

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of –)
)
Tzell Airtrak Travel Group Corporation) ASBCA No. 57313
)
Under Contract No. W91QUZ-07-D-0020)
Task Order No. 0001)

APPEARANCE FOR THE APPELLANT: Josephine L. Ursini, Esq.
Williamsburg, VA

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
CPT Bernal Rodriguez, JA
Erica S. Beardsley, Esq.
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE TUNKS
ON THE GOVERNMENT’S MOTION FOR SUMMARY JUDGMENT

Tzell Airtrak Travel Group Corporation (TATGC) appeals the termination for cause of a task order under a master contract for Worldwide Commercial Travel Office (CTO) services issued by the Department of the Army on behalf of the Department of Defense (DoD). The government moves for summary judgment on the ground of anticipatory repudiation. TATGC opposes the motion, alleging that its default is discharged by the government’s intentional misrepresentation of the quantity and nature of the work and alleging that there are material facts in dispute. TATGC makes other arguments which we find it unnecessary to address. We deny the government’s motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 4 August 2006, DoD, through the Army Contracting Agency-Information Technology, E-Commerce and Commercial Contracting Center (government) issued master request for proposals (RFP) No. W91QUZ-06-R-0051 (RFP 51) for a multiple award, indefinite-delivery/indefinite-quantity (ID/IQ), commercial items contract for CTO services.¹ The RFP called for the successful offeror to make travel reservations

¹ Master request for proposals (RFP) No. W91QUZ-06-R-0051 was submitted at the Board’s request on or about 18 May 2011. In order to avoid confusion, it has been added to the Rule 4 file as tab 147.

(called “transactions”) for authorized DoD personnel in 11 Defense Travel Areas (DTAs) (R4, tab 1 at 222; app. resp., tab A at 109). Defense Travel System (DTS) transactions were automated while Commercial Travel Office (CTO) Assist transactions were to be performed with the assistance of contractor personnel (R4, tab 147 at 1, 3, 26, 42, 68 of 74; app. resp., tab A at 4 of 9). At the time the RFP was issued, DoD was in the process of converting from the CTO Assist system to the DTS system (app. resp., tab A at 4 of 9). Task orders for each DTA were to be competed among eligible awardees. Compensation was to be based on fixed unit prices in accordance with FAR Subpart 16.5 INDEFINITE-DELIVERY CONTRACTS. (R4, tab 147 at 35, 45 of 74)

2. The master RFP incorporated the following clauses by reference:

FAR 52.212-4, CONTRACT TERMS AND CONDITIONS—
COMMERCIAL ITEMS (SEP 2005)

....

(c) Changes. Changes in the terms and conditions of this contract may be made only by written agreement of the parties.

....

(f) Excusable delays. The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers....

....

(m) Termination for cause. The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor.... If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

FAR 52.243-1, CHANGES—FIXED-PRICE (AUG 1987)
[ALTERNATE I (APR 1984)]^[2]

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

- (1) Description of services to be performed.
- (2) Time of performance (i.e., hours of the day, days of the week, etc.).
- (3) Place of performance of the services.

....

(b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract...the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.

(R4, tab 147 at 26 of 74)

3. Paragraph 14 of the pricing instructions in the master RFP provided as follows:

The percentage of estimated DTS transactions and CTO Assist transactions...is shown below. These percentages are provided to assist the Offeror in developing its pricing. The Offeror can expect to charge fees as follows:

- a. Base Year 1 – The awardee shall charge the Air/Rail CTO Assist transaction fee for 100% of the transactions during Base Year 1 regardless of the type of transaction used (DTS or CTS Assist).

² It appears that ALTERNATE I (APR 1984) should have been included as well.
See FAR 43.205(a) (2).

- b. Base Year 2 – The awardee can expect 90% of the transactions to be Air/Rail CTO Assist transaction fee charges and 10% of the transactions to be DTS transaction fee charges.
- c. Option Years 1-3 – The awardee can expect 50% of the transactions to be Air/Rail CTO Assist transaction fee charges and 50% of the transactions to be DTS transaction fee charges.

(R4, tab 147 at 38 of 74)

4. Paragraph 15 of the pricing instructions in the master RFP set forth a special equitable adjustment clause (special clause) which provided, in part, as follows:

Equitable Adjustment. A request for equitable adjustment may be made based on the following:

- a. Annual Equitable Adjustment. In the event there are variations in the total number of estimated transactions and/or the variations between the percentage of estimated DTS Transactions and Air/Rail CTO Assist Transactions, an annual equitable adjustment may be requested.
 - i. If after Base Year 1, and/or each subsequent contract year after, an annual equitable adjustment is required based on variations in the total number of estimated transactions or variations between the percentage of estimated DTS Transactions and Air/Rail CTO Assist Transactions, the Contractor or the Government can request an annual equitable adjustment.
 - ii. The annual equitable adjustment shall not be retroactive, but through a bilateral modification, the annual equitable adjustment shall become effective at the beginning of Base Year 2 or any option period as applicable.

(R4, tab 147 at 38-39 of 74)

5. In response to RFP 51, the government awarded master Contract No. W91QUZ-07-D-0020 to eight contractors, including TATGC, on 19 September 2007 (R4, tab 1). The master contract included the provisions in the RFP described in SOF ¶¶ 1-2, 4, but with revisions. The master RFP provided for an equitable adjustment for variations in the “total” number of estimated transactions and/or variations between the percentage of estimated DTS transactions and CTO Assist transactions. The special clause in the master contract limited compensable variations to “+/- 10%.” (R4, tab 1 at 277; R4, tab 147 at 38-39 of 74) The master contract established the following periods of performance:

Contract Year	CLINS	Period of Performance
Base Year 1	0001-0024	20 September 2007 - 19 September 2008
Base Year 2	0025-0047	20 September 2008 - 19 September 2009
Option Period 1	1001-1023	20 September 2009 - 19 September 2010
Option Period 2	2001-2023	20 September 2010 - 19 September 2011
Option Period 3	3001-3023	20 September 2011 - 19 September 2012

(R4, tab 1, ¶ A.4)

6. On 4 February 2008, the government issued RFP No. W91QUZ-08-R-0016 (RFP 16) for a task order for Europe (DTA 7) (R4, tab 148).³

7. Paragraph 1.2.2. of RFP 16 provided, in part, as follows:

The contractor shall maintain records of all official travel arrangements made pursuant to this task order. All documents used to process official travel are the property of the Government and shall remain with the Government at the expiration of the contract.

(R4, tab 148, subtab 1 at 4 of 41)

8. Award of the task order was delayed by a series of amendments to the RFP and bid protests (R4, tab 5; app. resp., tab A at 2-3 of 9). TATGC filed two preaward bid protests with the General Accountability Office (GAO) in April 2009, challenging Amendment Nos. A0008 and A0009 as out-of-scope. The amendments estimated that there would be a 10/90 DTS to CTO Assist mix for the base year of the TO (R4, tab 148, subtabs 35, 39). TATGC challenged the mix on the grounds that it was inconsistent with

³ At the Board’s request, the government submitted a copy of RFP 16 on 8 August 2011. RFP 16 has been added to the Rule 4 file as tab 148.

paragraph 14 of the master RFP, which provided for 100 percent CTO Assist for the base year (R4, tab 147 at 38 of 74). TATGC also challenged some reporting requirements not relevant here. In response, the government explained that the first base year of the TO was expected to correspond to base year 2 of the master contract which provided for a 10/90 mix. TATGC withdrew its protests on 2 June 2009. (See 26 pages of protest material provided to the Board and the government by TATGC on or about 1 April 2011)

9. Amendment No. A0014 to RFP 16 (Amendment 14), issued in 2009, required offerors to submit separate pricing that would apply only if the DTA 7 task order was awarded on or after 19 September 2009 (as proved to be the case). Amendment 14 stated that in this case, base years 1 and 2 and option year 1 of the task order would correspond to option years 1 through 3 of the master contract and that “the DTS/CTO Assist ratios will adjust accordingly.” (R4, tab 148, subtab 44 at 10 of 67) Those ratios were 50/50 (SOF ¶ 3). Amendment No. A0015 revised the period of performance from base years 1 and 2 and option year 1 to a base year and option years 1 and 2 (R4, tab 148, subtab 44 at 10 of 67). Under date of 21 August 2009, TATGC submitted a revised proposal (R4, tab 2 at 5). Based on the 50/50 mix indicated in RFP 16 as amended, TATGC planned to use 72 full-time employees to perform the work (R4, tab 33 at 3).

10. On 5 February 2010, the government notified TATGC that it had been selected for award of the DTA 7 task order, designated Task Order No. 0001 under the master contract, and that the CO would sign the task order on 8 February 2010 following receipt of an executed copy from TATGC (R4, tab 3 at 1 of 1). On that same day, TATGC accepted the task order, but asked that the CO confirm, before executing the task order, whether there would be zero DTS transactions or a 50/50 mix during the base period. On 17 February 2010, the CO responded: “50/50% ratio for DTS and Agent [CTO] Assist” is correct (R4, tab 9 at 3).

11. The amount of Task Order No. 0001 was \$2,432,378 for the base year (R4, tab 2). DTS transactions were priced at \$5.21 per transaction and CTO Assist transactions were priced at \$18.25 per transaction. Schedule B indicated that there would be 96,533 DTS transactions and 96,533 CTO Assist transactions during the base year. The task order stated that all provisions of the master contract were applicable and that there would be a 90-day transition period during which no payment would be made. (*Id.* at 4, 36-37, 77 of 79) The performance periods for the task order were as follows:

Base Year	5 February 2010 through 4 February 2011
Option Year 1	5 February 2011 through 4 February 2012
Option year 2	5 February 2012 through 4 February 2013

(R4, tab 2 at 4 of 79)

12. On 18 March 2010, TATGC advised the contracting officer (CO) that the estimates in the task order were inaccurate:

[I]n the Feb 5, 2010 contract, there is stated to be a mix of 50% CTO Assist and 50% DTS transactions. As you know, we have an implementation team visiting all locations in Europe. [W]hat we have learned from those visits is that DTS does not work very well in Europe. Indeed, some locations have zero DTS transactions. If anything, the mix is closer to 10% DTS and 90% CTO Assist.... This lack of automated tickets thru DTS [will] certainly warrant more staff than we expected....

(R4, tab 29 at 1 of 3)

13. On 22 March 2010, TATGC submitted a certified request for an equitable adjustment (REA) in the amount of \$1,080,000 in order to hire 20 additional full-time employees to handle the unexpected number of CTO Assist transactions. The REA stated, in part, as follows:

[O]ur site visits to the DTA 7 location indicates that DTS is not being used to the extent represented in the contract. Actual usage of DTS is closer to 5% to 10% DTS and 90% CTO Assist. Our visits also reveal that some of the locations in DTA 7 have virtually no DTS usage, e.g. 4 DTS transactions in six months.

TATGC also requested a wage determination adjustment, not in issue here (R4, tab 33 at 2-4).

14. By final decision dated 4 May 2010, Mr. Darryl Barnes, the CO, denied the REA:

[The special clause] clearly provides that...the clause is prospective based upon the transactions that have occurred under the DTA 7 task order.... Furthermore, the clause is very clear [that] “[t]he annual equitable adjustment shall become effective through a bilateral modification at the beginning of Base Year 2 or any option period thereafter as applicable.”

Consequently, [the task order] does not provide for an equitable adjustment before services commence.

(R4, tab 52 at 4) The CO also asserted that the increased revenue generated by CTO Assist transactions (\$18.25 compared to \$5.21 for DTS transactions) would more than pay the cost of 20 additional employees.

15. The Notice to Proceed was issued on 31 May 2010 (R4, tab 12 at 3). TATGC began work on 1 June 2010 at most Army locations and on 1 July 2010 at Air Force locations (compl. ¶ 17).

16. On 9 July 2010, TATGC submitted a “Notice of Proposed Cessation of Services effective July 31, 2010” (Notice) which stated, in part, as follows:

Our data from the first 40 days of performance shows conclusively that the percentage of DTS transactions is less than 5%-- not the 50% that was stated in the RFP....

....

Given the clear transaction data[,] TATGC demands that either the Government agree to modify the contract to change to the [10/90] mix, and to add the requested additional staff at the prices provided for in the contract, or TATGC will be forced to cease performance as of July 31st.

(R4, tab 108 at 2, 6)

17. On 12 July 2010, the government requested the data from the first 40 days of performance referenced in TATGC’s 9 July 2009 Notice (R4, tab 112).

18. TATGC e-mailed the data to the government on 13 July 2010. The data indicated that TATGC had processed a total of 22,957 transactions during the first 40 days of performance. Less than 1 percent (211 divided by 22,957) of the total transactions were DTS transactions and 99.1 percent (22,746 divided by 22,957) were CTO Assist transactions. (R4, tab 115) The CO replied that the data did “not support [the assertion] that the information provided by the government at the time of award [was] inaccurate.” The reply was accompanied by a show cause notice directing TATGC to provide assurances by 23 July 2010 that it would continue performance (R4, tab 117).

19. On 16 July 2010, the CO issued a cure notice, requesting TATGC to withdraw its repudiation of the contract and to provide assurances of continued performance within one day (R4, tab 124).

20. On 19 July 2010, TATGC confirmed that it would cease services at the close of business on 31 July 2010 unless the government amended the task order, stating that “[a]s it stands now, TATGC cannot continue without an increase to \$32 per transaction” (R4, tab 132 at 2).

21. On 26 July 2010, the CO terminated the task order for cause effective 31 July 2010 (R4, tab 141).

22. TATGC timely appealed the termination to this Board on 3 August 2010, where it was docketed as ASBCA No. 57313.

23. TATGC also appealed the 4 May 2010 denial of its 22 March 2010 REA on 3 August 2010, which was docketed as ASBCA No. 57314. The Board dismissed the appeal as untimely.

DECISION

Summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). All reasonable inferences must be drawn in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The government argues that TATGC’s Notice of Proposed Cessation establishes that it anticipatorily repudiated the contract, entitling the government to summary judgment as a matter of law. TATGC argues that there are additional facts, not included in the government’s motion, which establish that its repudiation is excused by the government’s intentional misrepresentation of the ratio of DTS to CTO Assist transactions in the RFP and the task order.

A contract is voidable if a party’s manifestation of assent was induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient was justified in relying. RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981); *Barron Bancshares, Inc. v. United States*, 366 F.3d 1360, 1381 (Fed. Cir. 2004); *T. Brown Constructors, Inc. v. Pena*, 132 F.3d 724, 729 (Fed. Cir. 1997); *see also Morris v. United States*, 33 Fed. Cl. 733, 745 (1995). In *Thomas v. HUD*, 124 F.3d 1439, 1442 (Fed. Cir. 1997), the Court stated that a breach is material if it relates to a matter of vital importance,

or goes to the essence of the contract. A misrepresentation is not “rendered innocuous” because it is caused by negligence or inadvertence, rather than bad faith or gross error. *Summit Timber Co. v. United States*, 230 Ct. Cl. 434, 677 F.2d 852, 857 (1982).

The government required TATGC to price the task order upon the basis that there would be a 50/50 mix of DTS to CTO Assist transactions in the base year (SOF ¶ 9). Drawing all reasonable inferences in favor of TATGC as the nonmovant, the government implicitly represented that the existing mix at the time of Amendment 14, and award, was consistent with a 50/50 mix during performance. TATGC presented undisputed evidence that the actual mix during performance was .91 percent DTS to 99.1 percent CTO Assist transactions, an astonishing 5,000 percent difference and, hence, the government’s representation could not have been correct (SOF ¶ 18). TATGC, in submitting its bid and in entering into the contract, had the right to rely upon the government’s affirmative representations regarding the ratio of DTS to CTO Assist transactions. In our view, appellant has raised disputed material facts regarding the government’s representation. Thus, drawing all reasonable inferences in favor of TATGC as the nonmovant, TATGC’s subsequent repudiation of the contract may be excused. *See* RESTATEMENT (SECOND) OF CONTRACTS § 237 (1981).

Accordingly, the government’s motion is denied.

Dated: 22 September 2011



ELIZABETH A. TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur



MARK N. STEMPLER
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. 57313, Appeal of Tzell Airtrak Travel Group Corporation, rendered in conformance with the Board's Charter.

Dated:

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