ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Mid-Eastern Industries, Inc.	)	ASBCA No. 53016
	)	
Under Contract No. N00189-93-D-0151	)	

APPEARANCE FOR THE APPELLANT: Mr. Thomas Nixon
Chairman and CEO

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
Benjamin M. Plotkin, Esq.
Assistant Counsel
Davis Young, Esq.
Trial Attorney
Fleet and Industrial Supply Center
Norfolk, VA

OPINION BY ADMINISTRATIVE JUDGE KIENLEN
ON
CROSS-MOTIONS FOR SUMMARY JUDGMENT

The appellant seeks payment of the guaranteed minimum price under an indefinite quantity contract. The Government moves to dismiss or for summary judgment on the ground that the appellant failed to state a claim upon which relief may be granted. We treat it as a motion for summary judgment. The appellant requests judgment in its favor. We treat its request as a motion for summary judgment. We grant the appellant's motion.

STATEMENT OF UNDISPUTED MATERIAL FACTS

On 29 January 1993, the Department of Navy, Fleet and Industrial Supply Center, Norfolk, Virginia, awarded this contract to Mid-Eastern Industries, Inc., for the repair and maintenance of various sections of piping in Naval Shipboard piping systems aboard Navy vessels. The contract was awarded under section 8(a) of the Small Business Act as a small disadvantaged business set-aside. It was an indefinite delivery, indefinite quantity contract. (R4, tabs 1, 6) Cost and pricing data was not required because adequate price competition was expected (clause L15-113, R4, tab 6 at 84). Award was made based on the lowest aggregate price for all items (clause M28A, R4, tab 6 at 94).

The contract included various standard clauses in full text, including: INDEFINITE QUANTITY (APR 1984), and OPTION TO EXTEND THE TERM OF THE CONTRACT - SERVICES

(MAR 1989). These clauses were editorially modified from the form of the clauses located at FAR 52.216-22 and FAR 52.217-9. The modifications do not affect the issues in this appeal. (R4, tab 6 at 62, 63) The Indefinite Quantity clause provided in relevant part:

> (a) This is an indefinite-quantity contract for the supplies or services specified, and effective for the period stated, in the Schedule. The quantities of supplies or services specified in the Schedule are estimates only and are not purchased by this contract.
>
> (b) Delivery or performance shall be made only as authorized by orders issued in accordance with the Ordering clause. The Contractor shall furnish to the Government, when and if ordered, the supplies or services specified in the Schedule up to and including the quantity designated in the Schedule as the "maximum." The Government shall order at least the quantity of supplies or services designated in the Schedule as the "minimum."
>
> (c) Except for any limitations on quantities in the Delivery-Order Limitations clause or in the Schedule, there is no limit on the number of orders that may be issued. The Government may issue orders requiring delivery to multiple destinations or performance at multiple locations.

(R4, tab 6 at 62)

The Delivery Order Limitations clause provided that the supplies and services under the contract were to be furnished when required by delivery orders issued by SUPSHIP ORDERING OFFICE for all orders under $100,000. Orders above $100,000 required the approval of the contracting officer (clause H01(a), R4, tab 6 at 48). The contract provided that the contractor was not required to respond to delivery orders under $500, but was required to honor all delivery orders up to $60,000 in any 30-day period. The DELIVERY-ORDER LIMITATIONS (APR 1984) clause, located at FAR 52.216-19, read in relevant part:

> (a) Minimum order. When the Government requires supplies or services covered by this contract in an amount of less than $500.00, the Government is not obligated to purchase, nor is the Contractor obligated to furnish, those supplies or services under the contract.

(b) Maximum order. The Contractor is not obligated to honor -

(1) Any order for a single item in excess of $15,000.00;

(2) Any order for a combination of items in excess of $60,000.00 or

(3) A series of orders from the same ordering office within 30 days that together call for quantities exceeding the limitation in subparagraph (1) or (2) above.

(R4, tab 6 at 61) In addition, an ORDERING clause provided that "If mailed, a delivery order is considered 'issued' when the Government deposits the order in the mail." (R4, tab 6 at 60)

The contract also included the following relevant provisions in the schedule, specifications, and other provisions:

B24 COST LIMITATIONS

The Contractor shall, at no extra cost or charge to the Government, provide all necessary administrative and support functions and equipment to perform the work required under the resultant contract. . . . It is understood that all such costs are included in the composite labor rates set forth in this Section B.

. . . .

B26 COST OF MATERIAL

The cost of materials furnished pursuant to specific authorization by the PCO or his representatives shall be reimbursed at the Contractor's invoice cost less any discounts taken or to be taken, plus material handling cost as specified by the Contractor. Expendable material costs for items such as office supplies, report paper, etc., and tools-of-the-trade items shall be absorbed by the Contractor at his given hourly wage rates.

C DESCRIPTION/SPECIFICATIONS

. . . .

C6.3.1 The Contractor shall provide equipment, material, and labor for accomplishing pipefitting as authorized in individual delivery orders and in accordance with references 2(a) through 2(k) and as contained herein.

. . . .

C6.3.9 The Contractor shall accomplish the following:

C6.3.9.1 Provide the services of a National Fire Protection Association (NFPA) Certified Marine Chemist and certify each space listed in the delivery order, requiring certification in accordance with Subpart B of reference 2(h) safe for workers and safe for hot work.

. . . .

C12 CONTRACTOR RESPONSIBILITIES

C12.1 The Contractor shall:

a. Provide sufficient qualified personnel to successfully perform all tasks to be ordered hereunder.

. . . .

C12.2 Contractor Facility

The Contractor shall establish and maintain an office facility, adequate for performance of this contract located so as to be able to respond by land travel, within one (1) hour of Supervisor of Shipbuilding, Conversion and Repair, USN, Portsmouth, VA. Certification of this requirement shall accompany proposals. If the required facility is not presently established, the Contractor shall present a plan to have such a facility established before award of contract.

C13 PERSONNEL QUALIFICATIONS (MINIMUM)

. . . .

> C13.2 Personnel assigned for performance of delivery orders placed under this contract shall meet the minimum qualifications prescribed below. The Government will review resumes of contractor personnel proposed to be assigned, and if personnel not currently in the employ of Contractor a written agreement from potential employee to work will be part of the technical proposal.
>
> . . . .
>
> F1 TIME OF DELIVERY (INDEFINITE DELIVERY CONTRACTS)
>
> The services to be furnished hereunder shall be performed within 15 days after the date on each individual delivery order, except that when the needs of the Government permit, orders may provide a longer time for delivery.
>
> F2 PLACE OF PERFORMANCE
>
> (a) The services furnished hereunder shall be performed ON BOARD NAVAL VESSELS located in the Tidewater area (D & S Piers, NOB Norfolk, Little Creek Amphibious Base, Norfolk, or Norfolk Naval Shipyard, Portsmouth).

(R4, tab 6)

The contract incorporated by reference various standard clauses, including the clause entitled, PAYMENTS UNDER TIME-AND-MATERIALS AND LABOR-HOUR CONTRACTS (APR 1984), located at FAR 52.232-7, which required in pertinent part:

> The Government shall pay the Contractor as follows upon the submission of invoices or vouchers approved by the Contracting Officer:
>
> (a) *Hourly rate.* (1) The amounts shall be computed by multiplying the appropriate hourly rates prescribed in the Schedule by the number of direct labor hours performed.
>
> . . . .
>
> (b) *Materials and subcontracts.* (1) Allowable costs of direct materials shall be determined by the Contracting

> Officer in accordance with Subpart 31.2 of the Federal Acquisition Regulation (FAR) in effect on the date of this contract.

(R4, tab 6 at 57) There were over a dozen classifications of labor hours. The schedule provided for both straight time and overtime rates, and provided estimated hours in each classification, varying from 5,000 hours for a pipefitter to 100 hours for a machinist. (R4, tab 6 at 2, 3)

Contract clause H05 provided for lump sum minimum and maximum dollar amounts for orders of services and materials. The lump sum minimum amount was $55,000. As contained in the solicitation, the clause read:

> As referred to in paragraph (b) of the "Indefinite Quantity" clause of this contract, the contract minimum quantity is a total of $55,000.00 worth of orders at the contract unit price(s). The contract maximum quantity is a total TO BE SPECIFIED AT TIME OF AWARD.

(R4, tab 6 at 53) The schedule contained unit prices only for the various labor hour classifications (R4, tab 1). The total bid price for all the estimated services, including $132,715 for materials and handling, was $486,898 for the base year and first option period. At the time of award the maximum amount of services was established as $486,898:

> 11. IN ACCORDANCE WITH CLAUSE H05 THE MINIMUM GUARANTEE AMOUNT IS $55,000.00. THE MAXIMUM QUANTITY AMOUNT FOR THIS AWARD IS $486,898.00. THE ACCOUNTING AND APPROPRIATION DATA FOR THE MINIMUM GUARANTEE IS . . . .

(R4, tab 1 at 13) The guaranteed minimum amount of $55,000, and the maximum of $486,898, applied separately to the base and each option year (compl. and answer at ¶¶ 2, 4; Gov't mot. at 2).

Clause F3 provided that the contract had a base performance period of one year beginning 1 February 1993. It also provided options for four additional one-year periods. (R4, tab 6 at 40) The Government exercised its option by executing modifications to extend performance under the contract for three option periods. The contract expired, at the end of the third option year, on 31 January 1997. (R4, tabs 2, 3, 4, 6)

During the third option year the Government placed 17 orders during the period from 1 February 1996 through 31 January 1997. The value of the delivery orders ranged

from as little as $409.99 on 28 January 1997 to as much as $5,524.14 on 15 February 1996. The last delivery order was dated 31 January 1997, valued at $2,014.07. The total value of the orders placed by the Government and provided by Mid-Eastern for the third option year was $51,238.72. That amount fell short of the minimum guarantee by $3,761.28. (R4, tab 16; compl. and answer at ¶¶ 5)

On 15 July 1998, the appellant invoiced for the $3,761.28 balance of the unpaid portion of the minimum guarantee. Another invoice was submitted on 3 July 1999. The Government did not pay or process those invoices. After repeated attempts to collect the balance of the guaranteed minimum dollar amount of the contract (letters dated 15 July 1998, 25 January 1999, and 3 June 1999), on 29 February 2000, Mid-Eastern submitted its claim of $3,761.28 to the Government for the unpaid portion of the $55,000 minimum guarantee. (R4, tab 16) The Government did not issue a final decision in response to Mid-Eastern's claim. On 7 August 2000 the appellant appealed to this Board from the contracting officer's failure to issue a final decision on its claim.

After the appellant's appeal, the Government offered to pay the appellant $518.13. As reflected in a unilateral modification, which was filed with the Government's answer, the $518.13 was intended "to document the Contracting Officer's unilateral determination of the equitable amount due to MEI as a result of its request for additional payment under the minimum guarantee provisions of the contract." Specifically, the contracting officer stated:

> The Contracting Officer hereby determines that MEI is due payment of a principal amount of $376.13, plus Contract Disputes Act (CDA) interest in the amount of $142.00, as the full and complete amount to which it is entitled in additional compensation for the Contract. This amount is based on the Contractor's reported profit margin under the contract, 7.5%, with an additional 2.5% profit, in the interest of fairness and due to the Government delay in responding to Mid-Eastern's claim. The principal is therefore 10% of the total amount claimed, or $376.13.

This modification was executed by the contracting officer on 21 September 2000. It added $518.13 to the contract; but, instead of paying this sum as a partial payment on the appellant's outstanding invoice, it required the appellant to submit a new invoice for that amount. (Answer; attach. Mod. P00005)

In its answer the Government admitted all the factual allegations in the appellant's complaint. Along with its answer the Government filed a "Motion for Dismissal and/or Summary Judgment."

In response to the Government's motion, Mid-Eastern admits receiving the modification for $518.13 from the Government, but stated that it "did not agree or sign this document." Further, the appellant asserted that it incurred expenses under the contract in order to maintain its capability to provide services which could have been ordered under the contract. As stated by its Chairman and CEO, Mr. Thomas Nixon:

> Mid-Eastern Industries performed all delivery orders and met all requirements and demands by the contract and FISCNORVA during the years of contract performance. Mid-Eastern Industries maintained facilities, equipment and retained certified experienced personnel during and even past the last exercised option year. This was a burden cost greater than the $3,761.28 that remained on the guaranteed minimum. In view of this . . . Mid-Eastern Industries request [sic] that the Armed Services Board of Contract Appeals do not Dismiss or Award Summary Judgement [sic] as requested by FISCNORVA but rule in favor of Mid-Eastern Industries in accordance with the contract clause and FAR instruction 33.211 for Mid-Eastern Industries in the amount of $3,761.28.

(App. resp. ¶ 9)

We construe the *pro se* appellant's request to be a cross motion for summary judgment, to which the Government has responded. In its rebuttal to the appellant's response, the Government does not dispute or take issue with any factual assertions by the appellant. (Gov't rebuttal)

DECISION

In deciding motions for summary judgment, we are to grant summary judgment if the submissions by the parties show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. FRCP 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Celotex Corporation v. Catrett*, 477 U.S. 317, 323-24, 327 (1986); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987); *Ver-Val Enterprises, Inc.*, ASBCA No. 49892, 01-2 BCA ¶ 31,518; *George Hyman Construction Co.*, ASBCA No. 44362, 93-3 BCA ¶ 26,030 at 129,389; *York Industries, Inc.*, ASBCA No. 44370, 93-2 BCA ¶ 25,592 at 127,427. In this case the parties do not have any dispute over the material facts. They disagree only over the application of the law and the interpretation of the contract.

The Government concedes that it breached the contract, but argues that the appellant is only entitled to its lost or anticipated profit, plus interest, had it performed the work and had the Government ordered the guaranteed minimum dollar amount in services. The

Government offered $518.13, being composed of $376.13 profit, at 10 percent, plus $142.00 in interest. The Government relies on *PHP Healthcare Corporation*, ASBCA No. 39207, 91-1 BCA ¶ 23,647.[1]

Mid-Eastern states that it performed the contract requirements which required that it maintain facilities and equipment and certified experienced personnel during contract performance, the cost of which exceeded the remaining amount of the guaranteed minimum. Mid-Eastern contends that it is entitled, under the terms of the contract, to the difference between the minimum guaranteed amount and the amount the Government actually paid.

The decision relied on by the Government, *PHP Healthcare*, involved an indefinite quantity contract for medical clinic visits. The contract was in two parts. The first part was a 90-day implementation period during which PHP was to set up a clinic facility and prepare to provide services. PHP was paid a fixed price for this work. The second part was an indefinite quantity of clinic visits, but with a guaranteed minimum of 24,000 clinic visits during the base year. The guaranteed number of clinic visits did not materialize. Three days after the end of the base year the contracting officer notified PHP that the contract was constructively terminated for convenience. PHP was directed to submit a termination settlement proposal under the termination for convenience clause. Instead, PHP claimed for the balance of the amount due for the unordered clinic visits.

PHP Healthcare, citing *Maxima Corporation v. United States*, 847 F.2d 1549 (Fed. Cir. 1988), held that the "[e]xpiration of the basic performance period is the demarcation line" after which the termination for convenience clause could no longer be invoked; and, that the failure to order the guaranteed minimum number of clinic visits was a breach of the contract. 91-1 BCA at 118,451-52. However, unlike *Maxima*, the decision held that "[o]n the record before us, however, we are unable to conclude that the Army guaranteed PHP a minimum payment for being prepared to furnish services." *PHP Healthcare*, 91-1 BCA at 118,453.[2] Because the decision found that no minimum payment had been promised, the contractor was required to prove its breach damages on remand.

However, our most recent case dealing with the Government's failure to order the guaranteed minimum services in an indefinite quantity contract had a different result. In *Delta Construction International, Inc.*, ASBCA No. 52162, 01-1 BCA ¶ 31,195, *modified on recon.*, 01-1 BCA ¶ 31,242, the contractor was to replace indefinite quantities of rotten lumber at Government facilities in Panama. The contractor was required to possess sufficient capability to accomplish a daily rate of work valued at a minimum of $3,000 under single or multiple delivery orders. *Delta*, 01-1 BCA at 154,025. In exchange, the Government guaranteed to order at least $200,000 in supplies or services. The minimum guaranteed dollar amount of services was not ordered, even though the contractor was

required to and did maintain the capability of providing the services. *Delta,* 01-1 BCA at 154,028.

The decision in *Delta* held that the contractor was entitled to the guaranteed dollar amount, less any amounts previously paid for orders performed or delivered. In doing so the decision distinguished *PHP Healthcare* and relied on the Federal Circuit's decision in *Maxima*, where the court also found that the contractor had been required to maintain the capability to provide the services, whether ordered or not.

The recognition of the existence of this obligation to provide the capability "to provide not only the minimum but up to the maximum" services was the central holding of the majority in *Maxima* (847 F.2d at 1952 fn. 3). In that case the contract was an indefinite quantity contract for providing typing, photocopying, editing, and related services. The Maxima contract provided for a guaranteed minimum number of hours and pages for each of the various categories of service, with Maxima being required to provide up to a stated maximum, and with the Government agreeing to pay Maxima the annual guaranteed minimum sum of $420,534. *Maxima*, 847 F.2d at 1550-51.

> The total guaranteed minimum dollars (see footnote 2 supra) was calculated as the *minimum* total services at the 168-hour turnaround rate, although the contract required Maxima to provide not only the minimum but up to the maximum number of pages and hours, and also to provide 48-hour turnaround when requested, both on-site and off-site. For this capability the agency *guaranteed* the minimum amount of payment stated in the contract.

Maxima, 847 F.2d at 1551, fn. 3. The Government did not order the minimum quantity of services but did pay Maxima the guaranteed minimum payment. Over a year later the Government notified Maxima that the contract was constructively terminated for convenience, based on the Government's failure to have ordered the contractual minimum amount of services during the contract term. The Government sought the return of so much of the guaranteed minimum payment that exceeded the termination for convenience costs.

In holding that a constructive termination was not available in the circumstances in the Maxima contract, the court said that "[c]onstructive termination for convenience is a judge-made doctrine, and remains unrecognized in the procurement regulations that authorize 'actual' termination for convenience." The court went on to say that the "jurisprudence makes clear that termination for convenience, whether actual or constructive, is not of unlimited availability to the government, that it is not an open license to dishonor contractual obligations." *Maxima*, 847 F.2d at 1553. Further, the majority said that "no decision has upheld retroactive application of a termination for convenience clause to a contract that had been fully performed in accordance with its terms." *Maxima*, 847

F.2d at 1557. *See also, Ace-Federal Reporters, Inc. v. Barram*, 226 F.3d 1329, 1333-34 (Fed. Cir. 2000).

The Government in *Maxima* also argued that the payment of the guaranteed minimum price was made in error. The dissent also viewed this as the primary issue -- the payment was an error that was discovered. The majority rejected those arguments, stating that the payment of the minimum guarantee was "the agreed payment timely made." It was a payment in "compliance with the terms of the contract." *Maxima*, 847 F.2d at 1556. As we said in *Montana Refining Company*, ASBCA No. 50515, 00-1 BCA ¶ 30,694 at 151,628, the *Maxima* court held "that the contractor was entitled to be paid the minimum price . . . without requiring delivery of the shortfall [because] . . . the minimum price was the consideration for appellant's being ready to perform during the performance period which had expired."[3]

We conclude that the contract in the instant case is like the Delta and Maxima contracts, in that Mid-Eastern also had an obligation to maintain the capability of providing up to the maximum services. The contract provided that the "maximum quantity amount" was $486,898. As we found, the contractor was obligated to maintain the capability to perform any single order up to $15,000 or any combination of orders up to $60,000 within any 30-day period; and, to complete performance "within 15 days after the date on each individual delivery order." (Delivery Order Limitations clause and clause F1) Thus, the contractor had to maintain the capability to perform more than the annual minimum guarantee during any single 30 day period; and, to maintain the capability to perform nearly nine times the minimum guarantee during the annual contract period.

Further, in the absence of orders, the costs of maintaining this capability had to be borne by the contractor and recovered from the minimum guarantee amount. No other source of payment was provided by the contract, since all necessary administrative and support functions and equipment to perform the work required under the contract had to be included in the composite hourly labor rates. If the contractor's costs of maintaining this capability exceeded the guaranteed amount, the contractor would suffer a loss on the contract. The minimum price was the consideration for the appellant's being ready to perform during the performance period. Furthermore, it is undisputed that the contractor maintained facilities, equipment and retained certified experienced personnel to perform the work at a burden cost greater than the $3,761.28 that remained on the guaranteed minimum.

Accordingly, the contract having been completed, the contractor is entitled to be compensated at the minimum guaranteed amount of $55,000, less the amounts previously paid, plus interest under the Contract Disputes Act, as amended.

CONCLUSION

The Government's motion for summary judgment is denied. The appellant's motion for summary judgment is granted. The appeal is sustained.

Dated: 16 November 2001

RONALD A. KIENLEN
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

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

I concur

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

[1] The Government also relied on *Travel Centre v. General Services Administration*, GSBCA No. 14057, 99-2 BCA ¶ 30,521, *recon. denied*, 00-1 BCA ¶ 30,584. This case has since been reversed and vacated in *Travel Centre v. Barram*, 236 F.3d 1316 (Fed. Cir. 2001).

[2] The subsequent cases which followed the *PHP Healthcare* rubric on breach damages also did not find that, or simply did not discuss whether, the contractor had an obligation to maintain the capability to provide the maximum services: *Montana Refining Company*, ASBCA No. 44250, 94-2 BCA ¶ 26,656 at 132,613; *Apex International Management Services, Inc.*, ASBCA Nos. 38087 *et al.*, 94-2 BCA ¶ 26,842 at 133,551; *Merrimac Management Institute, Inc.*, ASBCA No. 45291, 94-3

BCA ¶ 27,251 at 135,783; and *AJT & Associates, Inc.*, ASBCA No. 50240, 97-1 BCA ¶ 28,823 at 143,826.

[3] In rejecting an agency's use of a constructive termination for convenience clause, the Comptroller General cited *Maxima* and *PHP Healthcare* and noted that:

> As a practical matter, an indefinite quantity contractor is obligated to stand ready to provide an uncertain quantity of goods and services the government will require--within preestablished limits--from the time of award until the time the contract expires. FAR § 16.504(a). At any point during that period, the government has the right to place an order with the contractor, and the right to expect that the order will be filled at the agreed-upon price.

Matter of Southwest Laboratory of Oklahoma, Inc., Comptroller General Decision, B-251,778, 93-1 CPD ¶ 368 at 8 (5 May 1993). *See also, Nash & Cibinic Report*, Vol. 2 No. 7, ¶ 43 (July 1988), and Vol. 10, No. 8, ¶ 40 (August 1996).

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. 53016, Appeal of Mid-Eastern Industries, Inc., rendered in conformance with the Board's Charter.

Dated:

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