

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Golden Wings, Inc.) ASBCA No. 57136
)
Under Contract No. W91GY0-07-C-0629)

APPEARANCE FOR THE APPELLANT: James A. Conrady, Esq.
Okmulgee, OK

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
CPT Elisabeth L. Gilman, JA
Trial Attorney

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

This is a timely appeal of a Contracting Officer's (CO) denial of Golden Wings, Inc.'s (GWI) certified claim. The Contract Disputes Act (CDA) 41 U.S.C. §§ 7101-7109, is applicable. On 8 December 2010, the government filed a motion for summary judgment; and GWI later filed an opposition brief. We grant the motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 24 May 2007, the Joint Contracting Command – Iraq (government) and GWI entered into Contract No. W91GY0-07-C-0629 for the lease of 19 Chevrolet and GMC armored vehicles. The contract contained two Contract Line Item Numbers (CLINs), 0001 and 1001. The first CLIN covered the contract's base period, 1 June 2007 through 30 November 2007; and the second CLIN dealt with an option period extending from 1 December 2007 to 31 May 2008. Both CLINs encompassed the entire inventory of vehicles and provided a monthly unit price of \$66,500. The total, fixed-price amount of each CLIN was, therefore, \$399,000. (R4, tab 1 at 1)

2. The contract contained the following pertinent FAR clauses:

52.217-8, OPTION TO EXTEND SERVICES (NOV 1999)

The Government may require continued performance of any services within the limits and at the rates specified in the contract. These rates may be adjusted only as a result of revisions to prevailing labor rates provided by the Secretary

of Labor. The option provision may be exercised more than once, but the total extension of performance hereunder shall not exceed 6 months. The Contracting Officer may exercise the option by written notice to the Contractor within 5 days of contract expiration.

52.217-9, OPTION TO EXTEND THE TERM OF THE CONTRACT (MAR 2000)

(a) The Government may extend the term of this contract by written notice to the Contractor within 5 days; provided that the Government gives the Contractor a preliminary written notice of its intent to extend at least 30 days before the contract expires. The preliminary notice does not commit the Government to an extension.

(b) If the Government exercises this option, the extended contract shall be considered to include this option clause.

(c) The total duration of this contract, including the exercise of any options under this clause, shall not exceed 18 months.

52.228-8, LIABILITY AND INSURANCE—LEASED MOTOR VEHICLES (MAY 1999)

(a) The Government shall be responsible for loss of or damage to—

(1) Leased vehicles, except for (i) normal wear and tear and (ii) loss or damage caused by the negligence of the Contractor, its agents, or employees; and

(2) Property of third persons, or the injury or death of third persons, if the Government is liable for such loss, damage, injury, or death under the Federal Tort Claims Act (28 U.S.C. 2671-2680)

(b) The Contractor shall be liable for, and shall indemnify and hold harmless the Government against, all actions or claims for loss of or damage to property or the injury or death of persons, resulting from the fault, negligence, or wrongful act or omission of the Contractor, its agents, or employees.

(c) The Contractor shall provide and maintain insurance covering its liabilities under paragraph (b) of this clause, in amounts of at least \$200,000 per person and \$500,000 per occurrence for death or bodily injury and \$20,000 per occurrence for property damage or loss.

(d) Before commencing work under this contract, the Contractor shall notify the Contracting Officer in writing that the required insurance has been obtained. The policies evidencing required insurance shall contain an endorsement to the effect that any cancellation or any material change adversely affecting the interests of the Government shall not be effective (1) for such period as the laws of the State in which this contract is to be performed prescribed or (2) until 30 days after written notice to the Contracting Officer, whichever period is longer. The policies shall exclude any claim by the insurer for subrogation against the Government by reason of any payment under the policies.

(e) The contract price shall not include any costs for insurance or contingency to cover losses, damage, injury, or death for which the Government is responsible under paragraph (a) of this clause.

(R4, tab 1 at 8) (Underlining in original)

3. Item 3 of the contract's "Statement of Work" (SOW) provided:

Contractor Responsibilities: The contractor will be required to provide vehicles for the establish [sic] length of the contract. The contractor is responsible for retrieving vehicles at cost upon completion of the contract.

(R4, tab 1 at 11)

4. On 5 November 2007, the parties entered into bilateral Modification No. P00004 which stated:

The purpose of this modification is to exercise option period one:

- 1) In accordance with contract clause 52.217-9 – Option to Extend the Term of the Contract – the government hereby exercises option one with a period of performance of 1 Dec 2007 to 31 May 2008.
- 2) \$399,000.00 funds this action (see 12).
- 3) All other terms and conditions remain unchanged.

(R4, tab 5)

5. On 24 May 2008, the parties entered into bilateral Modification No. P00005 which provided, in part:

2. Extend expiration date from 31 May 2008 to 31 July 2008, total extension of 2 months.
3. Contract value is increased from \$798,000.00 to \$931,000.00, a total increase of \$133,000.00.
All other terms and conditions remain unchanged.

(R4, tab 6)

6. Through Modification Nos. P00006, executed on 12 July 2008, and P00007, with an effective date of 23 August 2008, the parties bilaterally extended the contract to 30 November 2008 (R4, tabs 7, 8).

7. On 22 January 2009, GWI filed a certified claim in the amount of \$467,079.00, citing FAR 52.228-8, LIABILITY AND INSURANCE—LEASED MOTOR VEHICLES (MAY 1999), which stated that the government was “responsible for loss of or damage to the leased property [the armored vehicles] except for Normal Wear and Tear” (R4, tab 9 at 1). GWI stated further that it “took re-delivery of the Nineteen (19) vehicles through its Agent in Baghdad and the same were jointly inspected as evidenced by an inspection report dated 12 December, [sic] 2008....” GWI alleged that the vehicles were damaged as a result of the government’s “misuse, abuse and neglect.” (*Id.* at 2)

8. On 2 February 2009, the CO responded to GWI’s claim. He stated that he had conducted a personal inspection of the vehicles and, as a result, had compiled an attachment of several pages delineating the damages. The CO agreed that the damages listed in his attachment were “beyond normal wear and tear.” He also wrote: “Please review the attachment and resubmit your claim.” (R4, tab 10 at 1)

9. On 23 February 2009, GWI forwarded a recomputed claim to the CO in a total amount of \$307,190 (R4, tab 11 at 2). The CO agreed that this revised amount was reasonable; and, on 4 November 2009, he executed Modification No. P00008 which added CLIN 1002 to the contract in the amount \$307,190 which reflected GWI’s

recomputed claim (R4, tab 18). On 25 February 2009, as a result of this settlement, GWI withdrew its claim (R4, tab 12).

10. On 17 August 2009, GWI submitted to the CO a “CERTIFIED CLAIM FOR SUPPLEMENTAL DAMAGES” in an amount \$228,068.40, “plus \$1,357.55 per day from and after 15 August 2009” (R4, tab 13 at 1). The gravamen of GWI’s claim was that, although the CO “anticipated” that funding would “be available within the week,” it had not yet been paid (*id.* at 2; ex. A at 2). GWI also stated:

The Contractor continues to incur additional daily liabilities for storage at the rate of \$12.00 per day per vehicle.... The Contractor continues to suffer depreciation and decline in value over time at a rate of \$59.45 per day per vehicle based upon a useful life of 7 year [sic] from date of original delivery. The damages continue at a rate of \$1,357.55 per day....

(R4, tab 13 at 3)

11. On 9 December 2009, the CO issued a final decision in which she denied GWI’s claim in its entirety. She stated in pertinent part:

In response to the contractors [sic] supplemental claim I informed the contractor’s lawyer Mr. James Conrady in an email dated 10 Nov 09 that the [sic] his request for payment of depreciation fees was denied. As stated in the email depreciation is the normal occurrence for any vehicle owner and his client would have faced this decline regardless of the vehicles [sic] condition. I also stated that I would agree to the payment of storage fees in the amount of \$22,176.00, based on receipts received in October 09. However, after further research I determined that the government is not responsible for such costs. The contractor was not instructed by the government to place the vehicle in storage and IAW FAR 52.228-8 the government is only responsible for the “lost [sic] of or damage to – leased vehicles”, [sic] not for any additional costs incurred by the contractor. Once the contractor accepted the vehicles from the government they became the sole property and responsibility of the contractor. The responsibility for fixing the vehicles rested with the contractor who made the decision not to repair the cars, but, to place them in storage. It would have been in the contractor’s best interest to have the vehicles repaired and to

invoice the government for the incurred costs up to the equitable adjustment amount of \$307,190.00, which is normal business practice. And although the contractor was told that “funding” would be available within a “week”, [sic] he was not promised payment within that time. No modification or invoice was ever created prior to November 2009. Therefore, the government cannot assume responsibility for the actions of the contractor between February 2008 and the present.

(R4, tab 24 at 1-2) This appeal followed (R4, tab 25).

12. GWI received payment on 19 January 2010 (answer ¶ 14).

THE PARTIES’ ARGUMENTS

After the pleadings were filed, the government filed a motion for summary judgment. It contended that there was no genuine dispute between the parties over material facts. (Gov’t mot. at 3) Citing the contract’s SOW, the government noted that GWI was responsible for retrieving the leased vehicles upon contractual completion. The contract placed no further burdens upon the government. (*Id.* at 2) The government also contended:

Following the expiration of the period of performance the contractor inspected and retrieved the vehicles from the U.S. Government. Once the vehicles were returned to the contractor, the contractor elected to store and then sell the vehicles. The costs for storage of the vehicles and depreciation of the vehicles after expiration of the lease are not allocable to the contract and as such are not allowable.

(*Id.* at 1)

In its “Objection to Government’s Motion for Summary Judgment,” GWI does not even allege that a genuine dispute over material facts exists (app. opp’n, *passim*). Nor does GWI fortify its opposition brief with any affidavits. Moreover, GWI does not cite any contractual provisions to bolster its arguments. GWI cites the CO’s statement at the time its initial claim was settled that he anticipated “funding” would “be available within the week.” GWI contends that it relied upon this statement as a “quasi contract...that perpetuated consequential damages to the Contractor for which it should be justly compensated.” (*Id.* at 2)

In its reply brief, the government notes that “[b]oth the Government’s and Appellant’s version of the material facts are consistent.” It contends that GWI is not

entitled to consequential damages and that its “only remedy for the late payment of funds...is addressed solely through the Prompt Payment Act, 31 U.S.C. § [sic] 3901-3907.” Similarly, the government contends that “[i]mproperly sought damages that are neither allowable nor allocable under the contract are not proper remedies for late payment (FAR 31.201-2(a); 31.201-4).” (Gov’t reply br. at 2)

DECISION

Clearly, there are no genuine issues of material fact presented by the government’s motion for summary judgment. Therefore, we can analyze the legal positions of the parties to determine whether either of them should prevail. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987).

We simply note that neither party cites a contractual provision which places any responsibility whatsoever on the government with respect to the vehicles upon expiration of the contract. Indeed, the only pertinent provision is in the SOW, and it provides that GWI – not the government – was responsible for “retrieving vehicles at cost upon completion of the contract” (SOF ¶ 3).

It is undisputed that GWI’s initial claim was not paid until 19 January 2010 (SOF ¶ 12). But, although the CO did state that he “anticipated” funding would “be available within a week,” GWI was not promised payment within that time frame (SOF ¶ 10). Therefore, it was not entitled to rely upon this assertion as a basis for incurring post-contractual storage and depreciation costs as part of a damages claim. It could either have sold the vehicles immediately upon contractual completion or have absorbed the repair costs itself and then sold them. At any rate, its actions were voluntary and do not form a basis for a claim against the government.

CONCLUSION

The motion for summary judgment is granted. The appeal is denied.

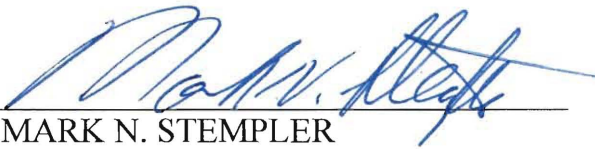
Dated: 17 March 2011



MICHAEL T. PAUL
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



JACK DELMAN
Administrative Judge
Acting 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. 57136, Appeal of Golden Wings, Inc., rendered in conformance with the Board's Charter.

Dated:

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