

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Charles Mullens) ASBCA No. 57432
)
Under Contract No. NAFHA1-06-T-0226)

APPEARANCE FOR THE APPELLANT: Robert D. Stachel, Jr., Esq.
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APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
MAJ Samuel E. Gregory, JA
Stephanie B. Magnell, Esq.
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

Charles Mullens appeals a contracting officer's final decision denying a \$90,000 damages claim for the government exercising a no-fault termination of the captioned contract (hereinafter Contract 0226). Mr. Mullens alleges that there were no "changed circumstances" justifying the termination, that the termination was in bad faith, and that he was wrongfully denied the right to continue performance of the contract pending decision of this appeal. We find no merit in these allegations and deny the appeal.

FINDINGS OF FACT

1. On 27 January 2006, the Non-Appropriated Fund (NAF) Contracting Office, Fort Sam Houston, Texas, awarded Contract 0226 to Mr. Mullens to operate a recreational vehicle (RV) and marine maintenance (mechanic) concession at Fort Huachuca, Arizona (R4, tab 1 at 1-3). This concession was a component of the Fort Huachuca Morale, Welfare, and Recreation (MWR) program serving military and civilian personnel stationed at the Fort, their dependents and other authorized persons.

2. The concession was located in one bay of the Fort Huachuca MWR Rents facility where NAF-owned RVs and boats were available for rent to authorized personnel. In addition to the shop space, the government provided Mr. Mullens with use of the building utilities, special marine tools and some other shop equipment. (R4, tab 1 at 6) Mr. Mullens agreed to pay the government a \$250 per month concession fee and to

“provide a discounted rate of \$15.00 per hour for all maintenance and repairs made to NAFI equipment” (*id.* at 3, 5).¹

3. The Contract 0226 specifications at section 19.0 entitled “CONDUCT AND APPEARANCE OF CONCESSIONAIRE PERSONNEL” stated among other things, that concessionaire personnel “shall conduct themselves in a manner that shall not reflect unfavorably upon Ft. Huachuca” and “give prompt and courteous treatment to authorized patrons.” Section 19.0 further stated that “Superior and friendly customer service must and shall be given to every patron.” (R4, tab 1 at 8)

4. The initial term of Contract 0226 was from 1 February 2006 through 31 January 2007. The contract included four successive 12-month option periods thereafter. (R4, tab 1 at 3) The contract also included a clause entitled NO-FAULT TERMINATION (NOV 2004) which stated: “This contract may be terminated in whole or in part by either party upon 10 days written notice to the other party” (*id.* at 15).

5. The first two option periods were timely exercised by the government. By administrative oversight, the third option year 1 February 2009 to 31 January 2010 was not exercised. However, Mr. Mullens continued operating the RV/marine maintenance (mechanic) concession and paying the monthly concession fee through 31 July 2009.

6. Over the course of the contract, there was an established practice between the manager of the MWR Rents facility (Ms. Townsend) and Mr. Mullens that when Mr. Mullens was absent and a customer came to pick up a boat that had been repaired, Ms. Townsend² could release the boat to the customer and either collect the money due on the work order or tell the customer to “Come back and pay Mr. Mullens.” (Tr. 1/156-57, 2/31-33; app. supp. R4, tab A-26 at 29-30)

7. On 19 May 2009, Ms. Danielle Elaban came to the MWR Rents facility to discuss with Mr. Mullens a boat that had been dropped off the night before (tr. 2/33, 36-37). This discussion as recalled by Mr. Mullens was in pertinent part as follows:

[Ms. Elaban] says, I have the boat that I brought in yesterday, and I says, what boat? ‘Cause my area that I use for putting my work boats that I was working on they use for a storage yard also, and she says, that one right there, and she pointed it out. And I said, okay. And she says, what I want you to do is

¹ A NAF is sometimes referred to as a non-appropriated fund instrumentality or “NAFI.” For purposes of this opinion the two terms are interchangeable.

² At the time of hearing Ms. Townsend had become Ms. Aguirre by marriage (tr. 2/10). To avoid confusion we will refer hereafter to her in this opinion as Ms. Townsend Aguirre.

we just got it and it won't run for us. We've had it running and it quit and we can't get it to run.

....

And she says, what I need you to do is go find out why it won't run and don't do anything more than you have to on it, just find out why it won't run and then give me a call and let me know what's going on with it so that I can decide where we're going to go with this boat....

....

So I told her, I said, well, tell me what happened. And she says, well, we had it running for a while and now it quit running and we can't get it to start and we don't know anything about it. And so, you know, do what you have to do, just don't do anything more than you have to do so we won't have a big bill and give me a call. And she filled out the work order....

(App. supp. R4, tab A-26 at 57-59)

8. Ms. Elaban filled out the sections of the work order for the date, her name, her street address, her telephone number, the make, model and serial number of the boat, and the name and telephone number of an alternate contact (Mr. Wilke). She did not fill out the "Instructions" section, or any other section of the work order, and she did not sign the customer authorization for repair work. (App. supp. R4, tab A-4)

9. Mr. Mullens states that after Ms. Elaban departed, he determined the cause of the motor not running and that he tried "numerous times" to contact her to discuss the needed repairs. Having failed to reach her, he made the repairs without her authorization. He completed the repairs on 21 May 2009 and the bill for those repairs was \$378.10. He then contacted the alternate contact on the work order, Mr. Wilke, to tell him that the repairs were completed and the boat was ready for pick-up. (App. supp. R4, tabs A-4, A-26 at 60, 66-67)

10. On 22 May 2009 (the Friday of the Memorial Day weekend), Ms. Elaban and Mr. Wilke picked up the boat at the MWR Rents facility. Mr. Mullens was not there at the time. The MWR Rents facility manager, Ms. Townsend Aguirre, was present and testified that she released the boat to Ms. Elaban as follows:

When [Ms. Elaban] came in, I looked on his [Mr. Mullens'] work bench for a work order and I couldn't find one so I tried to contact Mr. Mullens and I couldn't get a hold of him. So I told [Ms. Elaban] to go ahead and take the boat and to make sure she contacted [Mr. Mullens] on Tuesday because we were closed on Monday.

(Tr. 2/38)

11. On the Tuesday immediately following the weekend holiday, Ms. Townsend Aguirre told Mr. Mullens that Ms. Elaban had picked up the boat and that she had told Ms. Elaban to contact him regarding the bill "because I couldn't find a work order" (tr. 2/39). Mr. Mullens did not express at that time any disapproval of Ms. Townsend Aguirre's release of the boat to Ms. Elaban without payment.

12. Over a period of "several weeks" after the boat was picked up, Mr. Mullens contacted Ms. Elaban on the telephone several times to obtain payment of his bill of \$378.10 for repair of the boat. When no payment was made, Mr. Mullens went to her work place to discuss the matter face-to-face (tr. 1/24-25). Mr. Mullens explains why he went and what he said as follows:

I said, this is enough. This is just a theft thing, and I told her when I was down there, I said, if you don't come and try to make payments on this and you keep saying you're going to and don't, I'm going to turn it in for [a] theft of service complaint and that's a criminal complaint.

(App. supp. R4, tab A-26 at 71)

13. On 23 June 2009, Mr. Mullens called the Fort Huachuca military police to report a theft. In a sworn statement, dated 25 June 2009, Mr. Mullens described his call and what occurred after the MPs arrived as follows:

TUESDAY 6/23/09 I CALLED THE MP STATION AND HAD 2 MP'S RESPOND TO MY BUSINESS AT BLDG. 70914 I HAD A COMPLAINT ABOUT A CUSTOMER STEALING A BOAT OUT OF MY YARD AND NOT PAYING FOR THE SERVICES RENDERED. MR. RAY SANTIAGO ARRIVED A FEW MINUTES AFTER THE MP'S HAD ARRIVED AND HAD THEM DISMISSED WITHOUT COMPLETING THE COMPLAINT. I BELIEVE THAT IS ILLEGAL AND HE WANTED THE MP'S REMOVED SO HE COERCE ME INTO

CONSPIRING TO DEFRAUD THE GOVERNMENT. HE SAID HE WAS IMPOWERED [SIC] TO PAY A \$350.00 PRIVATE BILL WITH A GOVERNMENT CHECK EVEN THOUGH THE DEBT WAS NOT A GOVERNMENT DEBT.

Q: JACOBUS

A: MULLENS

Q: WHO'S BOAT DID YOU FIX THAT THE REPAIRS WERE NOT PAID FOR?

A: DANIELLE ELABAN

Q: WHAT WAS THE COST OF THE REPAIRS?

A: \$378.10

Q: ON WHAT DAYS DID YOU REPAIR THE BOAT AND WHEN WERE THE REPAIRS FINISHED?

A: 5/19/09-5/21/09

Q: WHO BROUGHT THE BOAT TO YOU TO BE REPAIRED?

A: DANIELLE ELABAN FILLED OUT THE PAPER WORK, BUT I WAS NOT THERE WHEN THE BOAT WAS DROPPED OFF.

Q: DID DANIELLE AGREE TO THE REPAIRS THAT YOU PERFORMED?

A: YES

Q: WHO REMOVED THE BOAT FROM YOUR PREMISES?

A: I'M NOT POSITIVE BUT WHEN I TALKED TO ANDY WILKE HE STATED THAT HE DID.

Q: WHO ATTEMPTED TO PAY YOU WITH GOVERNMENT FUNDS?

A: RAY SANTIAGO

Q: WAS HE AUTHORIZED TO PAY YOU WITH GOVERNMENT FUNDS?

A: HE STATED THAT HE WAS AUTHORIZED BY THE AUTHORITY OF DENNIS MARUSKA THE DIRECTOR OF MWR.

Q: DO YOU KNOW WHAT AUTHORITY DENNIS MARUSKA HAD TO USE GOVERNMENT FUNDS FOR THIS MATTER?

A: I'M NOT SURE OF WHAT AUTHORITY HE HAS TO USE GOVERNMENT MONEY FOR ANOTHER PERSONS PRIVATE DEBT.

Q: WHEN WERE YOU OFFERED THE CHECK FOR \$378.10?

A: TUESDAY MORNING 06/23/09.
Q: WERE THEY ATTEMPTING TO USE MWR FUNDS?
A: RAY SANTIAGO STATED THEY WERE.
Q: DO YOU HAVE ANYTHING FURTHER TO ADD TO
YOUR STATEMENT AT THIS TIME?
A: NO///END OF STATEMENT///

(App. supp. R4, tab A-7)

14. Mr. Mullens has further explained his reason for calling the military police to “file a theft of service complaint” as follows:

I said [to the responding MPs], here’s the work order and this is the customer and I explained the deal and I said, I want to file a theft of service complaint and maybe that will kick start them, ‘cause you know how the military is, they go over there and say, look, you need to talk to this man or you’re going to have a criminal complaint and they come in and they talk with you finally, that’s all I wanted.... I wanted to be paid. I had no reason to hurt these people....

(App. supp. R4, tab A-26 at 72)

15. Mr. Raymond Santiago was the director of the MWR Recreation Division. He reported to Mr. Dennis Maruska, the Fort Huachuca MWR director. Mr. Santiago was responsible for, among other things, the operation of the MWR Rents facility where Ms. Townsend Aguirre was the manager and where Mr. Mullens operated the MWR RV and marine repair shop concession. (App. supp. R4, tab A-20 at 8-10)

16. Mr. Santiago’s first contact with the Elaban billing matter was “sometime in May [2009]” when Ms. Elaban’s mother, an employee in another division of MWR, told him that her daughter had been charged for a boat repair without having been given an estimate. Mr. Santiago told the mother to have Ms. Elaban call him. (App. supp. R4, tab A-20 at 20-23) When Ms. Elaban called Mr. Santiago, she told him that “she had been unfairly treated, that she had been charged for a boat or being harassed at her work for not paying for a boat when all she asked for was an estimate” (*id.* at 26). Mr. Santiago considered Ms. Elaban’s complaint as a customer service issue regarding an MWR concession that was within his area of responsibility (*id.* at 25).

17. On 23 June 2009, when Mr. Santiago was informed by an MWR Rents employee that MPs were at Mr. Mullens work-bay, he went to the MWR Rents building. After ascertaining that the MPs were there on the Elaban matter, Mr. Santiago requested their withdrawal and attempted to mediate the billing dispute. He asked Mr. Mullens

“what does it need to get this issue taken care of[?]” Mr. Mullens answered \$350. Mr. Santiago replied that \$350 was a lot of money and that if Ms. Elaban was not given an estimate, “it doesn’t seem like we’re being fair.” (App. supp. R4, tab A-20 at 52-54) The meeting broke up without any resolution of the dispute. Mr. Mullens has alleged in his sworn statement that Mr. Santiago’s inquiry was an offer to pay Ms. Elaban’s bill with MWR funds. Mr. Santiago has testified that he had no authority to commit MWR funds and that he did not offer to have MWR pay Ms. Elaban’s bill at the 23 June 2009 meeting or at any other time (*id*).

18. At some point in the 23 June 2009 meeting the MPs were recalled by their supervisor without taking Mr. Mullens’ complaint (app. supp. R4, tab A-26 at 79, 87-88). On 25 June 2009, Mr. Mullens contacted Investigator Jacobus of the military police who took his sworn statement that is quoted in its entirety in finding 13 above (tr. 1/31; app. supp. R4, tab A-7). Mr. Mullens’ sworn statement was referred to the Army Criminal Investigation Division (CID), the CID referred it to the FBI, the FBI returned it to the CID and the CID sent the complaint to the MWR (app. supp. R4, tab A-26 at 85-86). There is no evidence that either the CID or the FBI found any basis in Mr. Mullens’ sworn statement for a criminal investigation of the alleged misuse of MWR funds by Mr. Maruska or Mr. Santiago.

19. On this record we find that Mr. Mullens’ allegations of criminal theft of service by Ms. Elaban were reckless and unsubstantiated. Ms. Elaban did not remove her boat by stealth from Mr. Mullens’ repair concession. She removed it with the permission of an MWR employee in accordance with an established practice between that employee and Mr. Mullens (*see* findings 6, 10-11). She subsequently refused to pay the bill because she had not been given an estimate before the work was done. There is no dispute that Mr. Mullens did not give her an estimate before doing the work (*see* findings 7-9). There was otherwise a bona fide dispute as to her liability for the bill when no estimate had been provided. That issue was subsequently resolved in Ms. Elaban’s favor when she was sued by Mr. Mullens for payment of the bill in an Arizona State Small Claims Court (*see* finding 24).

20. We further find that Mr. Mullens’ allegations of criminal misuse of MWR funds by Messrs. Santiago and Maruska were also reckless and unsubstantiated. Apart from the fact that Mr. Santiago had no authority to commit MWR funds and has sworn that he made no such offer to Mr. Mullens (*see* finding 17), there is no evidence that the use of MWR funds to settle a dispute between an MWR customer and an MWR concessionaire would have been illegal.

21. On 9 July 2009, Mr. Santiago sent an email to the contracting officer requesting that Contract 0226 be terminated. The request stated:

Please terminate [Contract 0226] with Mr. Chuck Mull[e]ns using the 10 day no fault clause. We will no longer need boat service support for the FMWR Rents facility and have had numerous bad experiences with this contract over the last two months.

(R4, tab 12 at 2)

22. Mr. Todd Lennox was the contracting officer for Contract 0226 when the termination was requested. When Mr. Lennox received the request, he already knew about the Elaban boat dispute, and he called Mr. Maruska because: "I was concerned about why we were terminating and whether or not this was in some way an attempt to get back at Mr. Mullens for that dispute." Mr. Maruska told Mr. Lennox that "he had been waiting for the option year to expire," that Mr. Mullens' concession "used up a lot of space," and that "he could generate more revenue with a different function in there." Mr. Lennox accepted this explanation as a basis for a no-fault termination because "I knew...what revenue we were generating there, and it didn't seem implausible that they could generate more doing something else." (Tr. 1/205-06)

23. On 20 July 2009, Mr. Lennox signed and issued Modification No. P00003 terminating Contract 0226 pursuant to the No-Fault Termination clause of the contract (R4, tab 12 at 1). The MWR allowed Mr. Mullens more than the contractually stipulated ten days to remove his materials and equipment after notice of the termination (app. supp. R4, tab A-26 at 110; tr. 1/57-58, 2/47-48). After Contract 0226 was terminated, the MWR no longer offered a boat repair service to its patrons. The last boat rental was in November 2009, and MWR referred inquiries for private boat repairs to Mr. Mullens' telephone number. (Tr. 2/17-18, 2/55)

24. At sometime after termination of the contract, Mr. Mullens sued Ms. Elaban in an Arizona State Small Claims Court for payment of his \$378.10 bill for repair of her boat. The final judgment of the Court was that Ms. Elaban did not owe the claimed amount because she had not been given an estimate. (Tr. 1/108)

25. On 2 July 2010, Mr. Mullens submitted a claim to the contracting officer for damages in the sum certain of \$90,000 for the alleged bad faith termination of Contract 0226 (compl., ex. 1). By final decision dated 16 August 2010, the contracting officer denied the claim entirely (compl., ex. 2). This appeal followed.

26. We find that Mr. Mullens has not proven that his contract was terminated in bad faith. We further find that Mr. Mullens has proven his own unsuitability for continuing to operate the MWR concession by the reckless and unsubstantiated criminal charges he made against a concession patron and MWR management in his sworn statement of 25 June 2009 (*see* findings 13-20).

DECISION


Contract 0226 was terminated by the government pursuant to the No-Fault Termination clause which stated *in toto*: “This contract may be terminated in whole or in part by either party upon 10 days written notice to the other party” (finding 4). A termination under such clause, where both parties have the same unconditional right to terminate, is valid without regard to the terminating party’s motive. *Harry Pohl KG*, ASBCA No. 51523, 01-1 BCA ¶ 31,329 at 154,753; *Christine Turner*, ASBCA No. 26900, 84-1 BCA ¶ 17,138 at 85,381. Moreover, we have found above that Mr. Mullens’ allegations of a bad faith termination are unproven.

Mr. Mullens also argues that the termination was a breach of contract because there were no “changed circumstances” justifying the termination, citing dicta in the plurality opinion in *Torncello v. United States*, 681 F.2d 756, 771 (Ct. Cl. 1982). We find no merit in this argument. *Torncello* concerned a Termination for Convenience of the Government clause that gave only the government the right to terminate for convenience. *Torncello* is not applicable to appellant’s case.

Mr. Mullens finally contends that paragraph (i) of the Disputes clause of the contract entitled him to continue performance of the contract until his appeal of the termination was decided. Paragraph (i) of the Disputes clause of the contract states: “The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal or action arising under the contract, and comply with any decision of the Contracting Officer” (R4, tab 1 at 14). Mr. Mullens’ contention ignores the last nine words of paragraph (i) which require compliance with the decision of the contracting officer. Where the decision of the contracting officer is to terminate the contract, there is no longer any contract work to be diligently performed other than such work as may be necessary to effect the termination. *Clyde P. Thomas*, ASBCA No. 28296, 86-3 BCA ¶ 19,246 at 97,331, *recon. denied*, 87-2 BCA ¶ 19,692, 88-3 BCA ¶ 21,179.

The appeal is denied.


Dated: 12 October 2012




MONROE E. FREEMAN, 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. 57432, Appeal of Charles Mullens, rendered in conformance with the Board's Charter.

Dated:

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