ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Tyrone Shanks	)	ASBCA No. 54538
	)	
Under Contract No. F04666-03-P-0005	)	

APPEARANCE FOR THE APPELLANT: Mr. Tyrone Shanks
Sole Proprietor

APPEARANCES FOR THE GOVERNMENT: COL Anthony P. Dattilo, USAF
Chief Trial Attorney
MAJ Ronald J. Goodeyon, USAF
Trial Attorney

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

This appeal arises out of the contracting officer's (CO) decision denying the contractor's 7 December 2003 claim for $16,160. On 16 August 2004 respondent moved for summary judgment. On 30 September 2005 appellant submitted an opposition to the motion. The Board has jurisdiction of this appeal under the Contract Disputes Act of 1978, 41 U.S.C. § 607, as decided in *Tyrone Shanks*, ASBCA No. 54538, 05-2 BCA ¶ 33,069.

STATEMENT OF FACTS (SOF) FOR THE PURPOSES OF THE MOTION

The following facts are taken from the movant's "Undisputed Findings of Fact," as supplemented by the Board.

1. On 14 November 2002 the U.S. Air Force 9th Contracting Squadron issued Solicitation No. F04666-03-T-0006 requesting quotations for tax assistance at Beale Air Force Base (AFB), CA to be submitted by 25 November 2002. The solicitation included a Statement of Work that provided:

> SERVICES NON-PERSONAL: Contractor shall provide labor and transportation for the position of Tax Assistance Contract Representative . . . for the tax program at Beale AFB. . . . Hours of assistance will not exceed 40 hours per week. . . .

. . . .

DUTIES AND RESPONSIBILITIES

-Working knowledge and proficiency of [sic] federal and state tax laws . . .

-Attend the Beale AFB VITA course for the preparation of federal forms; and a course offered by the California Franchise Tax Board for state forms. The government will provide this training to the contractor

(R4, tab 1)

2. Tyrone Shanks' (appellant) 25 November 2002 quote set forth an estimated 880 hours of services at $30.00 per hour equating to an estimated $26,400 price (R4, tab 1 at Attachment A-18).

3. On 27 November 2002, the U.S. Air Force 9th Contracting Squadron issued to appellant Order for Commercial Items No. F04666-03-P-0005 (the Order) to provide an estimated 833 hours of tax assistance services at $30.00 per hour to Beale AFB personnel on a labor-hour basis, for the period 1 December 2002 to 2 May 2003 and a total estimated and ceiling price of $24,990 (R4, tab 1 at 1-2 of 16).

4. The Order incorporated by reference the (a) FAR 52.232-7, PAYMENTS UNDER TIME-AND-MATERIALS AND LABOR-HOUR CONTRACTS (FEB 2002), which provided:

> The Government will 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. . . .
>
> . . . .
>
> (3) Unless the Schedule prescribes otherwise, the hourly rates in the Schedule shall not be varied by virtue of the Contractor having performed work on an overtime basis. If no overtime rates are provided in the Schedule and

> overtime work is approved in advance by the Contracting Officer, overtime rates shall be negotiated. . . .
>
> . . . .
>
> (c) *Total cost*. It is estimated that the total cost to the Government for the performance of this contract shall not exceed the ceiling price set forth in the Schedule and the Contractor agrees to use its best efforts to perform the work specified in the Schedule and all obligations under this contract within such ceiling price. . . . If at any time during performing this contract, the Contractor has reason to believe that the total price to the Government for performing this contract will be substantially greater or less than the then stated ceiling price, the Contractor shall so notify the Contracting Officer, giving a revised estimate of the total price for performing this contract, with supporting reasons and documentation. . . .
>
> (d) *Ceiling price*. The Government shall not be obligated to pay the Contractor any amount in excess of the ceiling price in the Schedule, and the Contractor shall not be obligated to continue performance if to do so would exceed the ceiling price set forth in the Schedule, unless and until the Contracting Officer shall have notified the Contractor in writing that the ceiling price has been increased . . . .

and (b) FAR 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (FEB 2002) clause whose ¶ (c) stated: "Changes in the terms and conditions of this contract may be made only by written agreement of the parties." (R4, tab 1 at 3 of 16)

5. Mr. Shanks' invoice No. 4a dated 8 January 2003 billed to the Defense Department $995.65 for Mr. Shanks' travel and lodging costs in Chattanooga, TN, for tax center training on 2-4 January 2003. CAPT David Revelt, USAF, signed the DD Form 250 accompanying invoice No. 4a for acceptance on 9 January 2003. (R4, tab 6 at 9-12)

6. Contract Modification No. P00001 (P00001), signed on 22 January 2003 by Mr. Shanks with an effective date of 17 January 2003, added two line lump sum items that increased the "total cost . . . from $24,990.00 by $2,411.00 to $27,401.00." Item 2 was for $1,400 and Item 3 was for "Tax-wise course" for $1,011. (Bd. corres. file)

7. Mr. Shanks' 7 February 2003 e-mail to CAPT Revelt stated that he and Revelt "agreed that I would bill only 40 hours a week, however, I have worked close to double the number of hours on my schedule" for the last two weeks (R4, tab 3).

8. CAPT Revelt's 10 February 2003 e-mail to Mr. Shanks stated:

> 1. Are the invoices currently accurate? As of 24 Jan 03, did you work 320 hours on this contract? If not, we'll make the appropriate adjustment.
>
> 2. Provide accurate invoices-reflecting the actual number of hours that you worked-during the last two weeks. If you worked more than 40 hours per week, we'll reduce the hours in the later weeks of the contract to ensure we (1) maintain a $30 rate and (2) do not exceed our funding limitation of $26,400.
>
> I'm going to ask Lt Waite to ensure that you do not work more than 40 hours per week for the remaining weeks, or if you do, we will shorten the performance period to maintain the same rate.

(R4, tab 4)

9. Appellant's 18 February 2003 e-mail to CAPT Revelt stated that Mr. Shanks did not take lunch and was still at work at 7:43 p.m. CAPT Revelt's 19 February 2003 e-mail to Mr. Shanks stated:

> I need to be very clear on this next issue: We will <u>not</u> pay for any hours over 40 hours per week under your contract. That includes the hours that you are working this week. If you work extra on one day, you should work short hours on the next. Please coordinate with Lt Waite to ensure this occurs.

(R4, tab 4) Mr. Shanks' 25 February 2003 e-mail to CAPT Revelt replied, "No problem" (R4, tab 5).

10. Appellant submitted 14 invoices totaling $26,400 for 880 hours at $30 per hour for his tax services at Beale AFB for 21 weeks from 2 December 2002 through 25 April 2003, including Invoices No. 7 for 120 hours for the two-week period 27 January through 7 February 2003 and No. 8 for 80 hours for 8-23 February 2003 (R4, tab 6 at 1-8, 13-35). The government paid those 14 invoices (Metcalf decl., ¶ 2).

11. Appellant's 7 December 2003 facsimile letter to the CO stated:

> This letter is a claim for a reasonable estimated 240 unpaid expended hours to carry out Labor Hour contract F040666 [sic]-03-P-0005.
>
> WHY SHOULD I BE PAID?
>
> 1. A Labor Hour contract requires a contractor to be paid for hours expended.
>
> 2. The contract guaranteed contractor would not work beyond 40 hours per week.
>
> 3. I billed for hours worked beyond 40 when the hours became excessive -- close to 100 per week.
>
> FACTORS
>
> (1.) The number of appointment schedule [sic] per day.
> (2.) The experience, skills, and training of volunteers.
> (3.) Volunteers not showing up.
> (4.) Communication Problems. Conveying the importance of tax assembly.
> (5.) Returns outside the scope of VITA.
> (6.) Request to adhere to VITA income guidelines and Elderly.
>
> 4. I did not continue to bill for hours expended and did not track them because the JAG Office informed me not to.
>
> 5. I could have EARNED INCOME for those hours to OPEN MY OWN OFFICE.
>
> 6. A labor hour rate includes cost and profit. My rate was affected because of the following:
>
> (1) I planned to drive to the BASE but because of the AWARD date and the required ARRIVAL DATE I had to do the following:

(1) Schedule a RUSH FLIGHT
(2) Rent A CAR for three months
(3) Drive 128 miles a day*
(4) SHIP MY AUTOMBILE [sic]
(5) Unplanned trip Tennessee "Fees for borrowing"

* No one at the BASE, had time to assist me with finding housing in YUBA CITY or CLOSE TO BASE.

. . . In addition my hourly rate was 38 per hour and I was forced to bill 30. My claim is for $9,120.

CLAIM AMOUNT 240 X 38 = 9120
I am owed 880 X 8 = 7040 INVOICE AMOUNT
$16,160

(Capitalizations in original) Appellant provided no documentation to substantiate his claim. (R4, tab 7)

12. CO Gary S. Metcalf's 8 December 2003 letter to appellant stated:

SUBJECT: Your Request for Payment, Contract F04666-03-P-0005

. . . .

Our office has received your claim, requesting an additional $16,160 in compensation. After careful consideration of your claim, we are denying your request. Per the contract, you were to be compensated at $30 per hour. Each of your invoices, billing at a rate of $30 per hour have [sic] been paid in full, along with all invoices for reimbursement of expenses. We consider this matter to be closed.

(R4, tab 8)

13. Mr. Metcalf, the CO who signed the Order, declared that at no time did Mr. Shanks "specifically notify" the CO of a "belief that the performance of the tax preparation services . . . would exceed the ceiling price on the contract" or "offer a revised estimate . . . of any additional hours required to perform the task" or "specifically

notify the [CO] that [Shanks] was working more than 40 hours per week" and that the CO "never approved any overtime hours in advance for Mr. Shanks and no overtime rates were ever negotiated" (Metcalf decl., ¶¶ 2-3).

14. CAPT David Revelt was the point of contact between the 9th Contracting Squadron and Mr. Shanks, verified Mr. Shanks' invoices, and prepared the DD Forms 250 "to enable payment to Mr. Shanks" (Revelt decl., ¶ 3). On 7 February 2003 CAPT Revelt informed Mr. Shanks that he "was not obligated to work more than forty (40) hours per week" (Revelt decl., ¶ 6) and in February 2003 "informed Mr. Shanks that because we [9th Contracting Squadron] did not have any additional funds for the Tax Contract, we would shorten the term of the contract by one week to account for the additional forty (40) hours that he had already worked" (Revelt decl., ¶ 8).

DECISION

Movant argues that: (i) except for appellant's 7 February 2003 notice of working additional hours, respondent's payment for the additional 40 hours included in appellant's Invoice No. 7 for 120 hours for the two-week period 27 January through 7 February 2003, and the shortening of the performance period from 2 May to 25 April 2003 to account for those 40 additional hours, appellant did not provide further notice to the CO that he had reason to believe that to perform the Order, the total price would substantially exceed the stated ceiling price; (ii) absent such further notice, respondent had no obligation to pay Shanks any amount beyond the Order's stated ceiling price; (iii) respondent paid appellant the $26,400 for the 880 hours at $30 per hour invoiced by Mr. Shanks; and (iv) the parties never agreed to change appellant's hourly rate or the Order's ceiling price set by P00001. Movant concludes that there are no material facts in dispute with respect to the foregoing SOFs and it is entitled to judgment as a matter of law. (Gov't mot. at 8-13)

Appellant's response to the motion ignores movant's factual and legal contentions regarding the absence of any notice from appellant to the CO of an overrun of hours or price to perform the Order, and respondent's obligation to pay appellant no more than the specified ceiling price unless and until the ceiling price was increased. Instead, appellant asserts that movant has not shown that there are no disputed material facts:

> The appellant contends that . . . the government violated the spirit of their contract by changing the terms of the agreement by their action or inaction that entitled him [Shanks] to an equitable adjustment and to recover losses that directly resulted from the breach. Thus, the plaintiff [sic] complaint was not conclusory allegations but material facts which support a claim.

Appellant describes the following government violations:

> The government request of work outside of the training level of the workers provided by the government, the government workers not showing up for work, the government workers refusing to adhere to quality control, and other refusals by government resulted in the appellant having to work more hours to complete the project and affected the quality of the appellant's work.

(App. opp'n at 2-3) Considering Mr. Shanks' 7 December 2003 claim allegations, the Board understands that appellant's above-quoted assertions refer to the six "FACTORS" in ¶ 3 and to the allegations in ¶ 6 of appellant's 7 December 2003 claim.

Appellant further argues that "[t]he parties have not engaged in discovery." Appellant did not identify any specific facts he needs to discover to be able to respond to this motion for summary judgment, nor explain why he did not request such discovery in the 15+ months since respondent moved for summary judgment. (App. opp'n at 3)

Summary judgment is appropriate when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c); *US Ecology, Inc. v. United States*, 245 F.3d 1352, 1355 (Fed. Cir. 2001).

Appellant does not genuinely dispute any of the material facts set forth in the SOFs regarding appellant's duty to provide notice of an overrun to the CO, and respondent's duty to pay appellant no more than the stated ceiling price, and does not argue that the Ceiling Price provision in the FAR 52.232-7, PAYMENTS UNDER TIME-AND-MATERIAL AND LABOR-HOUR CONTRACTS (FEB 2002) clause does not apply to the foregoing undisputed material facts. Movant therefore has carried its burden to show entitlement to summary judgment under FED. R. CIV. P. 56(c).

The Board is mindful of the rules for summary judgment in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) ("[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion. . . ." "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. [Citations omitted.]" "[T]he nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial*.' Fed Rule Civ Proc 56(e) (emphasis added)").

These rules do not compel the denial of the instant motion. Even if we were to view in a light most favorable to appellant his allegations of excessive daily appointments, no-show volunteers, communications problems, returns outside the scope of VITA, a government request for appellant to work outside the scope of VITA and to adhere to VITA guidelines and government failure to assist Mr. Shanks to find convenient housing in Yuba City (SOF, ¶ 11; app. opp'n at 3), such allegations do not support appellant's conclusions that there are material facts in dispute and that "the government violated the spirit of their contract" and breached the Order. Such conclusions are invalid because appellant does not identify any provisions in the Order, and none are apparent to the Board, that prescribed the number of his daily appointments, the experience, skills and training of "volunteers" (a term not found in the Order), what standard of "quality control" was required of "volunteers," or any duty respondent was required to perform under the Order, such as housing assistance, that it failed to perform. We hold that appellant has not come forward with specific facts showing that there is a genuine issue for trial, or with arguments to establish that movant is not entitled to judgment as a matter of law. *See Matsushita, supra*. We grant respondent's motion for summary judgment, and deny the appeal.

Dated: 8 December 2005

DAVID W. JAMES, 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
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. 54538, Appeal of Tyrone Shanks, rendered in conformance with the Board's Charter.
Dated:

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