

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Business Management Research Associates, Inc.) ASBCA No. 55309
)
Under Contract No. HHS-100-00-0014)

APPEARANCE FOR THE APPELLANT: Douglas E. McKinley, Esq.
McKinley & Bornmann, PLC
Alexandria, VA

APPEARANCE FOR THE GOVERNMENT: Douglas W. Kornreich, Esq.
Attorney-Advisor
U.S. Department of Health and
Human Services
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE TUNKS
ON GOVERNMENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

Business Management Research Associates, Inc. (BMRA) seeks \$21,520 as a result of an alleged constructive change to a contract to provide procurement training for Department of Health and Human Services (DHHS) personnel. DHHS moves to dismiss arguing that the claim is based on promissory estoppel, which may not be applied against the government. BMRA opposes dismissal arguing that DHHS had a pattern of issuing verbal/constructive change orders during the contract, and issuing contract modifications after performance and payment. As a result, BMRA alleges that its claim falls within the constructive changes doctrine.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

On 11 September 2000, DHHS awarded the subject firm fixed price task order type contract to BMRA. The contract contained four option years. DHHS exercised all four options years, which extended the contract period through 10 September 2005. (R4, tab 2)

After completion of a pilot program, BMRA alleges that DHHS' then acting deputy director constructively added a requirement to provide online courses for approximately 200 students in fiscal year (FY) 04 and approximately 600 students in FY 05. Allegedly with DHHS' knowledge, BMRA entered into a licensing agreement in the amount of \$15,000 for the first year and \$20,000 for the second year on 27 August

2003 for the necessary technology. On 18 May 2004, the parties entered into bilateral Modification No. P00005, adding six sessions of online training for 25 students per session during each of FY 04 and FY 05 (R4, tab 2). Subsequently at DHHS' request, BMRA allegedly restructured its program at a cost of \$1,520. On 4 August 2004, DHHS advised BMRA via telephone that it did not plan to go forward with the online program in the Fall of 2004 and Spring of 2005 (R4, tab 3). BMRA submitted a request for an equitable adjustment in the amount of \$21,520 to the contracting officer on 23 August 2005, which was denied on 27 October 2005 (R4, tab 1). On 5 January 2006, BMRA appealed the contracting officer's decision to this Board.

Pursuant to section 602(a) of the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, agency boards of contract appeals have jurisdiction over "any express or implied contract . . . entered into by an executive agency" for various purposes including the procurement of services. 41 U.S.C. § 602(a). The subject of this appeal relates to an express contract for services between DHHS and BMRA, and DHHS is an executive agency. 5 U.S.C. § 101. Thus, we have jurisdiction over the appeal. Whether DHHS' actions fall within the doctrine of promissory estoppel or rise to the level of a constructive change is properly decided on the merits.

DHHS' motion to dismiss for lack of jurisdiction is denied.

Dated: 4 April 2007

ELIZABETH A. TUNKS
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. 55309, Appeal of Business Management Research Associates, Inc., rendered in conformance with the Board's Charter.

Dated:

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