

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Service Rodriguez Barragan, S.L.) ASBCA No. 54622
)
Under Contract No. N68171-98-C-4003)

APPEARANCE FOR THE APPELLANT: Ms. Dolores Rodriguez Barragan
Manager

APPEARANCES FOR THE GOVERNMENT: Thomas N. Ledvina, Esq.
Navy Chief Trial Attorney
Gregory J. Mullins, Esq.
Trial Attorney
Fleet & Industrial Supply Center,
Sigonella

OPINION BY ADMINISTRATIVE JUDGE PAUL
PURSUANT TO BOARD RULE 11

This is a timely appeal of a contracting officer's decision denying appellant Service Rodriguez Barragan, S.L.'s (Barragan) claim in the amount of €25,000 for purportedly increased costs incurred while performing a contract for school bus safety monitors at the U.S. Naval Station, Rota, Spain. In a decision issued on 16 February 2006, 06-1 BCA ¶ 33,214, the Board denied the government's motion for summary judgment. Familiarity with that decision is presumed.¹ The parties subsequently decided to submit the appeal on the record pursuant to Board Rule 11, and each of them provided supporting briefing materials. The appeal is subject to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613. Only issues of entitlement are before us for decision.

FINDINGS OF FACT

1. The Navy awarded Contract No. N68171-98-C-4003 to Barragan on 19 September 1997 in a fixed-price amount of \$160,127.23 to provide safety attendant services for school buses at the Department of Defense schools, Navy Station, Rota, Spain (R4, tab B at 001, 014-017). The base year of the contract extended from

¹ Administrative Judge Edward G. Ketchen, who authored the summary judgment decision and who presided over the Rule 11 briefing of this appeal, has retired. James Paris, Esq. has replaced Mr. Mullins as government trial counsel since the appeal was briefed.

1 October 1997 to 30 September 1998. The Navy exercised four contractual one-year options, and Barragan performed through the fourth option year which ended on 30 September 2002. (R4, tab B at 003, 068-069, 086-087, 094, 100)

2. The contract's Statement of Work provided, in pertinent part:

C-1.1 – SAFETY ATTENDANT

Contractor shall provide services specified in the schedule for Safety Attendant Services, Naval Station, Rota, Spain for the below listed daily round-trips (Round-Trip = Pickup at sites and delivery to school in the morning; and pickup at the school and delivery to original sites in the afternoon.) :

....

One (1) Safety Attendant shall be on each of the above round-trip daily bus runs.

....

All Safety Attendants shall report to the Rota or Fuentebravia gates each morning as provided by the schedule submitted by the Contracting Officer or COR [Contracting Officer's Representative]. Safety attendants will be released at the same gates each afternoon.

....

C – 1.1.2 – SAFETY ATTENDANT WORK STATEMENT

In order to ensure the safety of students while boarding, leaving and traveling on school buses, contractor personnel shall:

- (a) Board assigned bus no later than the first stop on the route and remain with the bus until the last student has departed.

....

Note: The Government does not provide transportation services for the Safety Attendants to get to work or return (home) from work.

C – 1.1.3 – BUS/LUNCH CAPTAIN SERVICES

One (1) Bus/Lunch Captain shall maintain the list of Service [sic] Attendants, assign bus routes, and call substitutes, when required. This person(s) shall train Service [sic] Attendant and Lunch Monitors ... and will be familiar with all the routes and stops.

....

The Bus Captain shall take instructions and guidance regarding the contract and service provided thereunder from the Contracting Officer or the COR.

(R4, tab B at 014-017)

3. The contract contained FAR 52.212-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (OCT 1995) which provided, in part: “Changes in the terms and conditions of this contract may be made only by written agreement of the parties” (R4, tab B at 020).

4. The contract also contained the CONTRACT ADMINISTRATION APPOINTMENTS AND DUTIES (OCT 1995) (NAVSUP) clause, which stated, in pertinent part:

In order to expedite administration of this contract, the following delineation of duties is provided The individual/position designated as having responsibility should be contacted for any questions, clarifications or information regarding the functions assigned.

1. PROCURING CONTRACTING OFFICER (PCO) is responsible for:

....

c. Change/question//information regarding the scope, terms or conditions of the basic contract document;

....

3. CONTRACTING OFFICER'S REPRESENTATIVE (COR)

(a) Definition: Contracting Officer's Representative means an individual designated in accordance with subsection 201.602-2 of the Defense Federal Acquisition Regulation Supplement and authorized in writing by the contracting officer to perform specific technical or administrative functions.

(b) If the Contracting Officer designates a Contracting Officer's Representative (COR), the Contractor will receive a copy of the written designation. It will specify the extent of the COR's authority to act on behalf of the contracting officer. The COR is not authorized to make any commitments or changes that will affect price, quality, quantity, delivery, or any other term or condition of the contract.

(R4, tab B at 030-031)

5. Reading the various contractual provisions harmoniously – as we must – several facts become clear regarding the assigned responsibilities for transporting the safety attendants from one location to another. First, it was not the affirmative responsibility of either contractual party to provide transportation for the “Safety Attendants to get to work or return (home) from work.” Moreover, it was the responsibility of the safety attendants themselves to “report to the Rota or Fuentebravia gates each morning” and to be “released at the same gates each afternoon.” Finally, it was the contractor's responsibility to insure that each safety attendant boarded each bus at or before the “first stop on the route and remain[ed] with the bus until the last student has departed.” (Finding 2) The contract was totally silent regarding which party was responsible for insuring that the attendants were transported either from the gates to their first stops in the morning or from their last stops to the gates at the end of the workday. Despite this obvious fact, there is no record evidence demonstrating that Barragan made any inquiries regarding this issue prior to contractual award.

6. Barragan's performance under the contract ended on 30 September 2002, as provided in Modification No. (Mod. No.) P00018 (R4, tab B at 100). Effective 3 June 2002, the Navy had issued Solicitation No. N68171-02-R-0032 for the follow-on contract to Barragan's contract (R4, tab N). In all respects material to this appeal, the solicitation

format, pricing structure, options, terms, conditions and clauses were the same as those contained in the solicitation for the instant contract (R4, tabs B, N, *passim*). Barragan was one of the offerors responding to the new solicitation (R4, tab C at 3). But, on 21 August 2002, the Navy awarded Contract No. N68171-02-C-4035 to Remora Serv, S.L., in a total amount of \$133,857.27 for the base period of 1 October 2002 through 30 September 2003 (R4, tab N).

7. On 29 October 2002, the CO signed Mod. No. P00002 to Contract No. N68171-02-C-4035 which effectively placed on the contractor the responsibility of ensuring that the safety attendants were transported from the gates to their first stops in the morning and from their last stops to the gates in the evening. As a result of this modification, the contractual price was raised by €44,795.66 for the contract's base year. (R4, tab P, Mod. No. P00002)

8. Learning of this modification, Barragan forwarded a letter to the CO on 13 November 2002. It stated that it had suffered "unfair disqualification" in the award of the follow-on contract. Barragan also wrote:

Since the beginning of our term serving the Rota schools, Mr. Stanley, Chief of Transportation, as well as Mr. Williamson, School Officer and my COR at the time, informed us of our responsibility to provide transportation for our own staff as needed to support Rota's operation, but that we will not be allowed to use the school's government vehicle with that intention. There was never, in my five year contract, any additional allowance to budget contractor's personnel transportation, nor was an item description ever included in the breakdown bid sheets or contract modification, so we assumed the cost and even invested in a brand new seven passenger van and the use of two more vehicles to serve that purpose.

(R4, tab C at 63)

9. In a sworn affidavit given on 6 July 2006, almost a decade after this meeting allegedly took place, Mr. Stanley stated:

I do not recall a meeting with Senior Chief Williamson and Ms. Barragan in which she was told that it was her responsibility to get her bus monitors to the places where they boarded the school buses. I do not recall having any discussion with Ms. Barragan about how she would get her

bus monitors to the base gates, the ... school, or to the beginning of the school bus routes.

(R4, tab I at 2-3) There is no record evidence demonstrating that Mr. Stanley possessed contractual authority.

10. In a sworn affidavit given on 2 July 2006, almost a decade after this meeting allegedly took place, then Command Master Chief Eric R. Williamson, who was the COR for approximately a year on the Barragan contract, stated:

I and Transportation Officer James Stanley met with Ms. Barragan very soon after Contract No. N68171-98-C-4003 was awarded. One or two bus monitors were the only others present at the meeting. Among the matters we discussed, Ms. Barragan inquired how she was to get her bus monitors from the base gates to the school bus departure point on school mornings. Subsequently I discussed this matter with Mr. Stanley and also talked to a contracting officer (I do not remember his name). The contracting officer told me that we could do only what was in the contract, and unless it was stated in the contract, we could not do it. We concurred that the contract did not require the government to transport bus monitors to the school buses, so it was the contractor's responsibility. There was never any mention or consideration of a change or modification to the contract.

(R4, tab H at 1-2) As COR, Chief Williamson lacked contractual authority to bind the government (finding 4).

11. The CO who was responsible for award of the Barragan contract was Mr. Christopher G. Henschel. In a sworn affidavit given on 6 July 2006, he stated:

I never learned of the conversation between the COR and Ms. Barragan about bus monitor transportation while I was responsible for Contract No. N68171-98-C-4003. I was not even aware of the problem, if there was one. I do not recall talking to the COR about the subject of transporting bus monitors. It is possible that I was the contracting officer that the COR says he talked to, but I do not remember it. I did not authorize him to talk to the contractor about this subject and I had no knowledge that he was doing so.

(R4, tab J at 3)

12. Mr. Henschel's successor as CO was Ms. Kathleen Lockhart. In a sworn affidavit which she gave on 6 July 2006, Ms. Lockhart stated:

Never during the term of Contract No. N68171-98-C-4003 did Ms. Barragan inform the government that she considered there had been any change in her contract. Never during the term of Contract No. N68171-98-C-4003 did Ms. Barragan inform the government that she incurred any expense outside of, or additional to, what was already covered by the offer and contract prices. I am not aware of any change in the terms, requirements, conditions, or circumstances of Contract No. N68171-98-C-4003 that would have supported Ms. Barragan's claim. This contract did not change in any of these respects from the time she made an offer for the solicitation until the contract was completed.

(R4, tab K at 4-5)

13. On 14 November 2002, the CO responded to Barragan's letter of 13 November 2002. She denied that either the Navy or the follow-on contractor had engaged in any wrongdoing (R4, tab C at 65).

14. In a letter of 5 December 2002, Barragan's attorney, Mr. Sotelo, contended that his client had incurred damages as a result of its transporting safety monitors. Mr. Sotelo stated:

The problem arose in the beginning of abovementioned contract, when the U.S. Government's representatives informed my client that she was responsible for providing transport to their personnel from the place where the service with minors finished to the place where this service started or to the Naval Base gates. However, this responsibility was not included in abovementioned bidding conditions so that because of that interpretation made by the Government's representatives, my client was obliged to provide those unplanned services without any economic compensation, which have [sic] caused important damages to my client in those five years.

Mr. Sotelo concluded his letter by stating that Barragan had been damaged in the amount of €240,000 (R4, tab C at 59-60). On 10 May 2003, Mr. Sotelo filed a certified claim, with supporting documentation, in a revised amount of €225,000 (R4, tab C at 26-54).²

15. The CO returned this claim to Barragan on 25 June 2003 because all of the supporting documentation was in untranslated Spanish (R4, tab C at 26). On 21 July 2003, Barragan filed a certified claim in English to the CO, once again seeking €225,000 in damages (R4, tab C at 21-24).

16. On 25 February 2004, the then CO, Mr. Jon G. Wester, issued a final decision denying Barragan's claim in its entirety (R4, tab C at 19-20). He stated:

Neither Mr. Stanley nor Mr. Williamson had any authority to modify the 4003 contract. There is no evidence that Mr. Stanley was delegated any power to bind the Government. Regarding Mr. Williamson, who was appointed the COR during the first year of the contract, his authority was strictly limited ... [and] he was not authorized to make any commitments or changes that would affect the price or any term or condition of the contract.

(R4, tab C at 19-20) This appeal followed.

DECISION

Initially, we deal with the threshold issue of ambiguity. The contract was specific about the parties' responsibilities for transporting safety monitors from one location to another with one exception. It was totally silent regarding which party was responsible for insuring that the attendants were transported either from the gates to their first stops in the morning or from their last stops to the gates at the end of the workday (findings 2, 5). Such an obvious omission constituted a patent ambiguity and placed on Barragan the burden to seek clarification of its rights and obligations before bidding. *Interstate General Government Contractors, Inc. v. Stone*, 980 F.2d 1433, 1435 (Fed. Cir. 1992), Barragan did not make such an inquiry and cannot now benefit from its inaction.³

² Effective 1 January 2002, Contract Modification No. P00019 substituted the Euro for the dollar to reflect ordering amounts (R4, tab B at 104-106).

³ It is axiomatic that the Board lacks jurisdiction to review any of Barragan's allegations that may constitute a bid protest. *Coastal Corp. v. United States*, 713 F.2d 728, 730-731 (Fed. Cir. 1983).

We also reject Barragan’s apparent contention that the contract was modified by authorized government officials so as to require it to provide the transportation services at issue here. First, the Board notes that Barragan bears the burden of establishing that the officials with whom it dealt in this regard had actual authority to bind the government. *See, e.g., Federal Crop Insurance v. Merrill*, 332 U.S. 380, 383 (1947). Barragan has not met this burden. Neither of the government officials with whom appellant allegedly met – Mr. Stanley and Chief Williamson – possessed authority to modify the contract (findings 4, 9, 10). Moreover, Barragan has failed to demonstrate that either of the responsible CO’s – Mr. Henschel and Ms. Lockhart – ratified any representations which might have been made by either Chief Williamson or Mr. Stanley (findings 11, 12). Accordingly, Barragan’s claim must fail in its entirety.

CONCLUSION

The appeal is denied.

Dated: 13 March 2008

MICHAEL T. PAUL
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. 54622, Appeal of Service Rodriguez Barragan, S.L., rendered in conformance with the Board's Charter.

Dated:

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