ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Spectrum Healthcare Resources, Inc.	)	ASBCA No. 55120
	)	
Under Contract No. N00259-05-F-6051	)	

APPEARANCE FOR THE APPELLANT: Paul M. Vincent, Esq.
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Washington, DC

APPEARANCES FOR THE GOVERNMENT: Susan Raps, Esq.
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M. Lee Johnson, Esq.
Assistant Counsel
Fleet and Industrial Supply Center
San Diego, CA

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

This appeal arises from the contracting officer's (CO) 20 June 2005 final decision that terminated the captioned Delivery Order under a Federal Supply Schedule (FSS) contract for cause, and appellant's timely appeal of that decision on 18 August 2005. After the filing of pleadings, respondent moved for summary judgment on 8 November 2005. In December 2005 appellant responded to the motion, and respondent submitted a rebuttal in January 2006. The Board's 26 January 2006 letter to the parties posed several questions to clarify the dates and terms of the contract documents and regulations governing the CO's termination. In March 2006 the parties submitted clarifications, explanations and further documents, including movant's "Supplemental Motion for Summary Judgment," to which appellant replied in April 2006. We first address our jurisdiction over the appeal and then turn to the motion for summary judgment.

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

1. On 27 August 2003 the Department of Veteran Affairs (VA), National Acquisition Center awarded FSS Contract No. V797P-4530a (VA/FSS contract) to Spectrum Healthcare Resources, Inc. (SHR), for, *inter alia*, Special Item Number "621-032 Certified Emergency Medical Technician (EMT) / Paramedic," for the period 1 September 2003 through 31 August 2008 (R4, tab 29 at 1 of 121, 1 of 2, 7 of 23).

2. The VA/FSS contract, as amended on 22 October 2003, included: (a) the FAR 52.216-22 INDEFINITE QUANTITY (OCT 1995) VARIATION (OCT 1995) and 52.216-18 ORDERING (OCT 1995) VARIATION (OCT 1995) clauses, the latter of which provided –

> (b) All delivery orders or task orders are subject to the terms and conditions of this contract. In the event of conflict between a delivery order or task orders [sic] and this contract, the contract shall control.

(b) clause 552.216-72, PLACEMENT OF ORDERS (SEP 1999) (ALTERNATE II SEP 1999) authorizing federal executive agencies to place orders under the VA/FSS contract, (c) clause 52.212-4 CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (OCT 2003), providing in pertinent part:

> (c) ***Changes***. Changes in the terms and conditions of this contract may be made only by written agreement of the parties.
>
> (d) ***Disputes***. This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613). Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal or action arising under or relating to this contract shall be a dispute to be resolved in accordance with the clause at FAR 52.233-1, Disputes, which is incorporated herein by reference. . . . .
>
> . . . .
>
> (f) ***Excusable delays***. The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. The Contractor shall notify the [CO] in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch, and shall promptly give written notice to the [CO] of the cessation of such occurrence.

. . . .

> (m) ***Termination for cause***. The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

and (d) clause I-FSS-249-B, DEFAULT (MAY 2000):

> In addition to any other clause contained herein related to termination, the following is applicable to orders placed under [FSS] contracts:
>
> Any ordering office may, with respect to any one or more orders placed by it under the contract, exercise the same right of termination . . . as might the [VA/FSS] Contracting Officer, except that when failure to deliver articles or services is alleged by the Contractor to be excusable, the determination of whether the failure is excusable shall be made only by the [CO] of the VA, to whom such allegation shall be referred by the ordering office and from whose determination appeal may be taken as provided in the clause of this contract entitled "Disputes."

(R4, tab 29 at 1, 24, 26, 36, 57; tab 30 at 1-4, emphases in original)

3. FAR Subpart 8.4, FEDERAL SUPPLY SCHEDULES, as in effect from 29 July 2002 until 19 July 2004, prescribed in pertinent part:

8.405-5 Termination for default.

(a)(1) An ordering office may terminate any one or more orders for default in accordance with Part 49, Termination of Contracts. . . .

(2) Should the contractor claim that the failure was excusable, the ordering office shall promptly refer the matter to the schedule contracting office. . . .

. . . .

8.405-7 Disputes.

(a) Disputes pertaining to the performance of orders under a schedule contract. (1) Under the Disputes clause of the schedule contract, the ordering office contracting officer may—

(i) Issue final decisions on disputes arising from performance of the order (but see paragraph (b) of this section); or

(ii) Refer the dispute to the schedule contracting officer.

(2) The ordering office contracting officer shall notify the schedule contracting officer promptly of any final decision.

(b) Disputes pertaining to the terms and conditions of schedule contracts. The ordering office contracting officer shall refer all disputes that relate to the contract terms and conditions to the schedule contracting officer for resolution under the Disputes clause of the contract and notify the schedule contractor of the referral.

(c) Appeals. Contractors may appeal final decisions to either the Board of Contract Appeals servicing the agency that issued the final decision or the U.S. Court of Federal Claims. . . .

(48 C.F.R. §§ 8.405-5, 8.405-7 (2003))

4. FAC No. 2001-24, effective 19 July 2004, revised and renumbered FAR 8.405-5 as set forth below:

> **8.406-4 Termination for cause**.
>
> (a)(1) An ordering activity contracting officer may terminate individual orders for cause. Termination for cause shall comply with FAR 12.403, and may include charging the contractor with excess costs resulting from repurchase.
>
> (2) The schedule contracting office shall be notified of all instances where an ordering activity [CO] has terminated for cause an individual order to a [FSS] contractor . . . .
>
> (b) If the contractor asserts that the failure was excusable, the ordering activity [CO] shall follow the procedures at 8.406-6, as appropriate. . . .
>
> . . . .
>
> (d) Only the schedule [CO] may modify the contract to terminate for cause any, or all, supplies or services covered by the [FSS] schedule contract. . . .

FAC No. 2001-24 renumbered FAR 8.405-7 as FAR 8.406-6 and changed the references to "ordering office" to "ordering activity." (R4, tab 31 at 69 Fed. Reg. 34,231, 34,238-39 (June 18, 2004))

5. SHR's 14 October 2004 response to the Naval Medical Center, San Diego's (NMCSD) Solicitation No. N00259-05-Q-0001 issued on 7 October 2004 stated:

> Our proposal is consistent with the requirements of your request for quotes and the accompanying statement of work. We agree with all terms and conditions of your solicitation. . . .
>
> . . . .

Contingency Plan for Temporary Replacement

SHR understands the importance of continuity of care and uninterrupted patient services at NMCSD. To plan for the possible temporary absence of the required healthcare professionals, SHR will utilize the resources of its time-tested contingency plan:

- SHR maintains a 24-hour call-in service, answered by an SHR representative. This toll-free hotline provides SHR with firsthand notification of any healthcare professional with an emergency or illness, which prevents them [sic] from working. After notification, SHR's representative contacts qualified backfill healthcare professionals to provide backfill coverage at the MTF [Medical Treatment Facilities].

(R4, tab 3 at 6, 9)

6. On 29 October 2004, NMCSD issued Delivery Order No. N00259-05-F-6051 (the DO) to SHR under the VA/FSS contract for "Advanced Life Support . . . capable Ambulance Services . . . 24/7, holidays" for the Branch Medical Clinic, Marine Corps Air Station (BMC MCAS), Miramar. Item 0001, ambulance services for the period 1 November 2004 to 30 September 2005, included sub-items 0001AA, EMTs, and 0001AB, Paramedics, both of which provided that "Contractor Personnel will be working on a 24 hour shift rotation, 7 days a week." The DO included a "PERFORMANCE AND WORK STATEMENT AMBULANCE SERVICE" (the SOW). The SOW included:

> 2.1 Services: Contractor shall provide one licensed health care provider, i.e., Paramedic, and one Emergency Medical Technician – Automated External Defibrillator and Combitube qualified (EMT-D/C) providing Advanced Life Support services at BMC MCAS for a total of twenty-four hours each day, seven days each week including holidays. Both contracted members shall be "Emergency Vehicle Operator" qualified and be able to drive the ambulance.

Block 1 on the DD Form 1155 DO referred to VA/FSS contract V797P-4530A and block 16 stated that the DO was subject to the terms and conditions of that contract. (R4, tab 4 at 1, 3-5, 8, 10)

7. Effective 1 January 2005, VA/FSS contract Modification No. 7 modified some of its terms because of "Regulatory and Statutory Changes," including:

> I-FSS-249-B, DEFAULT/CAUSE (MAY 2000)
> (DEVIATION DEC 2004)
>
> In addition to any other clause contained herein related to termination, the following is applicable to orders placed under [FSS] contracts:
>
> Any ordering office may, with respect to any one or more orders placed by it under the contract, exercise the same right of termination . . . as might the [VA/FSS] Contracting Officer, *including alternatives when failure to deliver articles or services is alleged by the Contractor to be excusable consistent with FAR 8.406-4(b)*. The schedule [CO] shall be notified of all instances where an ordering activity [CO] has terminated for cause an individual order to a [FSS] contractor, or if fraud is suspected. [Emphasis added.]

(R4, tab 30, Mod. 7 at 45)

8. NMCSD CO Loida Toledo sent SHR proposed bilateral Modification No. P00001 to Delivery Order No. N00259-05-F-6051 that she had signed on 24 March 2005, stating in pertinent part:

> Add subparagraph 4.5, Shift Fill Rates, to the statement of work of this task order to read as follows: The contractor shall ensure a shift fill rate of 100% at all times. The contractor shall demonstrate that all personnel substitutions/ additions meet the required professional qualifications. No personnel substitutions/addditions [sic] shall be made without the express consent of the [CO].

(R4, tab 23)

9. SHR's 7 April 2005 e-mail reply to NMCSD CO Loida Toledo stated:

> Mod 1 is requesting guaranteed 100% coverage. We would need to re-price the contract to include enough money to hire an additional employee who will be on-call 24/7 and be available to show up at the facility whenever a call-off occurs.

> In a guaranteed 100% coverage situation an additional person must be available at a moments notice.
>
> We currently have . . . employees for emergencies, however, [they] cannot guarantee that they will be available for all call-off due to the fact that [they] have full-time positions elsewhere.
>
> SHR's understanding is that we will continue to run under the original contract until consideration can be determined for addition of 100% guaranteed coverage, 24/7 on call employee[.]

The CO replied on the same day: "Please ensure that we have 24/7 coverage as stated in the contract" and that she would forward SHR's repricing request to her supervisor for guidance. (R4, tab 9)

10. The NMCSD CO's 25 April 2005 cure notice to SHR cited "failure to provide 24-hour/7 day ambulance coverage" on 8 February, 31 March and 21 April 2005 (R4, tab 12). SHR's 6 May 2005 letter replying thereto stated that it had increased the compensation for "employees who pick up additional shifts to cover backfill needs," had provided "over 99% coverage since the inception of the order" and would "continue to provide coverage on a 24/7 basis as required," and referred to its 7 April 2005 e-mail regarding proposed Modification No. P00001 (R4, tab 13).

11. On 26 May 2005 SHR stated to the NMCSD CO: "Spectrum is not willing to quote a 100% performance guarantee alternative" because "the price would be prohibitively expensive" and perfect performance was unrealistic (R4, tab 16A).

12. According to movant, SHR failed to provide EMT and Paramedic personnel at BMC MCAS Miramar on the following five dates and times:

Date	Times	R4, tabs
8 Feb 05	1100-1745	5, 6, 12
31 Mar 05	0730-1330	7, 8, 10, 12
21 Apr 05	0730-1905	10, 11
8 May 05	0730-2100	14-16
7 Jun 05	0700-1500	17-18

13. The 20 June 2005 final decision of the NMCSD CO terminated the DO in its entirety, effective 27 June 2005, alleging that on at least three occasions SHR failed to

provide ambulance services, for which SHR proffered no excusable causes, and SHR was unable and unwilling to continue the specified 24/7 performance. The decision advised SHR of its appeal rights. (R4, tab 19)

14. The 19 July 2005 letter of SHR's attorney Paul M. Vincent to the NMCSD CO requested that the CO withdraw the termination. Mr. Vincent asserted that the statement of effort to be performed under the DO did not require "100% perfect performance" for 24 hours per day, seven days per week, including holidays. He contrasted the language in the SOW with that in other DOs which, for example, explicitly dealt with service interruptions. He concluded that "Spectrum did not materially fail to perform the subject Task Order as a whole, and the few isolated service interruptions were caused by events beyond Spectrum's reasonable control." (R4, tab 20)

15. On 18 August 2005 SHR simultaneously appealed to the ASBCA and the VABCA from the NMCSD CO's 20 June 2005 final decision. The 16 September 2005 "Consent Motion Regarding Jurisdiction" of VA and SHR stipulated to dismiss the VABCA appeals on the ground that the disputes between the parties "relate solely to the terms and conditions of Task Order N000259-05-F-6051, and not to any terms or conditions of the [VA FSS contract]," the NMCSD CO had authority to issue the disputed final decision and the ASBCA has jurisdiction of the appeal, pursuant to FAR §§ 8.406-6(a)(i), (c). On 19 September 2005 the VA BCA issued an "ORDER DISMISSING APPEALS" stating that the order in question and the final decision terminating such order were issued by the NMCSD CO and were appealed to the ASBCA as stipulated, and "that, pursuant to FAR 8.406-6(c), the ASBCA has jurisdiction over this matter." (Gov't resp., attach. 2 at 2-4, 8-9)

16. Appellant's response to the motion for summary judgment included affidavits of Toni Kuehne, its vice-president, and Preston Carpenter, its regional manager, regarding the parties' course of dealing with respect to the 24/7 staffing requirement, appellant's procedures for replacing personnel in isolated instances of sickness, the significance of the proposed but unexecuted Modification No. P00001 to the DO, and military agency expectations and contract terminology for 100% and lesser percentages of uninterrupted performance of healthcare service contracts (app. response, exs. 1, 2). Movant's rebuttal to appellant's response included the 13 January 2006 declaration of CO Toledo regarding her understanding of the 24/7 staffing requirement and her proposed term "100% shift fill rate" in Modification No. P00001, which she supplemented in a declaration of 23 March 2006 (gov't rebuttal br. at 15). Appellant's Ms. Kuehne submitted a second affidavit disputing CO Toledo's 23 March 2006 statement that the NCMSD solicitation's 24/7 requirement meant "100% of the time" (app. br. at 14).

DECISION

I.

In view of the regulatory changes to the FSS provisions relating to terminations for cause and disputes with respect to DOs, we first address whether we have jurisdiction of this appeal.

Movant argued in November 2005 that the ASBCA has jurisdiction of this appeal because it:

> "is related solely" to Appellant's performance obligations under the Navy [DO]. As such, jurisdiction does not extend to the terms and conditions of the VA [FSS] contract, over which the Navy [CO] and the ASBCA lack jurisdiction.

(Gov't mot. at 16, citing *Sharp Electronics Corp*., ASBCA No. 54475, 04-2 BCA ¶ 32,704) Appellant's 9 December 2005 opposition to the motion did not address ASBCA jurisdiction (app. opp'n at 20-22). Movant's 13 January 2006 rebuttal brief argued:

> [T]he [CO] cannot apply termination standards emanating from the VA or GSA Contract under which the [DO] was issued [citing *Sharp Electronics*]. That matter needs to be pursued before the respective appeal authority over those contract documents [apparently the VA BCA]. . . .

(Gov't reply br. at 6)

SHR's 24 March 2006 Responses to Board Queries stated that the "new" Default clause I-FSS-249-B in Modification No. 7 to the VA/FSS contract, effective 1 January 2005 (*see* SOF, ¶ 7), permits ordering activity COs "to terminate for cause, even where an issue of excusable delay is involved" (app. resp. at 2-3). Movant's 24 March 2006 "Supplemental Motion for Summary Judgment" stated that the ordering activity CO has the same authority to terminate a DO for cause as the VA/FSS CO (gov't resp. at 12).

Before 19 July 2004, FAR 8.405-5, Termination for default, and the FSS-249-B Default (May 2000) clause in the October 2003 VA/FSS, authorized the ordering office to terminate a DO for default (SOF, ¶¶ 2, 3). However, should a FSS contractor claim that the failure was excusable, FAR 8.405-5(a)(2) and the foregoing FSS-249-B clause required the ordering office CO to refer the matter to the FSS contracting office (SOF, ¶ 3).

On and after 19 July 2004, FAR 8.406-4, Termination for cause, not only authorized the ordering activity CO to terminate a DO for default, but also authorized that CO, in appropriate circumstances, to determine whether the default was excusable. Thus, FAR 8.406-4(b) states that if the FSS "contractor asserts that the failure was excusable, the ordering activity [CO] shall follow the procedures at FAR 8.406-6, as appropriate." FAR 8.406-6(a)(1)(i), in turn, authorizes an ordering activity CO to issue a final decision on disputes arising from performance of an order under a FSS contract, but FAR 8.406-6(b) requires such CO to refer all disputes relating to the FSS contract terms and conditions to the FSS contracting officer for resolution (SOF, ¶ 4). On 1 January 2005, Modification No. 7 to the VA/FSS contract revised the FSS-249-B Default clause to authorize the ordering activity CO to exercise the same right of termination as the VA/FSS CO, including alternatives when failure to deliver services is allegedly excusable "consistent with FAR 8.406-4(b)" (SOF, ¶ 7).

Here, the ordering activity (NMCSD) CO terminated the DO for cause on 20 June 2005, alleging that SHR failed on at least three occasions to provide ambulance services, for which SHR proffered no excusable causes, and was unable and unwilling to continue the specified 24/7 performance (SOF, ¶ 13). The VABCA dismissed SHR's appeals on 19 September 2005 based on the stipulation of SHR and VA that their disputes "relate solely to the terms and conditions of Task Order N000259-05-F-6051, and not to any terms or conditions of the [VA FSS contract]," so "pursuant to FAR 8.406-6(c) the ASBCA has jurisdiction over this matter" (SOF, ¶ 15).

To avoid nullifying or impairing the increased authority accorded to ordering activity COs by the 19 July 2004 revised FAR 8.406-4 provision, we construe that provision and the implementing FSS-249-B Default/Cause clause in VA/FSS Modification No. 7 to authorize an ordering activity CO to terminate a DO for default when an FSS contractor alleges excusable default, including interpreting the DO's terms – here, whether the DO requires 100% perfect performance of 24/7 services – and to determine the effect of the FSS terms and conditions – here, the excusable delay provision – to the extent they relate to performance of the DO.

Board precedents on DO's under FSS contracts are consistent with the foregoing interpretation. When the contractor contended that the Air Force CO's default termination of a DO under a GSA/FSS was wrongful and claimed $108,000 for a convenience termination, the CO denied that claim and claimed $10,987 in excess reprocurement costs in May 2002 (before the 29 July 2002 revision to FAR 8.405-7), and the GSA/FSS included the restrictive May 2000 FSS-249-B Default clause, the Air Force CO's final decision was invalid and the ASBCA lacked jurisdiction to entertain the dispute. *United Partition Systems, Inc.*, ASBCA Nos. 53915, 53916, 03-2 BCA ¶ 32,264 at 159,597. Likewise, when the contractor's dispute related "*solely* to the validity and/or applicability of the terms and conditions of the GSA [FSS] contract, *not* performance of

the Navy DO" (emphasis added), and the FSS contract did not include the December 2004 FSS-249-B Default clause, the Navy CO had no authority to issue the purported decision and the ASBCA had no jurisdiction of the appeal. *Sharp Electronics Corp.*, ASBCA No. 54475, 04-2 BCA ¶ 32,704 at 161,795-96.

Accordingly, we hold that the ASBCA has jurisdiction to entertain this appeal.

II.

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); *U. S. Ecology, Inc. v. United States*, 245 F.3d 1352, 1355 (Fed. Cir. 2001).

The parties have submitted opposing affidavits and declarations regarding key DO provisions, including whether its 24/7 term required 100% perfection of uninterrupted services, how the "Contingency Plan for Temporary Replacement" in appellant's 14 October 2004 offer to NMCSD may have affected the rigidity of the 24/7 requirement, whether NMCSD's solicitation originally required perfectly uninterrupted services "100% of the time" and what was the contractual significance of the NMCSD CO's proposed Modification No. P00001 to the DO to add a statement that the "contractor shall ensure a shift fill rate of 100% at all times," which modification appellant declined to execute (SOF, ¶¶ 5, 16).

It is clear that the parties genuinely dispute the foregoing material facts with respect to appellant's defense against default termination of the DO. Accordingly, we deny respondent's motion for summary judgment.

Dated: 31 July 2006

DAVID W. JAMES, JR.
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

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. 55120, Appeal of Spectrum Healthcare Resources, Inc., rendered in conformance with the Board's Charter.

Dated:

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