ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Tecom, Inc.	)	ASBCA No. 51880
	)	
Under Contract No. F33601-92-C-J012	)	

APPEARANCE FOR THE APPELLANT: Johnathan M. Bailey, Esq.
Theodore M. Bailey, P.C.
San Antonio, TX.

APPEARANCES FOR THE GOVERNMENT: COL John M. Abbott, USAF
Chief Trial Attorney
CAPT Gregory A. Baxley, USAF
Robert C. Allen, Esq.
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE DICUS
ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Tecom, Inc. (Tecom) claims that the Government's incremental month-to-month extensions of its contract made it impossible to schedule employee vacations. Tecom seeks reimbursement for the additional costs it incurred to pay the employees for their unused vacation days. The Government has filed a Motion for Summary Judgment. Tecom filed a Motion to Stay Discovery, which the Government does not oppose, pending the disposition of the summary judgment motion. Tecom and the Government assert there are no material facts at issue and that the motion may be decided as a matter of law. We grant the motion.

FINDINGS OF FACT

The following findings are for the sole purpose of resolving the motion.

1. By date of 1 March 1992, the Air Force awarded Tecom a fixed-price-award-fee contract for operating and maintaining base vehicles at Wright-Patterson Air Force Base (hereinafter sometimes "the Tecom contract"). The contract term was for a seven month base period, beginning on 1 March 1992, and four one-year options. (Gov't mot. at 2-3; app. resp. at 1)

2. Clause I-195, Federal Acquisition Regulation (FAR) 52.217-9, OPTION TO EXTEND THE TERM OF THE CONTRACT (MAR 1989) gives the Air Force the option to extend the contract for four one-year periods. The Air Force exercised all four options bringing Tecom's contract completion date to 30 September 1996. (Gov't mot. at 3; app. resp. at 1)

3. Clause I-194, FAR 52.217-8, OPTION TO EXTEND SERVICES (AUG 1989) gives the Air Force the option to extend Tecom's services for a period not to exceed six months. Clause I-194 states, in pertinent part:

> 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. . . .

(R4, tab 1)

4. The Air Force issued four modifications pursuant to clause I-194. Modification No. P00060 (Mod 60) extended services for October and November 1996; Modification No. P00065 (Mod 65) extended services for December 1996; Modification No. P00066 (Mod. 66) extended services for January 1997; and Modification No. P00067 (Mod 67) extended services for February 1997. As a result of these modifications, Tecom's contract completion date was 28 February 1997. (Gov't mot. at 3; app. resp. at 1-2)

5. The contract at I-285 incorporates by reference the FAR 52.222-43, FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT ACT--PRICE ADJUSTMENT (MULTIPLE YEAR AND OPTION CONTRACTS) (MAY 1989) (FLSA clause). Clause I-285 states in pertinent part:

> (b) The Contractor warrants that the prices in this contract do not include any allowance for any contingency to cover increased costs for which adjustment is provided under this clause.
>
> . . . .
>
> (d) The contract price or contract unit price labor rates will be adjusted to reflect the Contractor's actual increase or decrease in applicable wages and fringe benefits to the extent that the increase is made to comply with or the decrease is voluntarily made by the Contractor as a result of:

> (1) The Department of Labor wage determination applicable on the anniversary date of the multiple year contract, or at the beginning of the renewal option period. . . .
>
> (2) An increased or decreased wage determination otherwise applied to the contract by operation of law; or
>
> (3) An amendment to the Fair Labor Standards Act of 1938 that is enacted after award of this contract, affects the minimum wage, and becomes applicable to this contract under law.

(R4, tab 1)

6. Modification No. P00074 (Mod 74) applies clause I-285 and grants Tecom an increase in wages and fringe benefits from 1 October 1996 to 28 February 1997 due to a collective bargaining agreement dated 1 October 1996 (Gov't mot. at 3-4; app. resp. at 1). This collective bargaining agreement included vacation pay for eligible employees which is tied to their anniversary hire dates (R4 tab 2, Art. VII).

7. During 1996, the Air Force issued a solicitation for a new contract for base vehicle operation and maintenance. That contract was to be a fixed-price-award fee contract. In response, Tecom submitted its Best and Final Offer (BAFO) to the Air Force in January 1997. Tecom's BAFO included a provision for vacation costs for Service Contract Act employees. The Air Force awarded the new contract to another contractor, Baker-Serco, on 31 January 1997. Tecom protested the award to Baker-Serco in February 1997. By date of 21 May 1997, the General Accounting Office determined that Baker-Serco had been properly awarded the new contract. (Gov't mot. at 4-5, att. 5; app. resp. at 1-2)

8. During the time of the solicitation and protest of the new contract, the Air Force and Tecom negotiated and signed two agreements to extend Tecom's contract. Modification No. P00068 (Mod 68) extended Tecom's contract through March and April 1997, and gave the Air Force the option to extend the contract "a month at a time for up to four additional months." The modification also provided "Prices, terms, and conditions shall be in accordance with TECOM, Inc. letter dated 14 February 1997 (Attachment 1) and TECOM, Inc. BAFO proposal (including TECOM Technical Proposal and all revisions thereto) dated 24 January 1997." Tecom's BAFO included prices for vacation costs which anticipated a full twelve month performance period. The fixed price and award fee for Mod 68 was $993,194.98. Modification No. P00070 (Mod 70) extended Tecom's contract through May 1997, with the option to extend the contract "a month at a time for three additional months." That modification included the same provision as Mod 68 regarding prices, terms and conditions. The fixed price and award fee for Mod 70 was $496,597.49. The issue of increased vacation costs due to the

abbreviated performance period was neither negotiated nor addressed during the negotiations leading up to Mods 68 and 70. (App. resp. at 1-3, Gov't reply at 2; R4, tab 1)

9. Tecom submitted a certified claim dated 2 June 1998 in the amount of $154,748.85 for payments made in lieu of vacation time which it claimed it had to pay its employees who had anniversary dates between 1 October 1996 and 31 May 1997, because it could not schedule the vacations. The claim asserts, in pertinent part:

> TECOM did not have twelve (12) months to schedule eligible employees' vacation. For example, an employee with an anniversary date of May 16th would have become eligible for vacation on May 16, 1997 and would have been required to take his vacation prior to May 16, 1998. However, under the month to month extensions exercised by the Government, the employee did not have a twelve (12) month period to take vacation. Accordingly, TECOM incurred a cost for unused vacation plus payment for hours worked which basically is double payment because the employee was paid his basic rate for unused vacation plus his basic rate for hours worked. Finally, since TECOM was on a month to month extension, we could not plan or schedule vacation and maintain performance requirements outlined in our contract.

The Air Force denied the claim and Tecom timely appealed. (Gov't mot. at 5; App. resp. at 2; R4, tab 10)

10. Appellant has submitted the affidavit of William Rose, Senior Vice President. According to Mr. Rose:

> The Government extended the contract via a series of short extensions. Because the extensions were so short, we could not schedule vacations during non-peak periods as normal, and thus had to pay our employees vacation pay in addition to their normal wages, essentially paying them "double-time". Normally, the employees would actually take their vacations and thus would not receive both wages and vacation pay for the same time period.

(Rose affidavit)

DECISION

Summary judgment is appropriate where no material facts are genuinely in dispute and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one which will affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986). Inferences must be drawn in favor of the party opposing summary judgment. *Hughes Aircraft Company,* ASBCA No. 30144, 90-2 BCA ¶ 22,847.

When a party responding to a summary judgment motion fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. *Celotex Corp. v Catrett,* 477 U.S. 317, 323 (1986). As the proponent of the claim, appellant has the burden of proof. *Sphinx International, Inc.,* ASBCA No. 38784, 90-3 BCA ¶ 22,952.

The Air Force maintains that it is only liable for increases in fringe benefits, including vacation pay, if they are mandated by the FLSA clause. Since the Air Force has paid all FSLA clause-mandated increases under the contract, the Government argues that as a matter of law, Tecom is not entitled to additional funds.

Appellant claims that the Air Force's month-to-month extensions of the contract made it impossible for Tecom to schedule employees' vacations. Tecom alleges that because of the short duration and the uncertainty of the extensions, it was prevented from properly scheduling vacation days. Thus, Tecom allegedly incurred the additional cost of paying its employees in lieu of taking their vacation time and seeks reimbursement in the amount of $154,748.85. Tecom maintains, and for purposes of the motion we have found with respect to Mods 68 and 70, that the issue of increased vacation costs resulting from the Government's month-to-month extensions of the contract was never negotiated, and its BAFO anticipated a twelve month performance period. Tecom does not aver that it has not had an adequate opportunity for discovery.

The contract was a fixed-price contract, as were Mods 68 and 70. FAR 16.202-1 provides:

> A firm-fixed-price contract provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract. This contract type places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss. It provides maximum incentive for the contractor to control costs and perform effectively[.]

Thus, unless there is a contract clause providing for a price adjustment (*see* FAR 16.203-1), the contractor generally bears all costs without additional compensation.

ITT Arctic Services, Inc. v. United States, 524 F.2d 680 (Ct. Cl. 1975). In this contract, the relevant clause mandates a price adjustment to the extent it results from a Department of Labor (DOL) wage determination or amendment to the FLSA.

Appellant relies on *Crawford Technical Services, Inc.*, ASBCA No. 40388, 93-3 BCA ¶ 26,136, for the proposition that the Board has allowed recovery of such increased vacation costs under similar circumstances. We do not find that decision to be dispositive here, however, because the issue resolved was whether releases in modifications incorporating increases from DOL wage determinations barred further recovery. The Government did not dispute that appellant was due a price adjustment, but argued that the adjustment was resolved in the bilateral modifications which included releases. Moreover, the underlying claims involved vacation pay for employees whose anniversary dates had occurred during the extension periods (*Crawford* at findings 14, 23, 32), an issue not presented here. In this appeal, Tecom is claiming that it could not schedule vacations, not that a DOL wage determination required it to incur additional vacation costs because employee anniversary dates during the extensions increased its liability to those employees. We find *Crawford* inapposite.

We have allowed recovery where fringe benefits in the form of vacation pay were increased in an option year in order to comply with a wage rate determination. *Service Ventures, Inc.*, ASBCA No. 36716, 89-1 BCA ¶ 21,264, *mot. recon. denied*, 89-1 BCA ¶ 21,438, *aff'd, United States v. Service Ventures, Inc.*, 899 F.2d 1 (Fed. Cir. 1990); and *Government Contractors, Inc.*, ASBCA No. 24112, 80-1 BCA ¶ 14,281, *aff'd on recon.*, 80-1 BCA ¶ 14,454. In the latter appeal, we said:

> In the instant case, the payment of vacation pay was uniquely due and payable as a result of a wage determination inherited by the appellant and over which it had no control. Thus, the appellant's liability for vacation pay fell under the . . . price adjustment clause[.]

Government Contractors, Inc., 80-1 BCA at 70,331.

Here, Tecom simply could not schedule the vacations of the affected employees. Indeed, its claim does not even cite the FLSA clause or any other price adjustment clause (finding 9). Under Mods 60, 65, 66 and 67 the contract performance period was extended through 28 February 1997 pursuant to Clause I-194 which obligates appellant to perform "at the rates specified [unless] adjusted . . . as a result of [DOL] revisions to prevailing labor rates[.]" (Finding 3) Appellant does not argue that the claim emanates from a DOL action.[*] We agree with the Air Force that it had the contractual right to extend the performance period for short periods and that appellant's inability to schedule vacations during those periods was a management issue. Any increase in costs by cash payments for unused vacations was therefore not brought about by compliance with a wage determination pursuant to the FLSA clause or any other price adjustment clause. Where vacation cost increases have not arisen from compliance with a wage determination, they have been denied. In *Ajay Maintenance Company*, ASBCA No. 19354, 74-2 BCA ¶ 10,830, we denied a claim for increased vacation costs which were the result of the appellant's seniority and vacation plan. Similarly, in *Service Ventures, supra,* the appellant had priced the contract expecting to hire new employees and, when it could not, had to retain fifteen employees with vacation rights. Appellant did not claim the costs during the base period, but when the Government extended the contract, appellant included the costs for those employees in its claim for the extended period. The Board denied those costs as not arising from a wage determination "unless the vacation pay they were entitled to increased for the option year[.]" *Id.* at 107,199. Accordingly, the Air Force's motion is granted as to costs claimed through 28 February 1997.

With regard to Mods 68 and 70, the Air Force and Tecom extended the contract for a period not to exceed four months, thus extending the performance period beyond that originally established in Clauses I-194 and I-195. The parties also changed the "prices, terms, and conditions" of the contract to conform to the solicitation and Tecom's unsuccessful BAFO for the new vehicle operations and maintenance contract. The extension was necessary because Tecom had filed a protest against the award of that contract to another company. The new contract was also a fixed-price-award-fee contract. We have found that the terms of the Tecom contract did not provide a basis for recovery of payments for unused vacation, and there is no allegation by appellant that the Mod 68 and 70 extensions involved anything other than its inability to schedule vacations. Moreover, while there may have been differences between the "terms and conditions" of the solicitation incorporated in Mods 68 and 70 and the Tecom contract, appellant has the burden of proof to establish there were new conditions and that the new conditions provided for an adjustment in the fixed price of Mods 68 and 70. Appellant has failed to do so. Where the nonmoving party fails to meet its burden of proof "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case[.]" *Celotex*, *supra* at 322. Accordingly, we grant respondent's motion as to payments for unused vacation during the Mod 68 and 70 extensions.

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[*] Increases in vacation costs arising from a collective bargaining agreement, tied to the employees' anniversary hire dates, were included and paid through Mod 74 which covered the period between 1 October 1996 and 28 February 1997. Mod 74 applies Clause I-285. (Finding 6)

SUMMARY

The motion for summary judgment is granted. The appeal is denied.

Dated: 26 May 2000

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

EUNICE W. THOMAS
Administrative Judge
Acting 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. 51880, Appeal of Tecom, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals