

Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

GRANTED IN PART: March 19, 2004

GSBCA 16059-TD

BLOSSOM VALLEY GROOM & BOARD,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Karen Pechacek and Patrick Murphy, owners of Blossom Valley Groom & Board, Spring Valley, CA.

Vickie R. Shaw and Michael F. Felts, Office of Assistant Chief Counsel, Bureau of Customs and Border Protection, Department of Homeland Security, Indianapolis, IN, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **DeGRAFF**, and **GOODMAN**.

GOODMAN, Board Judge.

Appellant, Blossom Valley Groom and Board (appellant or BVGB), appeals from the respondent Department of Homeland Security's¹ deemed denial of its claim for additional payment under its contract. The parties agreed to submit the appeal for a decision on the written record pursuant to Board Rule 111. We grant the appeal in part.

Findings of Fact

1. Appellant was awarded contract no. CS-I-01-22942-6 (the initial contract) dated March 16, 2001, for the period March 21 through September 30, 2001, without an option to

¹ Respondent in this appeal was originally the Department of the Treasury, United States Customs Service. Pursuant to the Homeland Security Act of 2002, Pub L. No. 107-296, 116 Stat. 2135, § 110 et seq., the United States Customs Service was transferred from the Department of the Treasury to the Department of Homeland Security.

extend performance. The contract, on Customs Form 341, "Order for Supplies or Services," read in relevant part under Item B, "Supplies or Services":

Vendor shall provide all labor, material and facilities to perform kenneling services for 9 + 1 US Customs Canines. . . .

Note: 9 dogs are to be kenneled but we are including the rental of one additional run, to completely separate USCS [United States Customs Service] canines from commercially boarded dogs. . . .

Services shall be in accordance with the attached Statement of Work.

Appeal File, Exhibit 5.

2. The Statement of Work of the initial contract contained the following:

Scope of Work: The contractor shall provide all labor, materials, and supervision and facilities required to provide kenneling services for the US Customs Service . . . owned canines. The number of dogs to be kenneled is nine.

. . . .

Invoice: The contractor will submit an invoice to the COTR at the end of each month. The following information should be included on each invoice.

Vendor name and address, contract number, invoice number, name of each canine, USCS canine ID number, period of service, daily kennel rate, food amount consumed, and Total for all items.

Appeal File, Exhibit 5 at 3, 8.

3. With regard to invoicing respondent, appellant states:

[W]e were excused from the requirement of reporting the name and number of each canine and the amount of food each canine had consumed. We did report the number of runs actually being rented and maintained for the month, the unit price of each run and the extended total of (number of runs) X (number of days in the invoice period) X (unit price per run), as required in the Statement of Work. This was the amount we billed for each month. We operated in the understanding and belief that if the number of runs rented by Customs fell below the agreed minimum of 9 (nine), the difference would be made up when the agreement ended and/or the new competitive contract was awarded.

Appellant's Record Submission at 2.

4. In May 2001, the contract was amended by another Customs Form 341, Order for Supplies or Services, which read in relevant part:

Item 1. Due to a change in personnel, effective, May 9, 2001, only 9 runs will be required. This will be 8 runs used for kenneling and one empty separator run.

Item 2. Vendor shall provide all labor, material and facilities to perform kenneling services for 9 + 1 US Customs Canines. . . .
Services shall be in accordance with the attached Statement of Work. . . .

Subject order is modified to increase Item 1 and delete item 2

The corrected period of performance is 3/20/01-9/30/01

20 Mar - 8 May 01 = 49 days x 10 runs = \$9800.

9 May 01 -30 Sep 01

143 days x 9 runs x 20 = 25,740.

All other terms and conditions remain the same.

Appeal File, Exhibit 17.

5. There is no evidence in the record to indicate that a revised Statement of Work was attached to the Customs Form 341 referenced in the previous finding.

6. Appellant and respondent interpreted the initial contract as amended to require the respondent to pay for a minimum of ten kennel runs from March 20 through May 8, 2001, and nine kennel runs from May 9 through September 30, 2001. Appellant's Record Submission at 3; Respondent's Record Submission at 1.

7. Both appellant and respondent were of the understanding that before the contract period ended on September 30, 2001, respondent would issue a solicitation and competitively award a contract for kenneling services to commence October 1, 2001. Appellant's Record Submission at 3; Respondent's Record Submission at 3.

8. Respondent states that on September 5, 2001, solicitation CS-1-02-022 was issued for kenneling of canines in southern California. Respondent's Response to Interrogatories at 1. Appellant states that it responded to a request for proposals dated August 30, 2001, solicitation CS-I-02-004,² by submitting a timely proposal to the Customs Procurement Office in Indianapolis. Appellant's Record Submission at 3.

9. The offices of respondent in New York were destroyed during the attack on the World Trade Center on September 11, 2001. Restoration of respondent's operations took priority over other contracting efforts, and the agency did not award a contract for kenneling services resulting from the previous solicitation process. Respondent's Record Submission at 3; Appellant's Record Submission at 3.

² It is not clear whether the agency issued one solicitation or two. Neither party has included copies of the solicitations in the record.

10. Except for the last three days of the initial contract period, the respondent used the number of runs specified in the contract. On September 28, 2001, respondent reduced its number of run rentals to eight as the result of the retirement of one canine. Appellant's Record Submission at 3.

11. Appellant submitted its invoice dated September 30, 2001, for the month of September. Appeal File, Exhibit 37. With regard to this invoice, appellant states:

Of special interest in this invoice is the fact that Customs had rented its usual number of runs (9) during the period of 9/1/2001 to 9/27/2001. Then beginning 9/28/2001, three days prior to the end of the period covered by the Purchase Order, Customs reduced its number of run rentals to eight (8) due to the retirement of one of their dogs. In accordance with our understanding and the Statement of Work, we made our invoice reflect the number of runs actually used during this three-day period (8) rather than the minimum number of runs stipulated in the Purchase Order (9). It is noteworthy that if this invoicing procedure were incorrect, and we had actually been expected to bill for the minimum number of runs (9) at times when the actual number fell below that minimum, that neither the COTR [contracting officer's technical representative] nor the CO [contracting officer] in Indianapolis corrected the invoice in this instance and the invoice was processed and payment was made as per the data provided in the invoice. This having been done, Customs, from the perspective of BVGB, corroborated BVGB's interpretation of the invoicing procedure.

Appellant's Record Submission at 3-4.

12. Apparently, neither appellant nor respondent made any attempt to contact each other regarding further contractual arrangements when the initial contract period expired on September 30, 2001. Appellant continued to kennel the dogs that were currently at its facilities through October and November, and at various times during this period the number of dogs was reduced. Appellant describes its lack of communication with respondent during September, October, and November as follows:

BVGB heard no information from Customs about the status of the contract competition. Nor did Customs contact us to discuss or negotiate new terms for our boarding agreement even though the Purchase Order was to end 9/30/2001. Under these circumstances, BVGB held the belief that the terms of the existing agreement would follow through after 9/30/2001, including the provision for renting a minimum of 9 runs, since we continued to perform under the terms of the Statement of Work and Customs continued to board their canines with us and we received no documentation or communication from Customs notifying us of any intention to change our agreement.

In the absence of information from Customs regarding the status of the contract competition, BVGB presumed that the competitive contract would be awarded as soon as practicable under the circumstances and that the terms of

the original Purchase Order would need to be extended until that could be accomplished.

Appellant's Record Submission at 3.

13. Appellant submitted invoices at the end of October and November for the actual number of canines boarded during each of these months plus one buffer run. Seven canines were boarded for a portion of October and six for the remaining portion. Six canines were boarded during November. Appeal File, Exhibits 40, 47.

14. On or about November 30, 2001, appellant received what it characterizes as a new purchase order document. Appellant's Record Submission at 4. This document, on Customs Form 341, Order for Supplies and Services, dated November 7, 2001, contains a different contract number, C-SI-02-21988-9 (second contract), and read in relevant part under Item B, "Supplies and Services":

Vendor shall provide all labor, materials and equipment to provide kenneling services for US customs canines on an as needed basis. . . .

Oct 1-20 7 dogs + 1 buffer run. . . .

Oct 21-31 6 dogs + 1 buffer run.

1-30 Nov 01 6 each dogs + 1 buffer

Appeal File, Exhibit 41.

15. No Statement of Work was attached or referenced in the Order for Supplies or Services dated November 7, 2001. Appeal File, Exhibit 41.

16. For each month thereafter, through September 2002, respondent issued a Customs Form 341 under the second contract which indicated the actual number of canines to be boarded plus one buffer run during the month. Appeal File, Exhibits 45, 53, 57, 68, 73, 79. Each month, appellant billed and received payment for the actual number of canines boarded plus one buffer run. Appeal File, Exhibits 50, 55, 60, 64, 69, 75, 77, 82, 85, 91.

17. On October 25, 2002, appellant received notice that it had been awarded another contract (third contract) for the period October 1, 2002, through September 1, 2003. A contract and a statement of work were enclosed. Appellant's Supplementary Appeal File, Exhibit 4.³

18. By letter dated November 5, 2002, appellant submitted a claim to the contracting officer seeking additional payment in the amount of \$18,813.95 plus interest for amounts allegedly due under the last invoice of the first contract and all invoices of the second contract, for the period September 28, 2001, through September 30, 2002. The claim read in relevant part:

³ The record does not contain any indication as to the process through which appellant received this contract.

The original contract was for a fixed number of dogs and the contract was extended for a year under the same terms and conditions. However, we were never paid for the fixed number of dogs, as required by the contract.

I prepared and submitted the monthly invoices as instructed. My oral instructions were to send the billing invoices to the COTR for certification. Invoices without the exact number of canines annotated would be returned to me for correction. I thought that someone in your office would make the minimum run adjustment at some point. However, this was never done.

Appeal File, Exhibit 96 at 2.

19. The contracting officer did not issue a decision in response to the claim. Appellant appealed the contracting officer's failure to issue a decision to this Board as a deemed denial of the claim.

Discussion

Appellant was awarded an initial contract for supplies and services by respondent for kenneling canines for the period March 21 through September 30, 2001. Finding 1. The parties agree that the initial contract originally required respondent to pay for a minimum of ten kennel runs (for nine canines and a buffer or separator run), and that the contract was thereafter modified for a minimum payment for nine kennel runs (for eight canines and one buffer or separator run) from May 9 through September 30, 2001. Findings 2, 4, 6. Appellant believes it has not been paid in full for its services on the last three days of this contract.

Appellant had bid on a contract to be awarded after the initial contract expired, for the period October 1, 2001, through September 30, 2002. Finding 8. As a result of the impact of the events of September 11, 2001, respondent was not able to award the contract for which it had solicited bids. Finding 9. During fiscal year 2002 (from October 2001 through September 2002) respondent ordered supplies and services from appellant on a monthly basis. The parties differ as to their interpretation of the terms of these orders.

Appellant asserts that the orders placed during fiscal year 2002 were "sole source extensions of [its] initial agreement rather than Purchase Orders produced de novo" and that "FAR [Federal Acquisition Regulation] 37.111 provides that an Agency may extend the terms of an existing contract until such time as it is able to make the award of the new contract." Appellant's Record Submission at 5. Even though these orders stated services were to be provided on an "as needed" basis, and stated a specific number of canines below the previous minimum, appellant asserts that it had previously provided services as needed by respondent. Accordingly, appellant believed that these orders were a continuation of the initial contract which entitled appellant to be paid the minimum for nine kennel runs. Appellant further asserts that respondent "improperly produced a new Purchase Order following 9/30/2001 which failed to include a key element of the agreement under which we accepted their canines in the first place, namely, the requirement for a minimum number of runs." Appellant's Record Submission at 5.

Appellant submitted a claim for \$18,813.95 plus interest (the difference between its charge for nine kennel runs and the actual amounts invoiced in the last invoice of the initial contract and all invoices of the second contract). The claim was deemed denied when the contracting officer did not issue a decision in response. In its submissions to the Board, appellant has set forth its understanding of invoicing and payment procedures to support its belief that its contract had been extended. Appellant's Record Submission at 7-8.

According to respondent, the orders for supplies and services during fiscal year 2002 represented a "new, separate, contractual arrangement with new terms and could not have been mere extensions of the initial contract." Respondent further asserts that an extension of the initial contract beyond the explicit period for performance "would have constituted a modification beyond the scope of the contract and essentially created a new procurement, as the initial contract did not include an option clause and could not be extended under FAR 37.111." Respondent's Record Submission at 4.

Except for its claim with regard to the last invoice submitted for the initial contract, appellant does not prevail. It is clear that appellant's initial contract expired on September 30, 2001, and the orders placed in fiscal year 2002 were pursuant to a new contract with different terms. The initial contract was not extended pursuant to FAR 37.111 as appellant asserts. This regulation reads as follows:

Extension of services.

Award of contracts for recurring and continuing service requirements are often delayed due to circumstances beyond the control of contracting offices. Examples of circumstances causing such delays are bid protests and alleged mistakes in bid. In order to avoid negotiation of short extensions to existing contracts, the contracting officer may include an option clause . . . in solicitations and contracts which will enable the Government to require continued performance of any services within the limits and at the rates specified in the contract. However, 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 thereunder shall not exceed 6 months.

48 CFR 37.111 (2000).

The documents which comprise the initial contract do not contain an option clause which would have allowed respondent to require continued performance after September 30, 2001, the date specified for expiration of the contract. Finding 1. Accordingly, the initial contract expired on September 30, 2001, according to its terms. No legal basis existed to extend appellant's performance under this contract.

Appellant continued to kennel dogs during October and November 2001 before receiving any additional contractual commitment from respondent. Appellant could have demanded that respondent remove its dogs from appellant's facilities. Instead, appellant continued to kennel the dogs and invoiced respondent.

In late November appellant received a second contract document similar to the initial contract - a Customs Form 341, Order for Supplies or Services, dated November 7, 2001. This order, and additional orders placed for kenneling services in October 2001 through September 2002, clearly and unambiguously referenced a new contract number, specific periods of performance from month to month, and a different scope - kenneling of a steadily declining number of canines on an "as needed" basis. No mention of a minimum number of runs was contained. Rather, the first order stated that appellant was to provide kenneling services on an "as needed basis," and this order and all other orders during fiscal year 2002 contained specific numbers of canines to be boarded each month. Findings 14-16.

Appellant argues that it believed the scope of the initial contract for a minimum of nine dog runs applied to the new orders in fiscal year 2002 because it had always provided services to the agency "as needed" and it had not received a new Statement of Work, Finding 15, for the new orders and therefore the Statement of Work for the initial contract remained applicable. Appellant argues further that it was improper for respondent to issue a new order deleting the minimum run requirement.

These arguments lack merit. The Statement of Work of the initial contract stated that "the number of dogs to be kenneled is nine." The Statement of Work did not mention the additional buffer run, which was mentioned on the Customs Form 341. Finding 2. A revised Statement of Work was not issued under the initial contract when the number of dogs to be kenneled was reduced to eight in May 2001. Finding 5. Accordingly, in the initial contract, the scope of work was clearly delineated on the Customs Form 341 and not in the Statement of Work. Findings 1, 2. Apparently the change noted directly on the Customs Form 341 reducing the number of dogs and total number of runs was sufficient notice to appellant of that change. Similar changes were made on the new orders on the Customs Forms 341, indicating that services were to be supplied on an "as needed basis" rather than a minimum number of runs. Findings 14-16.

It was not reasonable for appellant to believe upon receipt of the order dated November 7, 2001, that the order was a continuation of the initial contract and the scope of the work to be performed remained as a minimum of nine dog runs. This order and the other orders issued during fiscal year 2002 contained clear language to the contrary - a new contract number and specific periods of performance for kenneling of a steadily declining number of dogs.

The information in the orders under the second contract was unambiguous and obviously differed from the information in the initial contract which specified a minimum number of runs. Findings 14-16. If appellant believed these orders were a continuation of the initial contract and the scope of these orders was a minimum number of runs, this was a patent ambiguity between the terms of the initial contract and the terms of the orders under the second contract which appellant had a duty to clarify prior to performing the services required by the second contract. A contractor proceeds at its own risk if it relies upon its own interpretation of a patent ambiguity instead of asking the Government for a clarification. Grunley Construction Co. v. General Services Administration, GSBCA 14376, 98-2 BCA ¶ 29,950, at 148,181. Appellant did not seek clarification but performed the orders. Accordingly, the legal effect of such performance is acceptance of the terms of the orders. See, e.g., Technical Systems Associates, Inc. v. Department of Commerce, GSBCA

13277-COM, et al., 00-1 BCA ¶ 30,684, at 151,560. Appellant's belief that the scope of the orders under the second contract was a minimum number of runs was not the fault of respondent but appellant's unilateral mistake, for which relief cannot be granted. Fire Security Systems, Inc. v. General Services Administration, GSBCA 12267, et al., 97-2 BCA ¶ 28,992, at 144,375.

Appellant's arguments concerning its invoicing practices also do not support its interpretation of the contract. Appellant states that it received oral instructions to send the billing invoices to the COTR for certification. Invoices without the exact number of canines annotated would be returned for correction. Appellant believed that respondent would make the minimum run adjustment "at some point. However, this was never done." Finding 18. For the entire period of the initial contract, except for the last three days in September 2001, respondent used and appellant billed for and received payment for the minimum number of runs. For the last three days of the initial contract period, one dog was retired and appellant billed for eight runs rather than nine, a reduction of the contract amount of \$60 (1 run x \$20 per day x 3 days). This was the only instance during the initial contract when respondent required less than the specified services. Findings 10, 11.

Appellant maintains that respondent's payment of this invoice in full without a correction for the minimum run corroborated appellant's belief that it should bill the exact number of canines and a correction would be made in the future. Finding 11. This argument lacks merit. This was the only invoice under the initial contract which contained a billing for less than the specified number of runs. Appellant's billing for actual usage had previously resulted in payment for the specified usage. The fact that respondent paid the invoice in full as billed by appellant without adding an additional \$60 which was due is hardly sufficient evidence that respondent's interpretation of the contract corroborated appellant's. In spite of appellant's allegations that it was instructed to submit billings indicating the exact number of canines, Finding 3, the initial contract contains no direction to the contractor to defer billing for the minimum payment until an unspecified time in the future. It is not clear why appellant believed it could not include a notation on its September 30, 2001, invoice that it was due the minimum payment under the contract for the three days in which only eight dogs were kenneled. The contract balance of \$60 was included in appellant's claim and remains due and owing. Appellant has been paid in full for the invoices in fiscal year 2002.

Decision

The appeal is **GRANTED IN PART** in the amount of \$60. The remainder of the claim is denied.

ALLAN H. GOODMAN
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

MARTHA H. DeGRAFF
Board Judge