ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Teresa A. McVicker, P.C.	)	ASBCA Nos. 57487, 57653
	)	
Under Contract No. W91YTZ-10-C-0004	)	

APPEARANCES FOR THE APPELLANT: Ralph C. Thomas III, Esq.
Bryan R. King, Esq.
Barton, Baker, Thomas & Tolle, LLP
McLean, VA

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
CPT Anthony V. Lenze, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DELMAN

Under ASBCA No. 57487, Teresa A. McVicker, P.C. (appellant or TAMPC)[1] seeks damages from the Department of the Army (Army or government) for breach of contract. Under ASBCA No. 57653, the government seeks to recoup alleged improper payments to TAMPC under the contract. We have jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109.

FINDINGS OF FACT[2]

1. In early September 2009, the government contacted TAMPC, a small business, soliciting its interest to provide the services of two pediatric physician assistants (PAs) and one pediatric gastroenterology technician (Tech) at the Walter Reed Army Medical Center, Department of Pediatrics (Walter Reed) in Washington, DC. TAMPC indicated that it was interested in this opportunity and the government provided TAMPC a copy of the performance work statement. The Army then requested and obtained direct award

[1] TAMPC also did business under the name "Medical Staffing Solutions" as the record reflects. The contract however was awarded under the name "Teresa A. McVicker, P.C.," and for purposes of consistency we shall refer to the contractor as appellant or TAMPC throughout this opinion.

[2] The parties' witnesses had different recollections of many of the key events and conversations referenced herein. Our findings of fact largely adopt the testimony of appellant's witnesses who, we find, were generally more credible and persuasive.

approval, DFARS 291.800, from the Small Business Administration (SBA). (Tr. 1/104-05) The government provided appellant with a solicitation and TAMPC submitted a proposal to the government (R4, tabs 2, 5).

2. During negotiations, the government's contract specialist advised TAMPC there were incumbent contractor personnel providing the PA and Tech services at Walter Reed. She indicated to TAMPC that the government "wanted those three particular employees [sic] they wanted them to stay and that we needed to pay them the amount of money that they were currently making to keep them there" (tr. 1/65). TAMPC hired these employees. The incumbent PAs were Ms. Susan Kline and Mr. Jason Mills.

3. Earlier in the year, in or around the Spring of 2009, the government, through its lead administrator at Walter Reed, Department of Pediatrics, had sought to hire incumbent contractor PAs Kline and Mills to perform the PA services at Walter Reed as federal employees, and he obtained federal employment application paperwork from them for this purpose. (Tr. 2/10-11, 59) The lead administrator was responsible for all human resources for pediatrics at Walter Reed (tr. 1/110).

4. It appears that the government could not reach mutually satisfactory employment agreements with the PAs during this time, the incumbent contract was soon expiring, and therefore TAMPC was sought to provide the required PA and Tech services at Walter Reed under a new contract. However, the government's intentions to bring these PA services in-house and to hire Kline and Mills to perform them remained unchanged.

5. The lead administrator knew that TAMPC was up for award of this contract for the PA and Tech positions at Walter Reed (tr. 1/116). TAMPC's owner, Ms. McVicker, testified, and we find that in the conversations between her and the lead administrator he never mentioned to her that he was seeking to convert these contract PA positions at Walter Reed to in-house government positions (finding 10).

6. After price negotiation during which TAMPC reduced its proposed per hour unit prices for the PA and Tech positions, the government accepted TAMPC's proposal. The contract awarded to appellant, effective 23 September 2009, was a firm fixed-price personal services contract based upon a fixed unit price per hour to provide the services of two PAs and one Tech at Walter Reed for one base year with four (4) one-year options. The contract provided one Contract Line Item Number (CLIN) for the PAs and a separate CLIN for the Tech for the base year and for each option period. Performance was to start 1 October 2009 and run through 30 September 2010. (R4, tab 1) Ms. Kline began work on 1 October 2009 (tr. 2/11). Mr. Mills did not start until 15 October 2009, since he was out of the country on vacation (tr. 2/69).

7. The procurement contracting officer appointed the lead administrator for the Department of Pediatrics at Walter Reed as the contracting officer's representative (COR) for this contract. The lead administrator's contractual authority as COR was set forth in a memorandum issued by the contracting officer. In brief, as COR he was authorized to monitor and verify contract performance, certify invoices for payment and keep track of contract payments. He was expressly unauthorized to perform a number of activities, including the following:.

> a. Award, agree to or sign any contract (including delivery orders) or contract modifications or in any way obligate (to include the promise of payment) the Government in any way.
>
> b. *Make any commitments or changes that affect price, quality, quantity, delivery, the period of performance or other terms and conditions of the contract or delivery order.*
>
> c. *Make any changes to deliverables required by the contract or the delivery order.* This includes extending or condensing the period of performance.
>
> e. *Alter the contract or delivery order in any way,* either directly or by implication.
>
> f. Issue instructions to the contractor to stop or start work.
>
> g. Order or accept goods, services or performance not expressly required by the contract. This includes the allowance of the contractor not to perform certain tasks within the contract or directing the contractor to perform additional tasks not included in the contract.

(Ex. A-4 at 2) (Emphasis added)

8. In a matter of days after the contract began, the government successfully processed federal employment applications for PAs Kline and Mills. According to the Notification of Personnel Action forms, the COR requested a federal hiring personnel action for the two PAs on 14 October 2009 (supp. R4, tabs 29, 30 at 2, "Request Office," ¶ 5). As of that date, Ms. Kline had been working as a TAMPC employee for roughly two weeks; Mr. Mills was to start work the very next day. Ms. Kline's federal appointment was effective 30 October 2009; Mr. Mills' federal appointment was

effective 29 October 2009 (supp. R4, tabs 29, 30, Block 4). The job offers and acceptances were made without appellant's consent or knowledge.

9. On 30 October 2009, the COR telephoned TAMPC's program manager and advised "I was just calling to inform you that the two PAs are no longer your employees as of yesterday" (tr. 1/15). Her immediate reaction was "shock" (*id*). Neither the COR nor any government representative had mentioned to her at any previous time that the government was recruiting TAMPC's employees or that the PA positions under the contract were to be converted to "in-house" government positions, nor did the PAs ever advise appellant of these matters.

10. Appellant's program manager immediately called Ms. McVicker. Ms. McVicker called the COR for verification, and he verified the matter. Ms. McVicker was likewise shocked:

> A ...It was shocking to me because I had no knowledge that was going to happen.
>
> To just be told on the day that those positions -- personnel were no longer on the contract, that was very surprising to me. I called him and he actually verified that, yes, as of the 29th of October, 2009, the physician assistants that was their last day on the contract.
>
> Q Did [the COR] ever discuss with you at any time prior to October 30, 2009, that these positions would be converted?
>
> A No, he did not.
>
> Q Did he say they might be converted?
>
> A He didn't say that they might be converted. We never discussed it. In the few conversations that I had with him, we never discussed the conversion of the positions.

(Tr. 1/70)

11. The effect of the government's action was to remove the CLIN for PA services from appellant's personal services contract. However, TAMPC received no contract modification, partial termination notice or any written confirmation of the government's action at or around this time (tr. 1/77-78).

12. Ms. McVicker then contacted the government's contract specialist about the COR's action. She also appeared surprised. However, she told appellant that it was the government's right to terminate a contract for convenience, and that if appellant wanted a modification they "would get one to me." (Tr. 1/71)

13. At the hearing, the COR stated that he did not tell the contracting officer of his intended conversion of the PA positions to in-house government positions (tr. 1/116).[3] However, the contracting officer became aware of the COR's action by the date of appellant's claim of 29 November 2009 (*see* below). She did not countermand the COR's direction or otherwise act to restore the CLIN on appellant's contract. Rather, she issued a partial termination of the contract, reaffirming the action of the COR (*see* below).

14. On 4 November 2009, Ms. McVicker visited Walter Reed for a meeting with government representatives, including the government's contract specialist and the COR. She addressed scheduling issues with respect to the Tech, the remaining health service provider under the contract, and also brought up the subject of the PA conversions:

> Basically my question was, you know, they were converted with me having no prior knowledge. It's just kind of slap, slap, they are no longer your employees.

(Tr. 1/75)

15. Notwithstanding appellant's objection, Ms. Kline and Mr. Mills, who started the contract as TAMPC's employees, remained federal employees performing the same PA services at Walter Reed that they performed for TAMPC under the contract. The CLIN for PA services remained effectively deleted from appellant's contract.

16. On 24 November 2009, TAMPC filed a certified claim with the contracting officer, contending that the government breached the contract. In summary, appellant contended that the COR's partial termination of the contract was unauthorized; that the deletion of the contract work was not the subject of a written contract modification or any other written notice; that the government failed to follow SBA 8(a) guidelines; and that TAMPC was not afforded fair treatment. TAMPC sought $150,000 in breach damages, seeking anticipatory profit for the base year and all option periods. (R4, tab 9)

17. By contract Modification No. P00002 (P00002) dated 22 January 2010, the contracting officer then assigned to the contract unilaterally terminated the subject contract for convenience in part under contract clause FAR 52.212-4(l),[4] reaffirming the

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[3] This testimony was inconsistent with a memo he sent to the CO dated 29 January 2010 in response to appellant's claim, wherein he stated that he kept all parties, including TAMPC and the CO, apprised of the conversion action (R4, tab 13).

[4] Subsection (l) provides in pertinent part as follows: "Termination for the Government's Convenience. The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work.... Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price

action taken by the COR in October 2009, i.e., partially terminating the contract "due to the positions being converted to General Schedule (GS) positions" (R4, tab 12 at 1, Block 14). For some unexplained reason, P00002 was issued by the CO effective 10 October 2009 (*id.*, Block 3), only ten days into the contract and more than three months prior to the date the contracting officer signed the modification. P00002 also erroneously partially terminated the Tech position, CLIN 0002; this error was corrected by Modification No. P00003 (R4, tab 17).

18. Under contract clause DFARS 252.219-7009, SECTION 8(a) DIRECT AWARD (SEP 2007) at subsection (b), the contracting office was required to give notice to the SBA before issuing a termination of the contract in whole or in part (R4, tab 1 at 23). The contracting office did not provide the SBA with any such notice. The termination contracting officer did not testify at the hearing, and no reason was provided for her non-appearance.

19. The government contends that P00002 was emailed to appellant on 22 January 2010; appellant contends it did not receive the email at that time but first saw the termination notice in Wide Area Work Flow on 18 February 2010 (tr. 1/79-80).

20. Appellant provided the un-terminated services, i.e., those of the Tech, for the balance of the contract period. The government exercised its option for the Tech for option year one and for option year two. As of the date of the hearing, the contract was in option year two, and it was too early to know whether the government would exercise its option for the Tech for option year three. (Tr. 1/86) As far as the record shows, Ms. Kline remains a federal employee and still works for Walter Reed as a PA (tr. 2/7), as does Mr. Mills (tr. 2/57).

21. Appellant's breach of contract claim was denied by final decision dated 20 October 2010. In denying the claim, the final decision stated at page three: "There was no intent to defraud Teresa A. McVickers [sic], P.C. (TAMPC)." (R4, tab 19) TAMPC appealed to this Board, and the Board docketed the appeal as ASBCA No. 57487.

ASBCA No. 57653

22. Appellant, having failed to receive any contract modification reducing the scope of the contract work during the months of November and December 2009, billed the contract price to the government for the services of both PAs for these months even though the PAs were by then federal employees. The government accepted and paid

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reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges...." The record is unclear whether the parties negotiated or otherwise addressed any payout to appellant under this provision.

these invoices. Appellant received roughly $55,000 for the PA positions for this period. (Tr. 1/58)

23. By letter to TAMPC dated 20 October 2010, the CO demanded the return of payments erroneously paid to appellant related to the PAs in the amount of $49,184 (R4, tab 18). The CO then issued an undated final decision seeking reimbursement for this amount (supp. R4, tab 23). TAMPC appealed this decision, and the Board docketed the appeal as ASBCA No. 57653. The appeals were consolidated.

DECISION

I. Breach of Contract

It is well settled that the covenant of good faith and fair dealing "imposes obligations on both contracting parties that include the duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract." *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005). We believe the government breached the covenant of good faith and fair dealing here.

The record establishes that in or around the Spring of 2009 the government, through its lead administrator at Walter Reed, Department of Pediatrics, sought to hire the PAs of the incumbent contractor at Walter Reed, Susan Kline and Jason Mills, in order to perform these services as federal employees, and he obtained employment application paperwork from them for this purpose. It appears that the government could not reach mutually satisfactory employment agreements with them during this time, the incumbent contract was soon expiring, and TAMPC, a small business, was sought to provide the required PA and Tech services at Walter Reed under a new personal services contract. However, the government's intentions to bring these PA services in-house and to hire Kline and Mills to perform them remained unchanged.

These intentions were never disclosed to appellant. During negotiations leading up to appellant's contract, the government urged appellant to hire Kline and Mills as its own employees to provide the PA services for the contract, and appellant agreed to do so. At no time pre-award did the government's lead administrator or any other government representative advise appellant of the government's intention to bring these PA services from contract to in-house.

However, within days after the start of this contract the government employment applications for Kline and Mills were processed. The lead administrator/COR advised appellant telephonically on 30 October 2009 that Kline and Mills were no longer appellant's employees "as of yesterday" (SOF ¶ 9). The intent of this action, as mutually understood by the parties, was not merely to hire away appellant's employees, but rather

to strip from appellant's contract the line item for PA services performed by these PAs. Henceforth, Kline and Mills would continue to perform the same PA services for which the government had just contracted with appellant, but now would be performing them as federal employees.

This government action served as a *de facto* partial termination of most of appellant's contract, yet was implemented by a COR without any authority to change or terminate appellant's contract terms. This *de facto* partial termination was also in effect for months without appellant's receipt of an authorized contract modification or partial termination notice. It was only after appellant filed a claim for breach of contract that the government issued a partial termination, effective 10 October 2009 (10 days into the contract), which ratified the COR's actions.

A government contractor has every reason to expect, absent a lawful convenience termination of the contract, that it will have the opportunity to provide the services it has contracted for at the agreed upon contract price for the prescribed contract period. TAMPC was not given this opportunity here. This was a material interference with the contractor's reasonable contract expectations.

The government's conduct here was akin to the "bait and switch" type of government behavior deemed a breach of the duty of good faith and fair dealing by the Federal Circuit in *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 829 (Fed. Cir. 2010), whereby the government awards a significant contract benefit to a contractor only to improperly eliminate it soon thereafter: "The government may be liable for damages when the subsequent government action is specifically designed to reappropriate the benefits the other party expected to obtain from the transaction, thereby abrogating the government's obligations under the contract" (*id.*).

This is precisely what occurred here. We conclude that the government's whisking away of appellant's PAs and stripping appellant's contract of their services in the manner described – and just shortly after the government had urged appellant to hire them– in order that they perform the same PA services as federal employees was a breach of the government's duty of good faith and fair dealing.

While there is no evidence showing that the government acted with malice or with specific intent to injure appellant, such evidence is not necessary to establish the breach of the duty of good faith and fair dealing. See *Precision Pine and Timber*, 596 F.3d at 829 (bait and switch type behavior constitutes the breach). See also *Malone v. United States*, 849 F.2d 1441, 1445-46 (Fed. Cir. 1988) (evasiveness and misleading behavior constitute the breach).

The government contends that the contracting officer was unaware of the COR's actions when he took them in October 2009. Assuming this is true, the COR nevertheless

acted as the contracting officer's agent and representative and the government is responsible for his conduct. In addition, the contracting officer did become aware of the COR's actions upon receipt of appellant's claim dated 24 November 2009. She did not reinstate the contract PA services deleted by the COR, but rather ratified his actions through issuance of the partial termination.

We are mindful that the government is afforded considerable discretion in terminating a contract in whole or in part. However, this discretion is not limitless and may be abused. Having duly considered the relevant factors to determine abuse of discretion,[5] we believe that appellant has shown an abuse of discretion here. While we might agree with the decision of the contracting officer that "there was no intent to defraud TAMPC," clearly the government misled appellant to its detriment here. If appellant would have been advised that the government was planning to bring the PA positions in-house and was planning to employ Kline and Mills for this purpose, it is inconceivable that appellant would have agreed to hire them and take on this contract for one year plus four option years. The government's termination notice simply ratified the government's breach. The TCO did not appear to explain any other basis for her decision, nor was she available to explain why she did not notify the SBA in advance of the termination of this small business as mandated by the contract and the regulations. DFARS 219.811-3(1); 252.219-7009(b).

We must conclude, under the facts presented, that the government's partial termination of appellant's contract may not stand and does not limit the contractor's remedy for breach of contract.[6]

II. Contractor's Remedy

Appellant seeks its anticipatory profits arising from the government's breach, for the base year of the contract and all option periods. The government argues that any breach damages must be limited to the base year of the contract because the contract was

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[5] These factors include whether the government acted with subjective bad faith; whether there was a reasonable contract-related basis for the termination decision; the degree of discretion afforded; and whether there was a violation of statute or regulation. *See Krygoski Construction Co. v. United States*, 94 F.3d 1537, 1543, n.3 (Fed. Cir. 1996); *Charitable Bingo Associates, Inc. d/b/a/ Mr. Bingo, Inc.*, ASBCA Nos. 53249, 53470, 05-1 BCA ¶ 32,863 at 162,847, *aff'd on recon.*, 05-2 BCA ¶ 33,088.

[6] By this Opinion we do not hold that the government may never terminate a contract for convenience in order to bring contract services in-house, nor do we hold that a contracting party may never hire an employee of the other party during the performance of a contract. Our conclusion is solely based upon the facts before us.

for one base year and the government did not guaranty that it would exercise these options.

The Federal Circuit recently restated the governing principles with respect to breach of contract damages:

> Damages for breach of contract are designed to make the non-breaching party whole. One way to accomplish that objective is to award "expectancy damages," i.e., the benefits the non-breaching party would have expected to receive had the breach not occurred. (Citation omitted) Expectancy damages "are often equated with lost profits, although they can include other damage elements as well." *Id.* To recover lost profits for breach of contract, the plaintiff must establish by a preponderance of the evidence that (1) the lost profits were reasonably foreseeable or actually foreseen by the breaching party at the time of contracting; (2) the loss of profits was caused by the breach; and (3) the amount of the lost profits has been established with reasonable certainty. (Citations omitted)

Anchor Savings Bank, FSB v. United States, 597 F.3d 1356, 1362 (Fed. Cir. 2010).

Applying the law to the facts of this case, we agree with the government that appellant's damages must be limited to the base year of the contract because there was no reason to expect that the government would exercise its options for the PAs, and thus there was no reason to expect any monetary benefits during these periods. Any anticipatory profit was not reasonably foreseeable by the breaching party at the time of contracting.

However for the base year, the preponderance of the evidence of record establishes that appellant's lost profits from the deletion of the PAs from the contract were reasonably foreseeable at the time of contracting; that these lost profits were directly caused by the government's breach; and given the awarded unit prices per service hour, the amount of lost profit for each service hour worked by the two PAs during the base year can be calculated with reasonable certainty. We remand the calculation of these anticipatory profits to the parties with due consideration of our conclusion below in ASBCA No. 57653.

III. ASBCA No. 57653 – Government Claim to Recoup Payments

Under ASBCA No. 57653, we agree with the government that appellant's damages must be reduced by the contract price received by appellant during the time the

two PAs were on the federal payroll. These revenues were unearned and appellant may not retain them. Accordingly, we grant the government's claim to recoup these funds and we deny appellant's appeal.

CONCLUSION

For reasons stated, ASBCA No. 57487 is sustained. ASBCA No. 57653 is denied.

Dated: 16 August 2012

JACK DELMAN
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 Nos. 57487, 57653, Appeals of Teresa A. McVicker, P.C., rendered in conformance with the Board's Charter.

Dated:

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