

PSBCA

APPEALS OF NOVA EXPRESS

UNDER CONTRACT HCR 78653

January 10, 2008

APPEARANCE FOR APPELLANT: Philip Emiabata

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OPINION OF THE BOARD

Appellant, Nova Express, held a contract with Respondent, United States Postal Service, to transport mail between a number of Postal Service facilities. At the end of the contract term, the contracting officer declined to renew the contract, and Appellant appealed. Appellant filed a claim for damages allegedly stemming from Respondent's failure to renew the contract and for funds Appellant had earned in the last month of the contract that Respondent had withheld. The contracting officer denied the claim, and Appellant appealed. Appellant also appealed a decision that excluded one of its drivers from Respondent's premises.

A hearing was held in Austin, Texas, and the parties filed post-hearing briefs. Entitlement only is at issue (Order, December 29, 2005).

FINDINGS OF FACT

1. On April 24, 2000, Respondent awarded Appellant contract No. HCR 78653 for transportation of mail between Respondent's Austin, Texas Processing and Distribution Center ("Austin P&DC") and post offices in Driftwood, Wimberley, Dripping Springs, Blanco, and Fischer, Texas. Service began May 6, 2000, and the contract was to run until June 30, 2003, at an annual rate of \$76,000. (Appeal File, Tab 1; Stipulation filed April 26, 2006, paragraph ("Stip.") 4; Hearing Transcript, Page ("Tr.") 841).

2. The contract required Appellant to "deny access to the mail to any employees or personnel when required to do so by the contracting officer." (Appeal File, Page

("AF") 15 (Contract Clause B.3, GENERAL REQUIREMENTS AND PROHIBITIONS, subsection h, Denial of Access to the Mails)).

3. On October 30, 2002, a brief scuffle occurred in the Austin P&DC between one of Appellant's drivers, who was Appellant's owner's wife, and a driver for another mail transportation contractor (AF 77-91; Tr. 100, 670-680). After receiving a report of an investigation of the circumstances, the facility manager barred both drivers from the facility and from access to the mails. The contracting officer confirmed the denial of access in a letter dated November 25, 2002. (Respondent's Exhibit SE 1; [FN1] AF 77-92, 112; Supplemental Appeal File, Tab/Pages ("SAF") D216-218; Tr. 99-106, 672-674). As a result, Appellant's driver was no longer able to perform services under this contract.

4. As provided in the contracting officer's letter, Appellant appealed the denial of access. That appeal was referred to the next higher level of contracting authority, but the appeal was denied by letter dated December 16, 2002. (AF 93-96).

5. While Appellant's owner and his wife did not have a problem getting along with some Postal Service employees (Tr. 97, 109, 538, 603), in their dealings with Respondent's administrative officials in the Austin P&DC they were consistently hostile and combative. They repeatedly accused the employees who monitored their contract performance of corruption and harassment. (AF 93, 94, 95, 100, 102, 104; SAF B59, B77, B82, B87, B91, B99, B104, B110, B113, B114, B116-117, B119, B163, B172, B173, B190, C196, C197, C198, D203-208, D215, D247, F307, F314, K1, K2, K3, K5, K8, K10, L136; Appellant's Exhibits ("App. Exh.") 3, 11,16; Joint Exhibits ("J. Exh.") 2, 4, 9, 10, 11; Tr. 79, 113-114, 133-134, 215, 245, 394, 399, 400, 480-481). Their conduct was disruptive of Respondent's transportation operations, was harmful to employee morale in the Austin P&DC, and demanded an inordinate amount of attention from the contracting officer and his staff (Tr. 82, 313, 386, 484-485).

6. The contract required that Appellant maintain its trucks in a mechanically sound and safe condition acceptable to the contracting officer or his authorized representative. Upon written notice from Respondent, Appellant was to take action as directed to maintain its trucks in a safe condition. Respondent was authorized to inspect Appellant's trucks to assure compliance with contract requirements, and it was part of the duties of the dock expeditors at the Austin P&DC to inspect mail transportation contractors' trucks at the dock. (AF 12 (Contract Clause B.2, VEHICLE REQUIREMENTS AND SPECIFICATIONS, subsection b), 17-18 (Contract Clause B.6, SAFETY REQUIREMENTS); SAF D211; Tr. 70).

7. However, Appellant resisted any inspection of its vehicles by Respondent's administrative officials, contending that only the Texas Department of Transportation was authorized to do so. Efforts by Respondent's officials in Austin to inspect Appellant's trucks were regularly met with loud, rancorous argument from Appellant's owner. Appellant carried over the argument to its written responses to irregularity reports addressing safety or other deficiencies of its trucks, accusing Respondent's officials of harassment. The inspections of Appellant's trucks were no different from those conducted for all contractor trucks coming into the Austin dock, although Appellant's trucks drew more irregularity reports because they were in worse condition than most in the facility. (SAF B125-126, D211, D213; J. Exh. 11; App. Exh. 3, 5; Tr. 75, 79-82, 88-89, 113-114, 133-134, 210-211).

8. The contract could "be renewed by mutual agreement of the parties." (AF 50,

Contract Clause H.17, RENEWAL (Clause B-78) (January 1997)).

9. Near the end of the contract term, the contracting officer decided not to renew the contract with Appellant due to what he considered Appellant's poor performance and Appellant's owner's confrontational and disruptive way of dealing with the contract's administrative officials. He believed administering Appellant's contract required far too much of his and his staff's time. (Tr. 483-485). By letter dated June 20, 2003, the contracting officer notified Appellant that based on information he had received from the administrative official in Austin Respondent would not renew HCR 78653 upon its expiration on June 30, 2003. He stated that the contract would be extended on an accounting-period [28 days]-by-accounting-period basis if Appellant chose to exercise its right to appeal the non-renewal to the next higher contracting authority. (AF 97-98; Stip. 10). The contract provided, and the contracting officer stated in his letter, that Respondent's decision not to renew a contract was not a dispute under the contract's Claims and Disputes clause. (AF 40 (Contract Clause G.2, APPEALS TO NEXT HIGHER CONTRACTING AUTHORITY, subsection c), 98; SAF J1-2; J. Exh. 5).

10. On July 7, 2003, the parties agreed to extend the contract at the existing rate, on an accounting-period-by-accounting-period basis, for a period ending no later than September 30, 2003. Except as changed by the extension, all the terms and conditions of the contract remained unchanged and in full force and effect. (SAF J3-28); Tr. 442, 483, 487-492, 503, 665).

11. Appellant appealed the decision not to renew its contract, and the contracting officer forwarded the appeal to the next higher level of contracting authority, which in this case was the Manager, Surface Transportation, at Postal Service Headquarters (AF 99-104; SAF J29).

12. Appellant followed up that appeal with a July 16, 2003 letter addressed to the Board but sent to the contracting officer in which Appellant sought to obtain documents supporting the contracting officer's decision not to renew its contract. (SAF J29-30). The contracting officer forwarded that letter to the Board, which treated it as an appeal of the decision not to renew the contract and docketed it as PSBCA No. 5102.

13. The contract expired by its terms on September 30, 2003 (Tr. 443-444, 618). Respondent continued to hold funds, which it calculated to be \$3,516.95, that Appellant had earned before the expiration of the contract (Tr. 458-461, 889). In a September 22, 2003 letter to the contracting officer, Appellant had demanded payment of the amount withheld. (J. Exh. 4).

14. By letter dated October 17, 2003, the Manager, Surface Transportation, denied Appellant's appeal of the non-renewal (AF 105; SAF J32).

15. By letter dated June 21, 2004, Appellant asked the contracting officer to rescind the 2002 denial of access for its driver (see Findings 3, 4). (AF 112-114). On July 21, 2004, the contracting officer issued what he characterized as a final decision confirming as final the driver's denial of access to the mail (AF 116). Appellant's appeal of the July 21, 2004 decision was docketed as PSBCA No. 5204.

16. By letter of July 30, 2004, Appellant submitted a certified claim relating to this and other contracts it had held with Respondent. Relating to this contract (HCR 78653), Appellant claimed the following damages: (1) \$360,000 that it would have earned under the contract had it been renewed for a four-year term; (2) \$6,800, including 10% interest, owed for its September 2003 performance before the contract expired; and (3) \$1,000,000 for pain and suffering of Appellant's owner and his family. (Attachment to Notice of Appeal in PSBCA No. 5206; See AF 117-119).

17. In a final decision dated September 3, 2004, the contracting officer denied Appellant's claims (AF 117-119).

18. Appellant's October 18, 2004 appeal of the September 3, 2004 final decision as it relates to HCR 78653 was docketed as PSBCA No. 5206.

DECISION

Motions

Respondent filed a motion to dismiss PSBCA No. 5102, contending that the Board did not have jurisdiction to address Appellant's challenge to Respondent's decision not to renew the contract. It also filed a partial motion to dismiss PSBCA No. 5206, contending that the Board is without jurisdiction to award damages for pain and suffering. The Board reserved decision on the motions and will consider the issues they raised in this Opinion.

Failure to Renew Contract

Respondent argues that the Board has no jurisdiction over the nonrenewal of Appellant's contract because the contract itself provides that a decision not to renew the contract is not a dispute within the meaning of the Claims and Disputes clause (Finding 9). We have considered this argument before and rejected it, as we do now. See *Tab Distributors, Inc.*, PSBCA No. 4134, 99-1 BCA ¶ 30,110, and cases cited therein.

However, the contract authorized renewal of the contract by mutual agreement of the parties (Finding 8). Under these circumstances, the contracting officer had wide discretion in deciding whether to renew the contract. See *Government Systems Advisors, Inc. v. United States*, 847 F.2d 811, 813 (Fed. Cir. 1988); *Edward H. Foran*, ASBCA Nos. 51596, et al., 01-1 BCA ¶ 31,323 at 154,724- 725. Where, as here, there has been no promise or commitment by Respondent that it would renew the contract, see *Shorthaul Trucking Co.*, PSBCA No. 1046, 1985 PSBCA LEXIS 64, June 18, 1985, the contracting officer's decision not to renew does not entitle Appellant to contractual relief absent a showing that the failure resulted from Respondent's bad faith or abuse of discretion. See *James Hovanec*, PSBCA No. 4767, 04-2 BCA ¶ 32,805 at 162,262; *Plum Run, Inc.*, ASBCA Nos. 46091, 49203, 49207, 97-2 BCA ¶ 29,193 at 145,230. To show that the failure to renew resulted from bad faith on the part of Respondent's employees, Appellant must show by clear and convincing evidence some specific intent to harm it. See *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1240 (Fed. Cir. 2002); *IMS Engineers-Architects, P.C.*, ASBCA No. 53471, 06-1 BCA ¶ 33,231 at 164,674, recon. denied, 07-1 BCA ¶ 33,467.

We have reviewed the record carefully and observed the witnesses testifying at the

hearing to make our evaluations of their credibility, and we do not find clear and convincing evidence that in deciding not to renew the contract Respondent's officials had specific intent to harm Appellant or that they were motivated by malice. See *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1240 (Fed. Cir. 2002). What we did find was substantial friction and hostility between Appellant's owner and a significant number of Respondent's employees responsible for administering the contract and monitoring Appellant's performance (Findings 5, 7). However, that friction, especially as Appellant's owner largely precipitated it, does not prove bad faith on Respondent's part. See *IMS Engineers-Architects, P.C.*, ASBCA No. 53471, 06-1 BCA ¶ 33,231 at 164,674, recon. denied, 07-1 BCA ¶ 33,467. In fact, the acrimonious working relationship that had developed provided a reasonable ground for a decision not to renew Appellant's contract. Cf. *AJ Custodial Service*, PSBCA No. 5220, 05-2 BCA ¶ 33,087; *D & C Building Maintenance, Inc.*, PSBCA No. 4459, 01-1 BCA ¶ 31,301.

Accordingly, Appellant's appeal of the decision not to renew its contract is denied.

Suspension of Appellant's Driver

When the contracting officer issued a final decision refusing to rescind the denial of Appellant's driver's access to the mail, Appellant appealed (Finding 15). In its Notice of Appeal, which Appellant designated as its Complaint in PSBCA No. 5204, Appellant asks the Board to reverse the contracting officer's decision to deny its driver's access to the mail. We have no authority to restore Appellant's driver's access to Postal Service facilities. As we said in *Edward Grinnell*, PSBCA No. 5331, September 20, 2006,

"The Board has no authority to afford Appellant an equitable remedy in the nature of injunctive relief. See *Lee Ann Wyskiver*, PSBCA No. 3621, 95-2 BCA ¶ 27,755; *Onice Ulmer*, PSBCA No. 2938, 91-3 BCA ¶ 24,345. Accordingly, the Board could not direct Respondent to permit Appellant access to the mail and postal facilities."

As Appellant has not asked for, and the record does not reflect that Appellant is entitled to, any relief stemming from the denial of access that is within the Board's authority to grant, the appeal of PSBCA No. 5204 is dismissed for lack of jurisdiction. See *Edward Grinnell*, PSBCA No. 5331, September 20, 2006; *Terry L. Bradley*, PSBCA No. 5103, 05-2 BCA ¶ 32,996.

Appellant's Claims

As we have held above, Appellant has not demonstrated that Respondent's decision not to renew HCR 78653 breached any duties under the contract or was made in bad faith. Accordingly, Appellant's claim for damages based on the nonrenewal is denied. [FN2] However, Appellant is entitled to recover any amounts withheld from contract pay Appellant had earned before the contract expired.

Conclusion

The appeal of PSBCA No. 5102 is denied. The appeal of PSBCA No. 5204 is dismissed for lack of jurisdiction. The appeal of PSBCA No. 5206 is denied, except that

Appellant is entitled to payment of unpaid earnings otherwise due Appellant at the time the contract expired, plus interest as allowed by the Contract Disputes Act. Calculation of Appellant's recovery is remanded to the parties.

Norman D. Menegat

Administrative Judge

Board Member

I Concur:

William A. Campbell

Administrative Judge

Chairman

I Concur:

David I. Brochstein

Administrative Judge

Vice Chairman

FN1. A packet of documents identified as SE pages 1 through 36 was admitted and will be referred to as "SE" followed by the page number.

FN2. Appellant's claim for damages for pain and suffering sounds in tort and is not recoverable in any event before the Board. See Don Wasylk d/b/a Klysaw, PSBCA Nos. 4186, 4283, 00-1 BCA ¶ 30,844; Computer Power Support, Inc., PSBCA No. 3401, 94-2 BCA ¶ 26,626; Onice Ulmer, PSBCA No. 2938, 91-2 BCA ¶ 23,991.

PSBCA No. 5102