

APPEALS OF STEVE C. MILLER

Under Contract No. HCR 29640

October 15, 2009

APPEARANCE FOR APPELLANT: Steve C. Miller

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OPINION OF THE BOARD [FN1]

Appellant, Steve C. Miller, has appealed from contracting officer's decisions terminating for default his mail transportation contract with Respondent, United States Postal Service, and assessing excess procurement damages. In addition, Appellant appeals a contracting officer's decision denying Appellant's claims for the payment of funds withheld by Respondent and for the payment of "unpaid wages." At the election of the parties, these appeals are being considered on the record, without a hearing, in accordance with §955.12 of the Board's Rules of Practice. Only entitlement is at issue in this proceeding. (See Orders of August 3 and December 14, 2006).

FINDINGS OF FACT

1. Renewal Contract No. HCR 29640 was awarded to Appellant on July 23, 2003, for a term of July 1, 2003, through June 30, 2007, at a rate of \$168,000 per annum. The contract covered the transportation of mail between the Greenville, South Carolina Processing and Distribution Center and annex (P&DC) and two destinations - Calhoun Falls and Greenwood, South Carolina. The Administrative Official (AO) for the contract was located at the P&DC. The service to be provided consisted of one daily round trip (designated Trips 3 (outbound) and 4 (return)) between the P&DC and Greenwood and a second round trip (Trips 5/6) between those points that was run on a daily basis except for Sundays and certain holidays. The service to Calhoun Falls (Trips 1/2 and 7/8) was to be run on a daily basis (except for certain holidays), but with a somewhat different route on Sundays. (Auxiliary Evidence File, Tab (AEF) 14, p. 115 [FN2]; Stipulation paragraphs (Stip.) 2, 3, 6). [FN3]

2. Under the contract, "[t]he supplier shall carry all mail tendered for transportation ... in accordance with the operating schedule and between the points fixed in the schedule" (AEF 14, p. 119).

3. Prior to the renewal, Appellant had made two higher offers, both of which were rejected by Respondent as too high. By letter dated June 2, 2003, the contracting officer offered Appellant the opportunity to make a best-and-final offer. He advised Appellant that if that offer did not result in an agreement, the route would be resolicited. Ultimately, Appellant offered to renew the contract for \$168,000 per annum, which offer was accepted by Respondent. (Stip. 38, Attachment B, p. 5; AEF 14, pp. 103, 107).

4. The contract required Appellant to provide a minimum of two vans, each with a 1200 cubic-foot capacity. In addition,

"The supplier will also be required to have readily available sufficient stand-by equipment ... to permit vehicle maintenance, and to prevent delays in emergencies such as mechanical failures and poor weather conditions."

(AEF 14, p. 117; Stip. 4, 5).

5. The contract contained clauses entitled "Termination for Default" and "Events of Default." Under those clauses, termination was authorized if the supplier failed to perform service according to the terms of the contract or failed to complete the contract requirements within the time specified. (AEF 14, pp. 140-142).

6. The contract also contained a clause entitled "Service Contract Act." In part, that clause provided:

b.(1) Each service employee employed in the performance of this contract by the supplier or any subcontractor must be (a) paid not less than the minimum monetary wages and (b) furnished fringe benefits ... as specified in any wage determination attached to this contract.

(2) (a) If a wage determination is attached to this contract, the contracting officer must require that any class of service employees not listed in it and to be employed under the contract ... be classified by the supplier so as to provide a reasonable relationship (that is, appropriate level of skill comparison) between the unlisted classifications and the classifications in the wage determination. The conformed class of employees must be paid the monetary wages and furnished the fringe benefits determined under this clause.

* * *

d.(1) In the absence of a minimum-wage attachment for this contract, neither the supplier nor any subcontractor under this contract may pay any person performing work under the contract (regardless of whether they are service employees) less than the minimum wage specified by section 6(a)(1) of the Fair Labor Standards Act of 1938....

(Contract Clause H.33, AEF 14, pp. 151, 153).

7. Included with Appellant's contract was a Form 7468A, "Highway Transportation Contract - Cost Worksheet." Instructions on that form stated to the Offeror that "[t]his worksheet will assist you in determining the cost you expect to incur in performing this service." The form listed certain standard categories that apparently identify the contractor's expected costs of performing the contract - e.g., Vehicle Cost, Operational Cost, Taxes, Vehicle Registration, Insurance, Straight Time, Overtime, Payroll Taxes, etc. - which costs totaled the contract amount of \$168,000 per annum. In the form that is in the record, Item 17 "Supplier's Wages (Personal Driving or Supervision)" contained no entry - i.e., there were no costs

attributable to this item that were included in the contract amount. (AEF 14, p. 110).

8. The Payment (Highway) clause of the contract provided that the contract was a fixed price contract and that payments would be made automatically at the conclusion of each Postal Accounting Period. Where, as here, the fixed price was expressed as an annual rate, the automatic payment was to be based on a calculated daily rate - the annual rate divided by 365 or 366 - multiplied by the number of days in the Accounting Period. (AEF 14, p. 135, Payment (Highway) (Clause B-74) (January 1997)). Other provisions of the Payment clause, not relevant to this appeal, provided for additional payments for such things as extra trips, adjustments due to certain increased costs, damage to trailers, and detours.

Termination for Default and Assessment of Excess Reprocurement Costs

9. Between August 2003 and January 10, 2005, Appellant was charged with service deficiencies - i.e., late or omitted service - on approximately seventeen occasions, all involving service to Greenwood (Trips 3 or 6) and caused by mechanical problems. (Supplemental Appeal File, pages (SAF) 7, 11, 25-31; AEF, pp. 45, 46, 101; Stip. 8, 10). On at least one occasion, July 19, 2004, the Administrative Official formally counseled Appellant with regard to what Respondent's personnel considered Appellant's generally unsatisfactory performance (SAF 13; SAF, Tab AA (Ball Declaration), para. 7).

10. The service delays and omissions on the Greenwood trips caused Respondent's operating schedules to be disrupted and caused Respondent to incur the costs of lost hours by both carriers and clerks while waiting for Appellant to deliver the mail. (SAF 11, 16; Ball Declaration, para. 6).

11. On March 14, 2005, Appellant omitted service on Trips 3 and 6 because one of his trucks had broken down. He advised the AO that he would have the truck repaired, but did not do so that day or the next. On March 15, 2005, Appellant omitted service on Trips 3, 4, 5 and 6 - i.e., all of the Greenwood service. On that date, the contractor advised the AO that he could not afford to repair or replace the broken-down truck and did not intend to try. Appellant advised that he could no longer provide all the service required by his contract. The AO arranged for temporary service by another contractor to provide the service omitted by Appellant. Appellant stated that he believed the contract should be divided into two separate contracts and that he would provide service under one of them. The AO advised Appellant that he would have to discuss contract changes of that nature with Respondent's contracting personnel. (SAF 35-40; Ball Declaration, para. 10).

12. On March 16, 2005, Appellant again failed to run any of the Greenwood trips. The Contracting Officer was informed of Appellant's performance failures, of his inability to repair or replace his truck, and of his proposal to provide service under only one part of the contract. The Contracting Officer directed his subordinate to contact Appellant and inform him that if he did not resume service or provide assurances that he would do so, his contract would be terminated. Having received no such assurances from Appellant, either directly or through his subordinate, the Contracting Officer terminated the contract for default, effective on that date. Appellant filed a timely appeal, which was docketed as PSBCA No. 5264. (SAF 6, pp. 41-44; SAF, Tab CC (Harris Declaration); PSBCA No. 5264 Appeal File, Tab (5264AF) 5, 7).

13. At the time of the default termination, Appellant's contract rate was \$173,529.20 per annum (5264AF 5). At that time, Respondent owed money to Appellant for services previously rendered (PSBCA No. 5292 Appeal File, Tab (5292AF) 5; AEF 4, pp. 26, 28; Stip. 32). However, payments to Appellant were suspended by the Contracting Officer concurrent with the termination, pending the assessment of repro-

curement costs (5264AF 5).

14. Following the termination, Respondent's Contract Specialist contacted five contractors to solicit replacement service. Of the five, four submitted offers, which ranged from \$200,000 to \$475,000 per annum. The low offeror, who was from Greenwood, later withdrew his offer. Respondent contracted with the next low offeror, at a rate of \$279,000 per annum. The replacement contract required the contractor to provide service that was substantially the same as that required in Appellant's contract. [FN4] (5292AF 1; Harris Declaration and attachments).

15. In a final decision dated August 9, 2005, the Contracting Officer advised Appellant that he was liable to the Postal Service in the amount of \$25,175.65 for excess reprocurement costs. That amount was calculated by taking the difference between the rates of Appellant's and the replacement contracts, dividing by 365 to derive a per-day difference, and multiplying by 86 days. [FN5] In addition, the Contracting Officer added \$325 in administrative costs for the time expended by the Contract Specialist and a secretary. The Contracting Officer credited Appellant with \$11,642.81, the amount Respondent stated had been withheld at the time of the termination, and demanded the payment of \$13,532.84. (SAF CC, Harris Declaration, para. 11, 12; 5292AF 3, 6). By letter dated August 15, 2005, Appellant filed a timely appeal of the excess cost assessment. That appeal was docketed as PSBCA No. 5292.

Appellant's Claim

16. By letter dated March 31, 2005, Appellant filed a claim, certified in accordance with the Contract Disputes Act, seeking the payment of two amounts. The first claim element was a demand for the payment of \$13,311, alleged by Appellant to be the amount owed him for service on his route for the 28 days prior to the termination. The second element of Appellant's claim was a demand for payment of \$684,300 for his work as a "First Line Supervisor/Manager" for 15 years "without being compensated by the USPS." For support, Appellant included excerpts from a U.S. Department of Labor, Bureau of Labor Statistics internet web site entitled "2001 State Occupational Employment and Wage Estimates, South Carolina," which web site contained a table of "... occupational employment and wage estimates ... calculated with data collected from employers ... in South Carolina." Within that web site, Appellant cited an entry for "First-Line Supervisors/Managers of Transportation and Material-Moving Machine and Vehicle Operators" and alleged that he had been working in that capacity without compensation by the Postal Service. The "Mean Annual" wage estimate for that position listed in the table was \$45,620 which, when multiplied by fifteen, equaled the amount of Appellant's claim. (AEF 2, pp. 11-18).

17. In a final decision dated August 2, 2005, the Contracting Officer denied both of Appellant's claims in their entirety. The bases for the denials were, for the first claim element, that payments to Appellant had been suspended following the termination to offset expected excess costs, and, for the second claim element, that Appellant's relationship with the Postal Service was that of a contractor and not an employee. By letter dated September 11, 2005, Appellant filed a timely appeal, which was docketed as PSBCA No. 5301. [FN6] (AEF 2, p. 8).

DECISION

Respondent, which has the burden of proof with respect to the termination for default and the assessment of excess reprocurement costs, argues that the termination was justified by Appellant's failure to provide service on the Greenwood portion of the contract for three days, and by Appellant's statements that he would no longer be able to, and did not intend to, provide a second truck, as required by the contract. With regard to the assessment of excess reprocurement costs, Respondent argues that the Contracting Officer's actions in soliciting and awarding a replace-

ment contract were reasonable.

Appellant, who has the burden of proof with respect to his claim, argues [FN7] that under the provisions of the Service Contract Act clause of the contract and under regulations of the Department of Labor he was entitled to be paid for the supervisory and managerial work he performed in operating his contract for the Postal Service over the period of fifteen years that he held the contract.

Termination for Default (PSBCA No. 5264)

Respondent argues that the termination for default was justified on either of two independent grounds: Appellant's failure to provide contractually required service to Greenwood on March 14-16, 2005, and Appellant's anticipatory repudiation of the contract - as evidenced by Appellant's statements that he could no longer afford to operate a second truck and did not intend to try.

It is clear that Appellant failed to provide service to Greenwood for at least part of March 14 and on all of March 15 and 16. While some mechanical breakdowns may reasonably be expected over the course of contract performance, Appellant's failure to provide service over three consecutive days represented a material failure to provide the service required under the contract and justified the termination for default, e.g., Janet L. Fox and Todd Fox, PSBCA Nos. 6159, 6169, 09-1 BCA ¶ 34,082 at 168,506, unless Appellant can show that his failure to perform was excusable, Charli Selsa Schiver d/b/a NGX-Schiver, PSBCA No. 4545, 02-2 BCA ¶ 31,937; Patricia J. Stevens, PSBCA No. 3272, 94-1 BCA ¶ 26,419 at 131,429, recon. denied, 94-2 BCA ¶ 26,951, or that the termination was an abuse of the contracting officer's discretion, e.g., Jesse A. Farmer, PSBCA No. 2702, 91-3 BCA ¶ 24,181 at 120,941. [FN8]

Although not completely clear, Appellant apparently contends that he was attempting to make arrangements to lease a second truck when the termination occurred, and that he believed that the AO made alternate arrangements for service on March 14-16 in a cooperative effort to help him out while he made those arrangements. More generally, Appellant also complains that at the time of his contract renewal, Respondent's personnel would not negotiate with him concerning the substantial price increase he believed was necessary in order for him to have the funds necessary to perform the contract properly.

Appellant argues that Respondent rejected his higher offers at the time of contract renewal and refused to negotiate on a line-by-line basis. Ultimately, Appellant argues, "for personal financial reasons I decided to submit a bid [\$168,000] that deleted all elements that would have made it possible to successfully operate the route." [FN9] Although not explicitly stated, Appellant's argument suggests that he contends that his performance failures should be excused because he agreed under duress to a contract renewal price that was too low. The record, however, does not support such a contention.

At a minimum, in order to support a claim of duress, Appellant must show that he involuntarily accepted Respondent's terms. E.g., PNL Commercial Corp., ASBCA No. 53816, 04-1 BCA ¶ 32,414, citing *Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320, 1329 (Fed. Cir. 2003); see also *Systems Technology Associates, Inc. v. United States*, 699 F.2d 1383, 1387 (Fed. Cir. 1983). In this instance, however, Appellant was at all times free to elect not to renew the contract. While he may have felt personal financial pressure to renew, such pressure - where not the result of wrongful actions by Respondent - does not constitute legal duress, Gary W. Noble, PSBCA No. 4094, 99-2 BCA ¶ 30,413; see also *Rumsfeld v. Freedom NY, Inc.*, supra, 329 F.3d at 1330; *International Telephone & Telegraph Corp. v. United States*, 509 F.2d 541, 549, n. 11 (Ct. Cl. 1975), and does not excuse Appellant's breach of the contract. In this instance, Appellant has not alleged actions by Respondent that could be

considered wrongful. That Respondent's personnel refused to accept a higher price and drove what Appellant considered a hard bargain, does not constitute wrongful action or duress. See Gary W. Noble, *supra*.

The record also does not reflect that the contracting officer abused his discretion in terminating the contract. As of the date of termination, Appellant had not performed the Greenwood portion of the contract for three days in succession, and had told the AO that he was unable to repair or replace the truck needed to provide that service and did not intend to try to do so. Based on these facts, the contracting officer terminated the contract for default (Finding 12). In addition, whatever Appellant may have believed regarding the purpose of the AO's efforts and even if, as Appellant argues, he was attempting to make arrangements for a second truck at the time of the termination, we are not persuaded from the record evidence that he made Respondent's personnel aware that he intended to, and would be able to, continue performance of the Greenwood portion of the contract. Under these facts, we cannot conclude that the contracting officer abused his discretion when he decided to terminate the contract.

Respondent has demonstrated that Appellant breached his contract, and Appellant has not shown that his breach was excusable or that the termination represented an abuse of discretion. Accordingly, Appellant's appeal of the termination is denied.

Assessment of Excess Reprourement Costs (PSBCA No. 5292)

With regard to the assessment of reprourement costs, we conclude that Respondent's actions in securing emergency replacement service were reasonable. The service described in the emergency contract was substantially the same as that required in the terminated contract, differing only in immaterial detail (Finding 14). Respondent solicited offers from multiple sources and received multiple offers. When the initial low offeror withdrew his offer, Respondent contracted with the next low offeror. Finally, Respondent limited the assessment of excess costs to a period of 86 days - approximating the usual time required to replace an emergency contract with a long-term replacement. Appellant has not submitted evidence challenging Respondent's actions with regard to the reprourement, and under the facts of this case we conclude that they represented a reasonable attempt to mitigate Appellant's damages.

Accordingly, Appellant's appeal from the assessment of excess reprourement costs is denied. Inasmuch as only entitlement is at issue and inasmuch as the parties differ in their assessment of how much money was owed to Appellant as of the date of the termination (see Findings 15, 16), the matter is remanded to the parties to negotiate the final amount due from Appellant.

Appellant's Claim (PSBCA No. 5301)

The first element of Appellant's claim - his demand for the payment of money allegedly owed him for the period before the termination - has been addressed above in connection with the excess reprourement costs assessment. As the contracting officer found in his final decision, Appellant is entitled to credit for the amount owed to him as of the time payments were suspended simultaneously with the termination for default, and Respondent has not taken a different position during the course of this litigation. Since the determination of that amount has been remanded to the parties, we need not address this element of Appellant's claim further.

Appellant did not offer any explicit arguments in his brief with regard to the second element of his claim - i.e., his demand for payment for his work as a supervisor or manager over the fifteen years he held the contract. However, his argument is largely contained in his September 11, 2005 notice of appeal from the contracting officer's denial of his claim. Appellant cites the language in 29 C.F.R. §§

4.6(b)(2)(i) and 4.6(b)(2)(iv)(C), which is similar to the language in §§ b.(2)(a) and d.(1) of the contract's Service Contract Act clause (Finding 6). That language sets out requirements for the payment of a contractor's service employees not specifically covered by a wage determination, and provides that all employees must be paid at least the minimum wage required by the Fair Labor Standards Act. Appellant then argues that these provisions require that some payment be made to him as a supervisor - under Item 17 of the Form 7463 (or 7468A) (see Finding 7) - and that such payment be measured in accordance with the Bureau of Labor Statistics salary figures (Finding 16).

It is not completely clear whether Appellant is claiming that he is owed the amount claimed because he was acting as a Postal Service employee during the 15-year period, or whether he is claiming entitlement to that amount as a contractor in addition to the payments required by his contract. If the former, the simple answer is that there is no evidence that Appellant was a Postal Service employee. Moreover, the Service Contract Act has no application to the wages paid to Postal Service employees. The Service Contract Act regulates the pay of "service employee[s] employed in the performance of this contract by the supplier or any subcontractor." (Finding 6). The primary purpose of the Act is to provide wage and benefit protection to employees of federal contractors, see *Halifax Technical Services, Inc. v. United States*, 848 F.Supp. 240, 244 (D.D.C., 1994), not employees of the federal government, including the Postal Service.

Respondent's payments to Appellant as contractor, on the other hand, are governed entirely by the terms of the contract specifying such payments (see, e.g., Finding 8) and not by the provisions of the Service Contract Act or the Service Contract Act clause. E.g., *Sarah M. Mitchell*, PSBCA No. 6173, 09-1 BCA ¶ 34,107. [FN10]

Accordingly, there is no legal basis for Appellant's claim under the Service Contract Act, and his appeal related to this claim element is denied.

Accordingly, the appeals in PSBCA Nos. 5264, 5292 (entitlement only), and 5301 are denied, and the appeal in PSBCA No. 5269 is dismissed. As noted above, while Respondent is entitled to excess procurement costs, the appeal in PSBCA No. 5292 is remanded to the parties for a determination of the net amount owed by Appellant.

David I. Brochstein

Administrative Judge

Vice Chairman

I Concur:

William A. Campbell

Administrative Judge

Chairman

I Concur:

Norman D. Menegat

Administrative Judge

Board Member

FN1. Administrative Judge Gary E. Shapiro took no part in the Board's consideration of these appeals.

FN2. The documents admitted into evidence by virtue of the Board's Order of June 23, 2009, have been designated collectively as the Auxiliary Evidence File.

FN3. Respondent filed proposed stipulations, dated January 8, 2007, and Appellant responded by letter dated February 12, 2007. The Board is referencing only those proposed stipulations to which Appellant agreed or to which he expressed no substantive objections.

FN4. Trips 4 and 5 were scheduled in the replacement contract to operate one hour and fifteen minutes earlier than in Appellant's contract. There is no evidence that that change had any effect on the number of vehicles required or any other material effect on the service required when compared with the defaulted contract.

FN5. Respondent's usual practice, followed in this instance, was to charge defaulted contractors for a period of three of Respondent's accounting periods plus the number of days remaining in the accounting period in which the termination occurred. This represented the length of time - about three months - that it normally took Respondent to replace the emergency contractor with a longer-term replacement contract. (SAF CC, Harris Declaration, para. 11).

FN6. When Appellant's March 31, 2005 claim letter was filed with the contracting officer, Appellant also sent a copy to the Board. That copy was docketed as an appeal (PSBCA No. 5269), but must be dismissed, since the Board had no jurisdiction over a claim that had not first been filed with the contracting officer. 41 U.S.C. § 605(a); Paragon Energy Corp. v. United States, 645 F.2d 966, 971 (Ct. Cl. 1981); Ronald L. Johnson, PSBCA No. 5282, 06-1 BCA ¶ 33,234.

FN7. Appellant did not directly address his claims in his brief. However, his argument with regard to his claim for services rendered as a supervisor or manager (Finding 16) is contained in his September 11, 2005 notice of appeal under PSBCA No. 5301.

FN8. Because of this result, we do not address Respondent's anticipatory repudiation argument.

FN9. See Appellant's letter dated August 20, 2006 (Stip. 38, Att. B, p. 5).

FN10. Appellant's complaint that he was entitled to be paid as a supervisor under Item 17 of the Form 7463 or 7468A misses the mark. The cost worksheet form was intended merely as an estimating aid (Finding 7). Appellant has shown no contractual basis for concluding that the information on the form governed payments by Respondent to Appellant or by Appellant to its employees or that it had any bearing on the contract payments otherwise specified in the Payments clause. Therefore, under the facts before us, whether Appellant entered an amount under Item 17 or not has no relevance to Respondent's payments under the contract.