

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Service Rodriguez, Barragan, S.L.) ASBCA No. 54622
)
Under Contract No. N68171-98-C-4003)

APPEARANCE FOR THE APPELLANT: Ms. Dolores Rodriguez Barragan
Manager

APPEARANCES FOR THE GOVERNMENT: Susan Raps, Esq.
Navy Chief Trial Attorney
Robert L. Kois, Esq.
Assistant Counsel
Naval Regional Contracting
Center, Naples

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

This appeal involves the claim of Service Rodriguez, Barragan, S.L. (Barragan or appellant) under a fixed-price contract to provide safety attendants (also referred to in the record as monitors, school bus monitors or safety assistants) on school buses at the United States Navy Station at Rota, Spain. Barragan seeks reimbursement in the amount of Euros 225,000 (U.S. \$181,407.73) for the cost of transporting safety attendants from the base control gates to the school bus departure area where attendants boarded the buses and then back to the base control gates after they completed their daily schedules. The government’s motion for summary judgment maintains that the contracting officer’s representative (COR) and the David Glasgow Farragut (DGF) Rota Schools Transportation Officer (STO) did not have actual contract authority to order Barragan to provide transportation for the school bus safety attendants, and appellant did so at its own risk. Barragan filed a response to the government’s motion. We deny the government’s motion.

STATEMENT OF FACTS (SOF)
FOR PURPOSES OF THE MOTION

1. The United States Navy (Navy or government) awarded Contract No. N68171-98-C-4003 (contract 4003) to Barragan on 19 September 1997 in the amount of \$160,127.23 to furnish safety attendant services for school buses at the DGF Department of Defense Schools at the Navy Station, Rota, Spain (R4, tab B at 001,

014-017). The base year term of the contract was from 1 October 1997 to 30 September 1998. The contract provided for four successive one-year contract options which the government exercised and Barragan performed through the fourth option year that ended on 30 September 2002. (R4, tab B at 003, 068-069, 086-087, 094, 100)

2. The contract 4003 Statement of Work in pertinent part provided:

C-1.1 SAFETY ATTENDANT

Contractor shall provide services specified in the schedule for Safety Attendant Services, Naval Station, Rota, Spain for the below listed daily round-trips (Round-trip = Pickup at sites and delivery to school in the morning; and pickup at the school and delivery to original sites in the afternoon.):

....

One (1) Safety Attendant shall be on each of the above round-trip daily bus runs.

....

All Safety Attendants shall report to the Rota or Fuentebravia gates each morning as provided by the schedule submitted by the Contracting Officer or COR. Safety Attendants will be released at the same gates each afternoon. [Emphasis added]

....

C-1.1.2 – SAFETY ATTENDANT WORK STATEMENT

In order to insure the safety of students while boarding, leaving and traveling on school buses, contractor personnel shall:

(a) *Board assigned bus no later than the first stop on the route and remain with the bus until the last student has departed. [Emphasis added]*

....

Note: *The Government does not provide transportation services for the Safety Attendants to get to work or return (home) from work.* [Emphasis added]

C-1.3 BUS/LUNCH CAPTAIN SERVICES

One (1) Bus/Lunch Captain shall maintain the list of Service [sic] Attendants, assign bus routes, and call substitutes, when required. This person(s) shall train Service [sic] Attendant and Lunch Monitors . . . and will be familiar with all the routes and stops.

. . . .

The Bus Captain shall take instructions and guidance regarding the contract and service provided thereunder from the Contracting Officer or the COR.

(R4, tab B at 014-017)

3. The contract included the FAR 52.212-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (OCT 1995) clause that in pertinent part provided “[c]hanges in the terms and conditions of this contract may be made only by written agreement of the parties” (R4, tab B at 020).

4. Contract 4003 also provided as follows:

CONTRACT ADMINISTRATION APPOINTMENTS AND DUTIES
(OCT 1995) (NAVSUP)

In order to expedite administration of this contract, the following delineation of duties is provided The individual/position designated as having responsibility should be contacted for any questions, clarifications or information regarding the functions assigned.

1. PROCURING CONTRACTING OFFICER (PCO) is responsible for:

. . . .

c. Change/question//information regarding the scope, terms or conditions of the basic contract document;

....

3. CONTRACTING OFFICER REPRESENTATIVE (COR)

(a) Definition. Contracting Officer's Representative means an individual designated in accordance with subsection 201.602-2 of the Defense Federal Acquisition Regulation Supplement and authorized in writing by the contracting officer to perform specific technical or administrative functions.

(b) If the Contracting Officer designates a contracting officer's representative (COR), the Contractor will receive a copy of the written designation. It will specify the extent of the COR's authority to act on behalf of the contracting officer. The COR is not authorized to make any commitments or changes that will affect price, quality, quantity, delivery, or any other term or condition of the contract.

(R4, tab B at 030-031)

5. Senior Chief (also Master Chief) Eric Williamson was named as the COR for contract 4003 for the 1997-1998 school year (R4, tab B at 031). The record does not contain a copy of a written designation specifying the extent of COR Williamson's duties or the extent of his authority to act on behalf of the CO. COR Williamson also identified himself as the DGF Rota Schools Officer for the 1997-1998 school year. The Navy transferred COR Williamson to another assignment in June 1998. (R4, tab D at 007) The record does not reflect that the government appointed a COR to succeed COR Williamson until 25 January 2001 (R4, tab B at 099 (Unilateral Modification No. P00017)).

6. Barragan stated in its letter of 21 July 2003 (claim) to the CO that when Barragan began contract performance in 1997, Ms. Dolores Rodriguez Barragan (hereinafter Ms. Rodriguez) was informed in a meeting with the COR and Mr. James Stanley, the STO, that:

[T]he safety monitor contractor was responsible for the transportation of the monitors from the Base control gates to

the bus departure area at the School and return to the control gates after the schedule routes. The School had previously carried out mentioned service; however, this service was now under the contracting company's responsibility. I was also informed that I would not be authorized the use of [sic] the School official vehicle to transport the monitors. Neither before nor during the five years of service was I advised or informed that this transportation service could be added to the contract as an amendment in order to compensate extra expenses. During the five years of the contract I provided transportation to the monitors. For doing this I was forced to purchase a seven passengers vehicle to transport the safety monitors to and from the Rota and Fuentebravia gates twice daily

When the contract was offered again, I bidded [sic] for it increasing the amount of money for that extra expenses, however, the contract was assigned to other bidder who made a cheaper [sic] offer than me without including the monitors['] transportation expenses. Later on, the contract was amended including those extra expenses

(R4, tab C at 008-009) Ms. Rodriguez subsequently stated in a letter to the CO, dated 17 March 2004, that she understood that only the CO could direct a change to the contract work regarding its scope, terms and conditions. Ms. Rodriguez noted, however, that she had been informed by the COR in 1997 that transportation of the safety attendants between the base control gates and the school bus departure area, which formerly had been performed by the government, was now Barragan's responsibility under its contract. She stated: "I assumed this responsibility without any problem, however, there is no doubt that this caused me to incur additional costs." (R4, tab C at 017)

7. COR Williamson responded by email of 4 September 2003 to government counsel who had requested information concerning Barragan's performance and claim. COR Williamson's statements appear to be consistent generally with those in Ms. Rodriguez's letter of 21 July 2003. However, he pointed out he had been on three aircraft carrier cruises since he served as COR in 1997, and the best he could recall was that:

Any conversation that occurred with Ms. [Rodriguez] concerning the contract were [sic] concerning compliance with the contract. I do remember her asking about

transportation for some of the monitors from the front gate to the school. *If my memory serves me correctly she was told by myself and the contracting officer that it was the responsibility of the contractor to provide the transportation.* That it was not in the contract to provide this transportation and that based on government vehicle guidelines we could not use a government vehicle for this purpose. I believe we did make arrangements to have one of the busses stop at the front gate on it [sic] way to the school and pick up some of the monitors and bring them to the school and then return them to the same gate at the end of the day. I was never told nor did I notice that Ms. [Rodriguez] had purchased a van of any kind. I do remember her driving an old ford van, nothing new.

This van service was never provide[d] that I remember in the past for anyone while I was the schools officer. The contract that was written prior to 97 was in violation with the SOFA [Status of Forces Agreement]. The DFG PTA had the contract during this time, using navy [sic] dependents as monitors thus the need to write a new contract in 97. I was placed in the position as the schools officer as a clean up measure from the previous civilian that was not complying with the contract guidelines. [Emphasis added]

(R4, tab D at 007-008)

8. Mr. James Stanley, the STO, did not have contract authority and was neither a CO nor COR. He informed government counsel by email of 17 September 2003 that during Barragan's five year contract performance, Ms. Rodriguez never inquired of him about transportation of the safety attendants; she never informed him she had purchased a van; she did not use it to transport the safety attendants, he believed; and Ms. Rodriguez and the van were not at the school most of the time. Mr. Stanley believed the government had accommodated Barragan's transportation needs, at least during the contract 4003 base year, by arranging for the RICO Co., which furnished a work bus and the school buses under contract, to transport some of the safety attendants between the base control gates and the school bus departure area. (R4, tab D at 006)

9. Barragan submitted an offer in 2002 in response to the government's solicitation of offers for the follow-on contract for safety attendant services for one base year and for four additional one-year options. On 21 August 2002, the government awarded Contract No. N68171-02-C-4035 (contract 4035) for safety attendant services

for school buses for the 2002-2003 base (school) year with four one-year options to another contractor (Remora Serve) that had submitted a lower offer. Contract 4035 had an effective date of 1 October 2002. (R4, tab C at 065, tab D at 003) The record does not contain a copy of contract 4035.

10. Ms. Rodriguez informed CO Sherry Taylor by email on 16 September 2002 that she had learned that the government intended to modify contract 4035 to reimburse Remora Serve for the cost of transporting the safety attendants to and from work. She continued that contract 4035 “clearly” provided:

Note: the government does not provide transportation services for the Safety Attendants to get to work or return (home) from work.

.....

(a) Boards [sic] assigned bus no later than the first stop on the route and remain with the bus until the last student has departed.

Ms. Rodriguez advised the CO that Barragan’s offer for contract 4035 included the cost of safety attendant transportation. As reiterated below, Ms. Rodriguez further expressed her belief to the CO that Barragan was not the low offeror because it had included the cost of safety attendant transportation in its offer for contract 4035. She stated that Barragan did this because the government required that it furnish this transportation under the same provisions contained in contract 4003. (R4, tab C at 068)

11. CO Taylor responded to Barragan by email on 17 September 2002 that:

The new contract reads exactly like the old (your) contract. It says:

[“]All safety attendents [sic] shall report to the Rota or Fuenebravia [sic] gates each morning in accordance with the schedule provided to the contractor by the Contracting Officer’s Representative (COR). Safety attendants will be released at the same gates each afternoon.”[*]

It also contains the provision that you cite. It appears that there is an ambiguity between the two statements. You never

* This contract provision as set forth in the contract is quoted at SOF 2.

brought this to the NRCC's [Naval Regional Contracting Center, Naples, Italy] attention when you were performing.

It is the responsibility of the government to meet the monitors at the gate and return them there (as stated above). No one has said that the government will provide home to work transportation.

(R4, tab C at 067)

12. Barragan agreed with CO Taylor by email of 17 September 2002 that the identical provisions found in contract 4003 and contract 4035 are ambiguous with respect to the contract party responsible for transportation of the safety attendants. Barragan further noted that:

My conclusion to this issue during my contract was that I had to take the responsibility of the cost to transport the safety assistants when needed to their point of boarding the bus or to one of the gates at the base. This is a cost that I assumed during my last contract and again would assume with the new contract. My bid [for contract 4035] reflected this cost to effectively manage the contract including the transportation of the safety assistants when needed.

(R4, tab C at 067)

13. From the foregoing communications between Barragan and the government and between Barragan and CO Taylor, we conclude Barragan in 1997 provided the safety attendant transportation between the gates and the school bus departure area based on the interpretation in 1997 that the government was not responsible for this function under contract 4003. There is no evidence that Barragan protested to the CO in 1997 (or indeed the COR) that the contract did not require it to furnish the safety attendant transportation.

14. Barragan filed a certified claim with the CO in the amount of Euros 225,000 on 21 July 2003. Barragan's claim sought reimbursement for the additional expenses for transportation of the safety attendants between the base control gates and the school bus departure area for the contract 4003 base year and for the four option years from 1998 through September 2002. (R4, tab C at 008)

15. The CO issued a final decision (COFD) denying Barragan's claim by letter dated 25 February 2004 (R4, tab C at 013). Barragan filed a timely appeal.

DECISION

The government moves for summary judgment on the ground that a government official with actual contracting authority did not issue a change order or otherwise direct Barragan under its contract to provide transportation of the safety attendants between the base control gates and the school bus departure area. (Gov't mot. at 3-7) The government does not argue that contract 4003 required appellant to provide the school bus transportation services and, indeed, issued a change order on contract 4035 for that contractor to fulfill this function.

Barragan contends it included the cost of safety attendant transportation in its offer in response to the solicitation for contract 4035 because the government required it to provide safety attendant transportation at its cost under contract 4003. Barragan in effect argues that if the contractor under contract 4035 was not responsible for the transportation service, Barragan was not responsible for this service under contract 4003, which had identical requirements. (App opp'n at 1-2)

“Summary judgment is properly granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law” based on the pleadings, depositions, answers to interrogatories, admissions and affidavits, if any. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987); Fed. R. Civ. P. 56(c). All justifiable inferences are drawn in favor of the nonmoving party, and all significant doubt over factual issues is resolved in its favor. *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999).

Drawing all reasonable inferences in favor of appellant, the COR's 4 September 2003 email, which refers to the CO as having been present at the parties' meeting in 1997 and as having informed appellant that it was the responsibility of the contractor to provide the transportation, raises a genuine issue of material fact as to whether the CO, as an authorized contracting official, directed a change to the work.

For the foregoing reason, the government's motion is denied.

Dated: 16 February 2006

EDWARD G. KETCHEN
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

MARK N. STEMLER
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. 54622, Appeal of Service Rodriguez, Barragan, S.L., rendered in conformance with the Board's Charter.

Dated:

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