

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Bridget Allen ) ASBCA No. 54696  
 )  
Under Contract No. DABJ35-03-P-0096 )

APPEARANCE FOR THE APPELLANT: Ms. Bridget Allen

APPEARANCES FOR THE GOVERNMENT: COL Karl M. Ellcessor, III, JA  
Chief Trial Attorney  
CPT Eugene Y. Kim, JA  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD  
PURSUANT TO RULE 12.3

This is an appeal from a final decision denying a claim for work said to have been performed outside the scope of the contract and said to be payable at a rate in excess of the contract hourly rate. The contracting officer found entitlement to \$7,117.50 but denied entitlement to about \$20,000. Appellant has elected to process the appeal under Rule 12.3, Accelerated Procedure. A two-day hearing was held at the Board's offices. The record in this appeal includes the transcript of that hearing, the government-submitted Rule 4 file, and documents accepted into evidence at the hearing. Both parties have filed briefs. We are to decide entitlement only.

FINDINGS OF FACT

On 5 March 2003, the U. S. Army Contracting Agency, Fort Myer, VA issued Solicitation No. DABJ35-03-T-0077, a small business set aside. The Statement of Work (SOW), which was included in the solicitation, described the government's requirements for performing functions of the Army Community Service (ACS) Employment Readiness Program. The schedule was for a quantity of 720 hours of work and unit price bids were sought at an hourly rate. (R4, tab 2 at 1, 3-4 of 16)

On 21 March 2003, Bridget Allen (Allen) telefaxed a bid in the amount of \$16 per hour for a total bid of \$11,520 to perform the work (*id.*, tab 3). After a telephone conversation with Maureen Hickey of the Fort Myer Contracting Center on 25 March 2003, Allen reduced her bid to \$15 per hour (R4, tab 4). Thus, on 28 March 2003, Contract No. DABJ35-03-P-0096 (the contract) was awarded to Allen in the total award

amount of \$10,800, which represented \$15 per hour for 720 hours for the performance period of 1 April 2003 to 31 December 2003. The contract included the identical SOW as had been included in the solicitation. (R4, tab 1)

The SOW incorporated AR 608-1, 1 October 1999, Army Community Service Center, which prescribed policies and procedures for establishing and operating an ACS center at Army installations (R4, tabs 1, 26). Section IV, Employment Readiness, outlined the employment assistance to be provided to eligible personnel to help them find public and private sector employment. In addition to providing resource information, ¶ 4-31, Job search assistance, provided as follows:

Classes, programs, workshops, seminars or individual sessions will be conducted or sponsored with the intent of strengthening individuals by imparting knowledge and/or teaching a skill. These will include-

a. *Employment and personal development training.*

Trainers and organizations will be identified who can offer workshops under sponsorship of the ACS center. Resources include local area colleges, local businesses and organizations, Federal Women's Program Managers, Small Business Association and the Red Cross "I CAN" trained personnel. Workshop topics will include:

- (1) Personal effectiveness training and confidence building.
- (2) Financial planning and employment decisions.
- (3) Skills and competencies building.
- (4) Career opportunities.
- (5) Building an educational/career plan.
- (6) Dressing for success.
- (7) Resume writing.

b. *Personal career development*

c. *Educational training classes.* Courses will be identified that can provide training classes for typing, word processing and other skills that are highly employable.

(R4, tab 26)

Other contract requirements were set forth in ¶ 3 of the SOW and pertinent ones are set forth below:

- 3.1 The contractor shall provide labor, management, materials, and other resources required but not elsewhere specified in

the contract as Government furnished which are necessary to provide the non-personal, professional social support, and accounting services outlined below.

3.2 The contractor works directly in support of the Employment Readiness Program, ACS. The contractor has responsibility for operating the comprehensive customer support activities of the Employment Readiness Program. Customers (clients) are active duty soldiers, federal civilian employees, family members, and others in accordance with published Standard Operating Procedures. In addition, the contractor will have knowledge of other ACS Programs and provide information on these programs to clients.

3.2.1 The contractor shall screen the clients, post vacancy announcements, maintain client files, and respond to phone inquiries, and provide information on ACS Program services.

3.2.2 The contractor will acquire and maintain client information sheets, and file in individual folders.

3.2.3 The contractor will acquire and maintain client resumes and/or intake sheets and file in folders.

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3.3 Personnel requirements:

3.3.1 The contractor will work twenty (20) hours per week.

3.4 Work Schedule

3.4.1 Contractor personnel must be available to work on a variable schedule starting not earlier than 0730 or 7:30 am and ending not later than 1630 or 4:30 PM, Monday through Friday. Specific hours and days of operation will be determined by the ERP Manager, on the basis of client needs, and provided to the contractor by the contracting officer representative (COR[]). No federal holidays will be worked.

3.4.2 Excused absences . . . must be arranged in advance between the contractor and the COR. . . . There will be no compensation for these absences nor for travel time to and from the worksite(s).

3.5 Skills and experience required:

3.5.1 The contractor's proposed personnel must have, at least minimum, a high school diploma or equivalent, with two or more years of applicable experience.

3.5.2 All contractor personnel must have a knowledge of military family life.

3.5.3 All contractor personnel must have demonstrable skill in oral and written communication.

(R4, tab 1) Based upon the SOW and 608-1, we find that providing courses and resume assistance was cognizable under appellant's contract.

The contract incorporated by reference FAR 52.212-4, CONTRACT TERMS AND CONDITIONS-COMMERCIAL ITEMS (FEB 2002), FAR 52.233-1, DISPUTES (JUL 2002) and FAR 52.243-1, CHANGES-FIXED PRICE (AUG 1987) (R4, tab 1 at 5 of 16). The Changes clause provided that the contracting officer could, by written order, make changes in the services to be provided, the time of performance and the place of performance of the services and if such changes caused an increase or a decrease in the cost of or time of performance, an equitable adjustment is required to be made. The Contract Terms and Conditions clause provided among other things, that changes in the terms and conditions of the contract could only be made by written agreement of the parties.

Shortly after work commenced on 1 April 2003, Patti Wells (Wells), ERP manager at Fort Myer, asked Allen if she would be willing to perform her duties at the Fort Myer satellite office at the Pentagon, and Allen consented (tr. 219). Block 15 of SF 1449 of the contract provided that services were to be delivered to Patti Wells in Building 414 at Fort Myer, but was otherwise was silent as to the place of performance (R4, tab 1 at 1 of 16).

In June 2003, Wells, with Allen's consent, submitted a request through Acquiline (an electronic internet based system) to the Chief of the Contracts Division at Fort Myer to extend Allen's performance period from 31 December 2003 to 31 March 2004 and to increase the hours to be worked per week to 30. (R4, tab 8; tr. 127, 220) All other provisions of the contract would have remained the same (tr. 221).

In September 2003, Wells was to begin a three-month residency course at Fort Belvoir, Virginia, and prior to departing, asked Allen to change her contract performance location from the Pentagon to the Fort Myer ACS center (tr. 223). When she left for her course, Wells was under the mistaken assumption that her request to extend the performance period and expand the hours to be worked per week for the contract, had been approved, when, in fact, it had not (tr. 220-21). Allen also believed the contract to have been extended and expanded because she worked and billed for additional hours at the contract rate of \$15 per hour (R4, tab 5).

During September to December, while Wells was away, Allen assisted certain employees from Ft. Myer Department of Public Works who were in jeopardy of losing their jobs due to a possible reduction in force resulting from an A-76 initiative. Allen and Kimico Harley, a temporary worker at ACS, assisted several of those employees in preparing resumes and providing one or more courses on resume writing (tr. 126-27). Allen performed those functions without any contemporaneous complaint that they were in any way outside the scope of her contract (tr. 142). She presented no credible evidence that anyone, let alone anyone with authority, directed her to perform this alleged out of scope work, testifying that she received no written permission from ACS or from Fort Myer Directorate of Contracting to write resumes for ACS clients (tr. 147). She also presented no credible evidence that the cost of performance was increased as a result of the purported changes to her contract. We find no evidence of fraud or bad faith on the part of any government employee.

On 27 January 2004, Allen submitted what she termed a certified claim for \$7,117.50. Portions of the amount claimed were for invoices previously submitted and portions were for invoices she had not yet submitted. Defense Finance and Accounting Service (DFAS) had refused to pay invoices because the purported modification of the contract had not been approved and thus no funds remained under the original contract with which to pay the invoices. (R4, tab 5)

The contracting officer treated the claim as a request for approval of an unauthorized commitment (R4, tab 8), decided to pay Allen the entire amount claimed (\$7,117.50) and submitted a contract modification to that effect to her for signature (R4, tab 14).<sup>\*</sup> Prior to that event, however, Allen had submitted a new claim dated 22 April 2004, which sought to recover \$27,000 for writing federal resumes for approximately 28 employees, and providing classes/workshops for approximately 300 employees, such services she contended were not part of her SOW. Further, Allen contended that she received oral instructions from Wells and from Collen Tuddenham (Wells' supervisor)

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<sup>\*</sup> Allen has been paid a total of \$17,917.50, which is the original contract amount (\$10,800) and the initial amount claimed (\$7,117.50) (R4, tab 23; tr. 142-43).

(Tuddenham) to perform these additional services. (R4, tab 17, *see also* tab 9) Wells denies such instructions (tr. 2/223), and Tuddenham testified that she and Allen never discussed Allen's contract performance during the period April to December 2003 (tr. 2/162).

The claim is as follows:

1. Federal Resume preparation	\$11,200
2. Class/seminar development	\$3,025
- How to Write a Resume (Federal and Civilian)	
- How to Use Resumix	
- How to Start Your Own Business	
3. Material Preparation/Samples	\$4,025
4 Classes and seminars	\$8,750
(approx. 20 hours of class time at \$3,500 per eight hours)	
Total	<hr/> \$27,000

Wells testified that assisting with resumes was part of the function of the Employment Readiness Program at ACS (tr. 2/219). Allen testified that she went further than assisting in writing resumes with respect to the 28 employees, but that she actually wrote the resumes based upon information they supplied (tr. 126-27). Kimico Harley also testified that she assisted Allen in preparing and typing those resumes (tr. 2/24-25). Only one witness for appellant testified that his resume was fully prepared by Allen (tr. 48). Two other witnesses for Allen testified that she assisted them with resumes (tr. 2/63, 103-04). Another testified that Allen assisted her but that her resume was never completed (tr. 95).

#### Preliminary Matters

In her complaint, which was attached to the notice of appeal, Allen claims racial discrimination as a basis for recovery under 42 U.S.C. § 1981(a) and § 1981(b). She wanted to show that the administration of her contract was different than the administration of a contract in the same office with Zue Walters. Walters is apparently Caucasian and Allen is African-American. The hearing judge excluded evidence of discrimination at trial as irrelevant, and while he allowed some limited discovery in that area, further post-trial discovery of the contents of Zue Walters' contracts was not compelled.

Walters was on the government's witness list but not on appellant's. During the trial, government counsel advised that he did not need Walters and had excused her. Allen asked that we compel the government to make her available. The hearing judge declined to do so because her testimony was irrelevant to the issues, she was not on appellant's witness list and she was not a government employee under control of government counsel.

We have consistently held that we have no jurisdiction over claims based upon racial discrimination in violation of statute. *Starghill Alternative Energy Corp.*, ASBCA Nos. 49612, 49732, 98-1 BCA ¶ 29,708 at 147,232 (“[W]e have no jurisdiction over claims based upon the due process and equal protection guarantees of the Fifth Amendment or racial discrimination in violation of statute.”); *Orlando Williams, d/b/a Orlando Williams Janitorial Service*, ASBCA Nos. 26099, 26872, 84-1 BCA ¶ 16,983 (Claims based on allegations of racial discrimination dismissed because Board has no jurisdiction over claims based upon due process and equal protection guarantees of the Fifth Amendment or on racial discrimination in violation of a statute.) The issue in this appeal is whether Allen was directed by an authorized person to perform work outside her contract and whether performance of such extra-contractual work caused an increase or a decrease in the cost of performing the contract. Neither the contents of Walters' contracts, nor testimony with respect to how they were administered was likely to prove whether extra work was performed or whether such extra work caused the costs to increase or decrease. Therefore, we properly excluded such evidence.

### DECISION

Appellant has not proved that there was a compensable change to the contract or that there was a breach of contract. Assistance with resumes was part of the contract work. To the extent that writing resumes is somehow different from assisting with resumes, no one with authority asked appellant to write resumes. Similarly, providing employment related coursework was included under AR 608-1 that was incorporated into appellant's contract, and appellant was thus required to conduct such coursework as necessary.

Finally, appellant has been paid the contract amount for all of the hours she worked and has failed to show the cost of performance was increased as a result of the purported changes to her contract.

The appeal is denied.

Dated: 1 February 2005

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RICHARD SHACKLEFORD  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

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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. 54696, Appeal of Bridget Allen, rendered in conformance with the Board's Charter.

Dated:

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