its rights (R4, tab 17). Petchem performed 51 PTV movements ordered during the six-month period from 12 February to 10 August 2001 and invoiced the government for those movements "without prejudice" at the \$1,800 First Option Period rate. On 20 September 2001, Petchem submitted a claim for an additional \$28,200 for those movements. (R4, tab 40 at 1-2) By final decision dated 8 November 2001 the contracting officer denied the claim and advised Petchem of its appeal rights (R4, tab 42 at 2). No timely appeal of this decision was filed before this Board.

On 28 January 2002, Petchem submitted a claim for \$19,800 for the 11 guaranteed movements that were not ordered during the First Option Period (R4, tab 44). The contracting officer received the claim on 29 January 2002 (Stipulation). On 18 March 2002, the contracting officer denied this claim on the grounds that the guaranteed minimum was met and exceeded by the 80 movements performed in the First Option Period as extended through 10 August 2001 (R4, tab 48). Petchem timely appealed this decision, and that appeal is the subject of the present motions.

The government moves for summary judgment on substantially the same grounds as stated in the contracting officer's decision (gov't br. at 12, 17). Petchem in its opposition and cross motion argues that the guarantee of the 40 PTV movements for the First Option Period applied only to that period as defined in the contract from 11 August 2000 to 11 February 2001 (app. br. at 9-14). Petchem further argues that the purported extensions beyond 11 February 2001 were invalid because the 60-day notice required by the OPTION TO EXTEND THE TERM OF THE CONTRACT clause was not given (app. br. at 14-15).

We agree with Petchem as to the guarantee of 40 PTV movements during the First Option Period. Amendment 0002 to the solicitation specified that the 40-movement guarantee "shall be per period." The periods of performance designated in the contract were the "Firm Period" from 10 April to 10 August 2000 and the "First Option Period" from 11 August 2000 to 11 February 2001. In Modification P00001, the government

exercised the First Option Period as an option under the OPTION TO EXTEND SERVICES clause. That clause allowed multiple exercises of the option, but only to the extent that “the total extension of performance hereunder shall not exceed 6 months.” If the government had provided the 60-day notice required by the OPTION TO EXTEND THE TERM OF THE CONTRACT clause, it would have been entitled to multiple option exercises under that clause for a total contract duration of up to 60 months. By exercising the First Option Period for a total extension of six months under the OPTION TO EXTEND SERVICES clause, the government avoided the 60-day notice requirement, but it also precluded any further extensions under that clause. The purported exercises of options under the OPTION TO EXTEND SERVICES clause extending performance an additional six months after 11 February 2001 were invalid. The 51 PTV movements performed under protest after 11 February 2001 were not performed in the First Option Period and cannot be credited to the guaranteed minimum for that period.

Petchem’s complaint states that it is claiming \$28,200 for underpayment for 48 PTV movements during the period 12 February-10 August 2001 (compl., ¶¶ 11-16). Petchem’s brief on the motions for summary judgment states that it is entitled to the difference between \$2,500 and \$1,800 per movement for 51 PTV movements performed during that same period (app. br. at 15-16).<sup>\*</sup> These claims for PTV movements performed after 11 February 2001 are not the claim submitted by Petchem to the contracting officer on 28 January 2002, and are not within our jurisdiction to consider in the present appeal. In its answer to the complaint, the government has averred that: “the quantum at issue in this dispute is \$19,800.00” (answer. ¶ 16). The government’s answer on this point is in agreement with the 28 January 2002 claim that was submitted to the contracting officer and is the subject of this appeal (R4, tab 44).

Petchem’s motion for summary judgment is granted to the extent that it is entitled to damages for the government’s breach of the guarantee of 40 PTV movements during the first option period from 11 August 2000 to 11 February 2001, with interest pursuant to 41 U.S.C. § 611 from 29 January 2002. *See White v. Delta Construction International, Inc.*, 285 F.3d 1040, 1041 (Fed. Cir. 2002).

Dated: 2 February 2005

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MONROE E. FREEMAN, JR.  
Administrative Judge  
Armed Services Board

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<sup>\*</sup> We are unable to reconcile the amount claimed in the brief with the amount claimed in the complaint.

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of Contract Appeals

I concur

I concur

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

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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. 53792, Appeal of Petchem, Inc., rendered in conformance with the Board's Charter.

Dated:

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CATHERINE A. STANTON  
Recorder, Armed Services  
Board of Contract Appeals