

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

MOTIONS TO DISMISS AND FOR SUMMARY RELIEF
DENIED: August 4, 2004

GSBCA 16327

AIR MASTERS CORPORATION,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Philip J. Christofferson and Steven M. Cockriel of the Law Offices of Steven M. Cockriel, L.L.C., St. Louis, MO, counsel for Appellant.

Mark R. Warnick, Office of Regional Counsel, General Services Administration, Kansas City, MO, counsel for Respondent.

Before Board Judges **PARKER**, **DeGRAFF**, and **GOODMAN**.

DeGRAFF, Board Judge.

Pending are a motion for summary relief filed by Air Masters Corporation (Air Masters) and a motion to dismiss for lack of jurisdiction and for summary relief filed by the General Services Administration (GSA). We deny the motions.

Findings of Fact¹

On November 5, 1997, GSA awarded a contract to Air Masters for mechanical maintenance at the Federal Center in St. Louis, Missouri. The contract had a term of three years, beginning on December 18, 1997, with an option to renew for one two-year period. Exhibit 1.

The contract contained Federal Acquisition Regulation (FAR) clause 52.222-43, which reads in part as follows:

(c) The wage determination . . . current on the anniversary date of a multiple year contract or the beginning of each renewal option period, shall apply to this contract. . . .

(d) The contract price . . . will be adjusted to reflect the Contractor's actual increase or decrease in applicable wages and fringe benefits to the extent that the increase is made to comply with or the decrease is voluntarily made by the Contractor as a result of:

(1) The Department of Labor wage determination applicable on the anniversary date of the multiple year contract, or at the beginning of the renewal option period. For example, the prior year wage determination required a minimum wage rate of \$4.00 per hour. The Contractor chose to pay \$4.10. The new wage determination increases the minimum rate to \$4.50 per hour. Even if the Contractor voluntarily increases the rate to \$4.75 per hour, the allowable price adjustment is \$.40 per hour.

. . . .

(f) The contractor shall notify the Contracting Officer of any increase claimed under this clause within 30 days after receiving a new wage determination unless this notification period is extended in writing by the Contracting Officer The notice shall contain a statement of the amount claimed and any relevant supporting data, including payroll records, that the Contracting Officer may reasonably require. Upon agreement of the parties, the contract price . . . shall be modified in writing. The Contractor shall continue performance pending agreement on or determination of any such adjustment and its effective date.

Exhibit 1.

The contract incorporated a Department of Labor (DoL) Wage Determination (WD) dated October 8, 1996. Exhibit 1.

¹These facts are uncontested.

On October 15, 1998, DoL issued revision number 1 to the WD. On November 9, 1998, GSA issued unilateral contract modification number PO04, which incorporated revision number 1 to the WD into the contract. The modification did not change the monthly contract price. Exhibit 1.

In 1999, Air Masters and its union negotiated a new collective bargaining agreement (CBA), and Air Masters submitted the CBA to GSA. Complaint ¶¶ 6, 7; Answer ¶¶ 6, 7. On December 29, 1999, DoL issued revision number 2 to the WD. On January 5, 2000, GSA issued unilateral contract modification number PO05, which incorporated revision number 2 to the WD into the contract. The modification did not change the monthly contract price. Exhibit 1.

On March 21, 2000, GSA issued unilateral contract modification number PC06, which added some work, deleted other work, and changed the contract price to account for the changed work. The modification did not change the monthly contract price as a result of the revisions to the WD. Exhibit 1.

On July 12, 2000, DoL issued revision number 3 to the WD. On November 8, 2000, GSA issued unilateral contract modification number PO08, exercising its option to extend the term of the contract for one two-year term. The modification incorporated revision number 3 to the WD into the contract. The modification did not change the monthly contract price. Exhibit 1.

On December 6, 2000, GSA signed bilateral contract modification PS09, which had been signed by Air Masters on December 1, 2000. The modification added some work, deleted other work, and changed the contract price to account for the changed work. The modification did not change the monthly contract price as the result of the revisions to the WD and did not contain a reservation of rights to claim an increase in the contract price as a result of the revisions to the WD. Exhibit 1.

On November 13, 2001, GSA issued unilateral contract modification PO10, which again incorporated revision number 3 to the WD into the contract. The modification said the contract price remained unchanged. Exhibit 1.

In 2002, Air Masters and its union negotiated a new CBA and Air Masters submitted the CBA to GSA. Complaint ¶¶ 12, 13; Answer ¶¶ 12, 13. On August 27, 2002, DoL issued revision number 4 to the WD. On November 5, 2002, GSA issued unilateral contract modification number PO14, which incorporated revision number 4 to the WD into the contract. The modification did not change the monthly contract price. The modification also extended the term of the contract by four months, to April 30, 2003. Exhibit 1.

On October 16, 2003, Air Masters submitted a claim to the contracting officer for an increase in the contract price in the amount of \$238,922.83. Complaint ¶ 18; Answer ¶ 18. The contracting officer denied the claim in a decision dated December 2, 2003, on the basis that Air Masters had not notified GSA of its claimed increases within the thirty-day period established in FAR 52.222-43(f). Exhibit 5. On or about December 3, 2003, Air Masters mailed its notice of appeal to the Board.

Discussion

The Motion to Dismiss

According to GSA, we lack jurisdiction to entertain this appeal because Air Masters did not file its complaint within the time permitted by our rules and because Air Masters did not notify GSA of an increase claimed under FAR 52.222-43 within thirty days after receiving a revised WD. Respondent's Motion at 6-13. Our jurisdiction is conferred by the Contract Disputes Act, which allows a contractor to appeal a contracting officer's decision within ninety days from the date the contractor receives the decision. 41 U.S.C. § 606 (2000). Compliance with the ninety-day requirement is a prerequisite to our jurisdiction to entertain an appeal. Tiger Natural Gas, Inc. v. General Services Administration, GSBCA 16039, 03-2 BCA ¶ 32,321. We find no authority to support the conclusion that either the late filing of a complaint or the failure to comply with a contract's notice requirement deprives us of jurisdiction. The contracting officer's decision is dated December 2, 2003, and Air Masters filed its notice of appeal from the contracting officer's decision by mailing the notice to us on or about December 3, 2003. We possess jurisdiction because Air Masters filed this appeal within ninety days after receipt of the contracting officer's decision.

The Motions for Summary Relief

Summary relief is appropriate when there are no genuine issues of material fact in dispute and when the moving party is entitled to relief as a matter of law. A fact is material if it will affect our decision. An issue is genuine if enough evidence exists such that the fact could reasonably be decided in favor of the non-movant at a hearing. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). As explained below, neither party is entitled to summary relief.

Air Masters' Motion

According to FAR 52.222-43, Air Masters was required to notify GSA of any increase claimed under this clause within thirty days after receiving a revised WD. DoL issued revised WDs on October 15, 1998 (revision 1), December 29, 1999 (revision 2), July 12, 2000 (revision 3), and August 27, 2002 (revision 4). In the fall of 2003, Air Masters' claim notified GSA of the increase claimed under the FAR clause.

Air Masters contends it is entitled to summary relief because it provided GSA with the notice required by FAR 52.222-43 when it gave GSA copies of revised CBAs and WDs. Air Masters says it was not required to provide GSA with two notices, one to inform GSA of the revisions to the CBAs and WDs, and a second to inform GSA of a claimed increase in Air Masters' contract prices. According to Air Masters, notifying GSA of the revised WDs was the same as notifying GSA that Air Masters' prices had increased. Appellant's Motion at 3-5.

Although Air Masters gave GSA copies of revised CBAs and WDs, this was not the same as giving GSA notice of a price increase claimed by Air Masters. GSA asserts, without contradiction, that Air Masters provided copies of revised CBAs so GSA could transmit the CBAs to DoL, which could then decide whether to issue revised WDs. According to FAR 52.222-43, a revised WD could result in an increase to the contract price, although not always. As the example contained in FAR 52.222-43(d)(1) shows, if Air Masters had been paying its employees more than the wage rate set by a WD, a revision to the WD could have had no impact upon Air Masters' prices. For example, suppose a WD set a minimum rate of \$10 per hour and Air Masters paid its employees \$12 per hour. If a revised WD set a minimum rate of \$12 per hour and Air Masters did not increase its employees' wages, the revision would have no effect upon Air Masters' prices. Notifying GSA of wage rates set out in a revised CBA or WD was not the same as notifying GSA of an increase claimed due to a revised WD because a revised CBA or WD does not necessarily result in an increase in the contract price. In addition, the CBAs and WDs did not constitute the notice required by the contract because the contract required the notice to contain a statement of the amount claimed and the CBAs and WDs did not contain such a statement. Because Air Masters has not established it provided GSA with the notice required by FAR 52.222-43(f), it is not entitled to summary relief.

There is an added reason we cannot conclude Air Masters is entitled to summary relief. After DoL issued revised WDs, GSA issued unilateral contract modifications that did not increase the contract price due to the revised WDs, and Air Masters said nothing to GSA about claiming a price increase. Also, in December 2000, when Air Masters signed a

bilateral modification that established a new contract price, it did not reserve the right to ask for an increase to the contract price due to revised WDs, even though DoL had by then issued three revisions to the WD. Air Masters has not established that it is entitled to summary relief even though it remained silent when it received the unilateral modifications and even though it agreed to a new contract price and did not reserve the right to request a price increase due the WD revisions.

GSA's Motion

Air Masters' failure to establish it provided a timely notice as required by FAR 52.222-43 does not mean GSA is entitled to summary relief. Notice provisions are not applied mechanically, and a late notice does not defeat a contractor's claim unless a contract clearly states an untimely submission will cause a contractor to lose rights, or unless an agency can demonstrate it was prejudiced by a late notice. Riggs National Bank of Washington, DC v. General Services Administration, GSBCA 14061, 97-1 BCA ¶ 28,920 (citing cases). The contract here does not say Air Masters will lose rights if it fails to provide a notice within the time required by the contract. Thus, GSA is entitled to summary relief only if it can establish it was prejudiced by Air Masters' failure to provide timely notice. GSA makes an allegation of laches, Respondent's Motion at 12-13, and one element of laches is prejudice. 2160 Partners v. General Services Administration, GSBCA 15973, 03-2 BCA ¶ 32,259.

Although Air Masters says GSA cannot establish it was prejudiced by Air Masters' late notice, we are not sure this is correct. When GSA exercised the two-year option, DoL had issued three WD revisions. When GSA extended the contract for the final four months, DoL had issued four WD revisions. GSA knew of the revisions, but did not know Air Masters intended to ask for a price increase because of the revisions until long after it exercised the option and extended the contract. If GSA had known Air Masters planned to claim an increase in the contract price, perhaps GSA would have decided to solicit bids from other contractors instead of exercising the two-year option and extending the contract for four additional months. GSA, however, has not established the facts needed to support a conclusion that the notice provision should be enforced because GSA was prejudiced by the late notice. Therefore, GSA is not entitled to summary relief.

Decision

The motion to dismiss and the cross-motions for summary relief are **DENIED**.

MARTHA H. DeGRAFF
Board Judge

We concur:

ROBERT W. PARKER
Board Judge

ALLAN H. GOODMAN
Board Judge