ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Staff USA, Inc.	)	ASBCA No. 52777
	)	
Under Contract No. F10603-95-C-2001	)	

APPEARANCE FOR THE APPELLANT: Richard D. Lieberman, Esq.
McCarthy, Sweeney & Harkaway, P.C.
Washington, DC

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
Thomas S. Marcey, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE STEMPLER
ON THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

This appeal arises from a contracting officer's final decision denying appellant's claim for payment of the unpaid final invoice submitted under its contract to provide emergency room physician services. The Government has moved for summary judgment on the ground that payment was properly withheld pursuant to FAR 52.237-7, since appellant did not provide the liability insurance extended reporting endorsement (tail coverage) required by that clause. Appellant opposes the motion. We deny the motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. The 366 Contracting Squadron at Mountain Home AFB, ID (the Government) awarded Contract No. F10603-95-C-2001 (the contract) to National Medical Staffing, Inc. (NMS) on 15 December 1994 for emergency room physician services at a price of $431,878.23 (R4, tab 1). The basic period of performance was from the date of award through 30 September 1995. There were four one-year options, with the fourth option year ending 30 September 1999. (R4, tab 1 at 43) The contract incorporated by reference FAR 52.217-9 OPTION TO EXTEND THE TERM OF THE CONTRACT (MAR 1989) and FAR 52.233-1 DISPUTES (DEC 1991) (R4, tab 1 at 52, 54). Performance was complete on 31 January 2000.

2. The contract also incorporated by reference FAR 52.237-7 INDEMNIFICATION AND MEDICAL LIABILITY INSURANCE (SEP 1989) which provided, in pertinent part:

> (a) . . . The Contractor shall maintain during the term of this contract liability insurance issued by a responsible insurance carrier . . . .
>
> . . . .
>
> (c) Liability insurance may be on either an occurrences basis or on a claims-made basis. If the policy is on a claims-made basis, an extended reporting endorsement (tail) for a period of not less than 3 years after the end of the contract term must also be provided.
>
> (d) A certificate of insurance evidencing the required coverage shall be provided to the Contracting Officer prior to the commencement of services under this contract. If the insurance is on a claims-made basis and evidence of an extended reporting endorsement is not provided prior to the commencement of services, evidence of such endorsement shall be provided to the Contracting Officer prior to the expiration of this contract. Final payment under this contract shall be withheld until evidence of the extended reporting endorsement is provided to the Contracting Officer.

(R4, tab 1 at 55)

3. NMS provided certificates of insurance for Drs. Paul Monahan, Robert Lotstein, Sandra Lotstein, Belinda Murphy, Duane Mabeus, and Todd Palmer to the contracting officer. Each certificate indicated that it was for a claims-made policy and none indicated that it included tail coverage. (R4, tab 27)

4. An 8 February 1999 novation agreement transferred the rights, obligations, and liabilities of NMS under the contract to Staff USA, Inc. (appellant). Each of the six physicians provided new certificates of insurance. None of the certificates indicated that tail coverage was included. (R4, tabs 27, 28)[1]

5. Shortly after the contract was completed, Dr. Mabeus declares that the contracting officer met with him and informed him : ". . . that I [Mabeus] did not need to obtain 'tail' insurance liability coverage, and that 'tail' coverage was the responsibility of

[1] Appellant has filed a Rule 4(e) objection to Rule 4, tab 28. We have not considered Rule 4, tab 28 other than the novation agreement contained therein. Without it, we have no jurisdiction since the contract was not originally awarded to appellant.

Staff USA, Inc. to obtain." (Declaration of Duane Mabeus, M.D.) The contracting officer declares that he did have a discussion with Dr. Mabeus at or about this time but declares that the communication was the result of a telephone call from Dr. Mabeus. The contracting officer denies he encouraged Dr. Mabeus not to provide tail coverage and states: "I informed Dr. Mabeus that the Government was not requiring a policy specifically from him because we as the Government do not have privity of contract with him as a contractor employee, and therefore cannot do so. I also stressed to him that any agreement or contract he has with Staff USA, Inc. was strictly between himself and Staff USA, Inc." The contracting officer declares that Dr. Mabeus told him that he was calling the contracting officer because someone at Staff USA, Inc., told him to. The contracting officer also declares that he had a similar conversation with Dr. S. Lotstein at about the same time. (Affidavit of Aubrey S. Coyle, Jr.)

6. By letter to appellant dated 19 January 2000, the contracting officer stated, in pertinent part:

> 1. IAW FAR 52.237-7 (contract clause I-484), you are to obtain tail coverage to your claims-made insurance policy for a period of not less than 3 years after the end of the contract term. FAR 52.237-7 further directs, in paragraph (d), that final payment shall be withheld until evidence of the extended reporting endorsement (tail) is provided to the Contracting Officer. Evidence of this tail coverage must be provided to this office prior to submittal of your final invoice.

(R4, tab 13)

7. By letter dated 7 February 2000 to Captain John Terra of the Legal Office at Mountain Home AFB, appellant's counsel stated that it was his understanding that all of appellant's doctors had signed contracts in which they "certified that they were providing evidence that they had tail coverage or would obtain it" (R4, tab 16).

8. On 8 February 2000, appellant submitted its final invoice, No. 1287, dated 31 January 2000, in the amount of $48,528.70 (R4, tabs 14, 23). Also on 8 February, appellant, which had requested quotes for tail coverage from its employees' (Monahan, R. Lotstein, S. Lotstein) insurance carrier, received a reply. The insurance company refused to deal with appellant, inasmuch as the employees were the owners of the policies and the employees had not requested tail coverage. (R4, tab 17)

9. By letter dated 22 February 2000 to the contracting officer, appellant's counsel stated, in pertinent part, that appellant intended "to take appropriate actions to require performance by the physicians of their employment contracts, with respect to the tail

coverage, unless the Air Force is willing to make other arrangements in order to pay Staff's final invoice, which has already been submitted" (R4, tab 20).

10. By letter dated 25 February 2000 to Captain Terra, appellant's counsel stated, in pertinent part:

> One physician formerly employed by Staff USA has reported to us that the Contracting Officer has decided to place a legal interpretation on [FAR 52.237-7], and we respectfully request that he cease from making such an erroneous interpretation to former Staff USA employees. Specifically, Mr. Coyle advised one of Staff USA's former employees that the former employee should not seek tail coverage, since Mr. Coyle intends to demand that tail coverage be furnished by Staff USA. This is an unreasonable interference by the USAF with Staff USA's contract, is inconsistent with the USAF's actions during the entire performance of the contract, and is inconsistent with the mutual objectives of the USAF and Staff USA to provide the Air Force with the assurance and coverages it requires under FAR 52.237-7.

(R4, tab 22) The physician referred to in this letter has been identified by appellant as Dr. Mabeus (amended complaint at ¶ 7).

11. In its amended complaint, appellant stated, in pertinent part:

> 8. On information and belief, either the CO or another government official has provided similar advice and interference to other former Staff USA physician employees, advising them that the former employees should not seek tail coverage.
>
> 9. As a result of the erroneous and improper actions by government officials to misadvise Staff's former employees, and, despite reasonable efforts by Staff USA to have the doctors obtain tail coverage required by the physician's employment contracts, the affected physicians are refusing to obtain such tail coverage.

(Amended complaint at ¶¶ 8, 9)[2]

[2] Appellant's counsel informs us that appellant is attempting to compel its physicians to provide tail coverage and that with the exception of Dr. Mabeus, they are not

12. In its answer to appellant's amended complaint, the Government denied "specifically that Mr. Coyle told Dr. Mabeus that he should not seek tail coverage." In response to paragraphs 8 and 9 of the amended complaint, the Government answered:

> 8. Denies that either the Contracting Officer or any other official at Mountain Home AFB made such a statement to any of the former Staff USA physician employees.
>
> 9. Denies the allegation contained in paragraph 9 that Government officials misadvised Staff's former employees. Denies the allegations contained in the remainder of the paragraph for lack of knowledge or information sufficient to form a belief as to the truth of the matters asserted.

(Answer to amended complaint at ¶¶ 7-9)

13. By letter dated 17 March 2000, appellant submitted a claim for $48,528.70, the amount of unpaid Invoice No. 1287, plus interest under the Prompt Payment Act, to the contracting officer (R4, tab 23).

14. By letter dated 23 March 2000, appellant provided evidence of tail coverage for Dr. Mabeus to the Government (R4, tab 31).

15. By letter dated 16 May 2000, the contracting officer issued a final decision denying appellant's claim in its entirety. The contracting officer stated that the claim was denied because appellant had not provided a tail policy. The contracting officer also stated that when appellant provided the tail policy required by FAR 52.237-7, the Government would authorize final payment to appellant. (R4, tab 24) By letter dated 17 May 2000, appellant appealed this decision to the Board.

16. By letter dated 26 May 2000 to the contracting officer, appellant provided the evidence of tail coverage for Dr. Mabeus that it had previously provided with its 23 March 2000 letter and provided evidence of tail coverage for Dr. Palmer (R4, tab 32). The record contains no evidence of tail coverage for the other four doctors.

17. On 29 September 2000, the contracting officer wrote Dr. Mabeus, "changing his tune" (Mabeus declaration ex. 2) and requesting that Dr. Mabeus provide tail coverage for himself (Mabeus declaration ex. 3).

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cooperating in appellant's prosecution of the appeal. (Counsel's letter dated 5 March 2001, fn. 1)

DECISION

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987).

> The moving party bears the burden of establishing the absence of any genuine issue of material fact and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment.

Id. at 1390-91.

FAR 52.237-7 states that final payment under the contract shall be withheld until evidence of tail coverage is provided to the contracting officer. In its motion, the Government asserts that appellant has not provided evidence of tail coverage for all of its physicians and that the Government has properly withheld final payment under FAR 52.237-7. Appellant does not dispute the Government's allegation that it has not provided evidence of tail coverage for all of its physician employees. Instead, appellant argues that at least one genuine issue of material fact, specifically, whether the Government interfered with appellant's contracts with its physicians so as to prevent appellant from obtaining tail coverage, exists to make summary judgment inappropriate.

In its opposition to the Government's motion, appellant asserts that at trial, the evidence will show that:

- The USAF breached its duty too [sic] cooperate with Staff in the performance of the Contract by actively and affirmatively advising Staff's former contractor employees (the physicians) that they did not need to cooperate with and assist Staff in obtaining tail insurance coverage.

- The USAF hindered Staff's performance by actively misinforming Staff's former physicians that they did not need to honor their contracts with Staff, and did not need to cooperate in obtaining tail coverage.

- The USAF breached its implied duty of good faith and fair dealing with Staff, by not only failing to cooperate with Staff in obtaining the required tail coverage, but in actively misinforming Staff's contractor-physicians that there was no need to cooperate to obtain the tail coverage, when in

> fact, the physician's [sic] contracts with Staff required exactly the opposite.

(App. opposition br. at 6-7) Appellant asserts that, absent the Government's improper meddling in appellant's relationships with its physicians, appellant would have been able to obtain the required tail coverage. Appellant argues that it should, therefore, be excused from providing evidence of tail coverage and that the Government should be required to pay appellant's unpaid final invoice.

FAR 52.237-7 requires appellant to provide evidence of tail coverage for its employees and authorizes the contracting officer to withhold payment of the final invoice in the absence of such evidence. We are called upon in this appeal to determine whether appellant's admitted failure to supply evidence of such coverage is excused by the alleged breaches of the Government in influencing appellant's employees not to provide evidence of such coverage. Record evidence exists as to at least two of the communications that allegedly caused such breaches.

Appellant has clearly put into issue whether the contracting officer induced appellant's employees to refuse to provide the tail coverage necessary for payment of appellant's final invoice. Our task on summary judgment is not to weigh the evidence but to determine whether a genuine issue as to material fact exists.

CONCLUSION

The Government's motion for summary judgment is denied.

Dated: 9 March 2001

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

I concur

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

PETER D. TING
Administrative Judge
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. 52777, Appeal of Staff USA, Inc., rendered in conformance with the Board's Charter.

Dated:

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