

PSBCA 5412

APPEALS OF INCENTIVE TRANSPORTATION SERVICES INC.

Under Contract Nos. HCR 310CC and HCR 303JC and HCR 335LC

July 8, 2009

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OPINION OF THE BOARD

Respondent, United States Postal Service, awarded Appellant, Incentive Transportation Services, Inc., three contracts for transportation of mail during the Christmas 2006 season, but terminated each for default shortly after performance was to begin. Two months later, the contracting officer issued final decisions asserting Respondent's claim for procurement costs under each of the contracts, and Appellant appealed. Four months later, the contracting officer issued final decisions correcting Respondent's earlier claims for procurement costs, and Appellant did not appeal these "corrected" final decisions.

A hearing was held in Pasadena, California, and the parties filed post-hearing briefs. Respondent filed a reply brief. Entitlement and quantum are at issue (Order dated October 17, 2008).

FINDINGS OF FACT

1. In the fall of 2006, Respondent solicited proposals to provide mail transportation services for the upcoming Christmas season. Respondent utilized a web-based system, called Combined Net, to publicize its transportation needs and solicit ini-

tial bids on a per-mile basis from trucking companies that had been prequalified for transportation contracts. The Combined Net system was administered by Postal Service Headquarters, not by the contracting officer responsible for awarding the contracts at issue. The complete terms and conditions of the contracts to be awarded were not included on the Combined Net site, but at least the following information about each route was available on the web site: termini, minimum number of vehicles required, and duration of the contract. (Tr. 23, 84-86, 170, 175-179, 188-189; Tr. II 6, 28-29, 95, 99-104). [FN1]

2. Appellant is a trucking company that had supplied information about its available vehicles and its capabilities as part of its registration as a prequalified trucking business under the Combined Net process (Tr. II 94-96, 140).

3. Appellant submitted electronic bids through the Combined Net site, offering a per-mile rate to perform a number of Christmas 2006 mail transportation routes. Its rate was the lowest offered on the web solicitations for the three contracts at issue in these appeals. (AF 1 (pp. 16, 18), 2 (pp. 41, 44, 45, 47), 3 (pp. 81, 83); Stipulations 3, 4, 5; Tr. II 94-96).

4. Respondent sent Appellant certain forms to complete with respect to its successful initial bids. Appellant signed, dated (October 21, 2006), and returned to Respondent at least three pages of contract forms reflecting the rate-per-mile Appellant had bid for each of the routes. (AF 1 (pp. 16-18), 2 (pp. 45-47), 3 (pp. 81-83)).

5. On November 15, 2006, the contracting officer sent Appellant a separate notice of award and the contract forms reflecting the contracting officer's execution of each contract on that date. Each notice transmitted a complete copy of the contract. (AF 1 (pp. 14-19), 2 (pp. 41-47), 3 (p. 86); Stipulations 3, 4; Tr. 19, 28, 88-92, 94, 103; Tr. II 32-33, 100).

6. The contracts, all for the period December 5, 2006, through December 23, 2006, were for the following routes: HCR 303JC between Respondent's Atlanta Christmas Annex and the Northern Area Crossdock postal facility in Massachusetts (AF 2 (pp. 41, 44, 45, 47); Stipulation 4); HCR 310CC between Respondent's Macon, Georgia Processing and Distribution Center and the Northern Area Crossdock postal facility (AF 1 (pp. 16, 18); Stipulation 3); and HCR 335LC between Respondent's Tampa, Florida Distribution Center and the New York Christmas Annex at or near John F. Kennedy International Airport (AF 3 (pp. 81, 83); Stipulation 5).

7. Each contract included a detailed schedule listing departure times and arrival times for each stop on every trip called for under the contracts, and repeated the statement of the minimum number of tractors and trailers to be supplied on the route as stated in the electronic solicitation (AF 1 (pp. 21-22, 24), 2 (pp. 52-54, 56), 3 (pp. 86-87, 89); Tr. 19, 28, 103; Tr. II 33-35, 58, 106-107, 114, 140-141, 153-154).

8. Appellant expected to perform each of the contracts using the number of tractors and trailers listed in the solicitation (Tr. II 102).

9. Each of the contracts included a provision authorizing Respondent to terminate

the contracts

for default by the supplier [Appellant] In the event of termination for default, . . . the supplier will be liable to the Postal Service for any and all rights and remedies provided by law. . . . If it is determined that the Postal Service improperly terminated this contract for default, such termination will be deemed a termination for convenience.

(AF 4, Contract Clause 2.3.1.m (p. 114)).

10. The contracts incorporated by reference Respondent's Clause B-69, Events of Default, which provided that the contract could be terminated for, among other things, Appellant's "failure to perform service according to the terms of the contract." (AF 4, Contract Clause 2.3.1.s (8) (p. 116); Postal Service Supplying Principles and Practices, Clause B-69, Events of Default (March 2006)).

11. The three contracts were identified as emergency contracts, and the terms and conditions contained a special provision covering their termination for convenience:

Emergency contracts may be terminated by the Postal Service upon notice of not less than 24 hours, or by the supplier upon written notice of not less than 15 days; without the allowance of any damages or extra pay in lieu of damages.

(AF 4, Contract Clause 2.3.3e, Clause B-72 Termination for Convenience - Emergency Contracts (March 2006) (p. 119)). The authority of Respondent to terminate on 24 hours' notice was also stated on the signature page of each of the contracts (Transportation Services Proposal & Contract for Emergency Service, PS Form 7405A (September 2001)). (AF 1 (p. 16), 2 (p. 45), 3 (p. 81)).

12. The contracts contained another termination for convenience provision that allowed Appellant, after a termination for convenience by Respondent, to submit to the contracting officer a termination claim for the amount due Appellant by reason of the termination (AF 4, Contract Clause 2.3.3d, Termination for the Postal Service's Convenience (pp. 118-119)).

13. Contract HCR 335LC (Tampa-New York) required Appellant to make three northbound and three southbound trips per day. One additional northbound and one additional southbound trip each day were to begin on December 12. Each one-way trip under the contract was about 1182 miles long, with a scheduled run time varying from 23 to 26 hours. The contract repeated the statement from the electronic solicitation that the minimum equipment required to perform the contract was 2 tractors and 2 trailers (AF 3 (p. 89)), obviously an impossible task (AF 3 (p. 86); Tr. 88-92, 94; Tr. II 111).

14. Appellant had some difficulty supplying the required vehicles and drivers to commence full service on the three routes at the beginning of the term (Tr. II 69).

15. On December 6 at 4:31 a.m., Respondent's contract specialist emailed Appellant's president and advised that trucks for two morning northbound trips on HCR

335LC (scheduled to depart Tampa at 12:30 a.m. and 2:30 a.m.) had not appeared at Tampa (AF 11 (p. 211); Tr. II 71).

16. At 7:30 a.m. on December 6, Appellant emailed the contract specialist:

We are sorry to inform you that due to confusion on contract # 335LC we are not going to be able to perform service on it. Please re-assign the contract so you are able to make the schedule on time. We greatly appreciate the opportunity and do take this seriously. Please accept our apology and we hope to be able to salvage our business relationship.

(AF 11 (p. 212); Tr. 115-116; Tr. II 36, 112-113, 117).

17. After receiving Appellant's December 6 email (Finding 16), the contract specialist called Appellant's president. The contracting officer joined the call, and urged the president to perform, suggesting ways Appellant could provide the service. Appellant's president complained that contract 335LC could not be performed without using team drivers, a fact he said was not made known to him before he bid or in the contract documents. He stated that Appellant would not perform route HCR 335LC. [FN2] The contracting officer told Appellant's president that he would be terminating all of Appellant's contracts. (Tr. 33-35, 105, 108-114, 182; Tr. II 11-13, 37, 114).

18. On December 6 at 1:37 p.m., Appellant emailed the contract specialist regarding HCR 310CC: "We are capable of doing the Macon to MA loads. The ones for today will be late, however all loads starting tomorrow will be on time. Please let me know if this will suffice." Appellant was willing to perform HCR 310CC. (AF 11 (p. 210); Tr. II 117-118). [FN3]

19. By final decision dated December 7, 2006, the contracting officer terminated all three contracts effective December 6, 2006, for Appellant's failure to perform service according to the terms of the contract. The letter advised Appellant of its right to appeal to the Board within 90 days after receipt of the letter or to the United States Court of Federal Claims within one year after receipt. By separate contract route service orders, the contracting officer suspended all pay Appellant had earned under the contracts. (AF 10; Tr. 110-111). Appellant did not appeal the terminations (Tr. 75).

20. Appellant had performed a few trips on each route before the contracts were terminated. At the contract price of the work performed, Appellant had earned a total of \$20,922.45: \$11,718 on HCR 303JC (AF 8 (pp. 183, 186), 14 (p. 224); Tr. 147; Tr. II 48), \$2,112.45 on HCR 310CC (AF 7 (pp. 175, 178), 13 (p. 219); Tr. 147, 149; Tr. II 48), and \$7,092 on HCR 335LC (AF 9 (p. 191, 194), 15 (p. 248); Tr. 147; Tr. II 21-27, 48).

21. On December 6, Respondent's contract specialist contacted other trucking companies with mail transportation experience, faxed them copies of the detailed schedules, and arranged for performance of Appellant's routes. All three routes were assigned to others to begin performing on December 7 (AF 12; Tr. 59, 136-140), although the contract documents reflecting the replacement contracts were not completed until sometime later (AF 17). The contract replacing HCR 335LC reflected the

minimum required vehicles to be two tractors and two trailers (AF 17 (p. 306)).

22. By separate final decisions dated February 26, 2007, the contracting officer assessed damages against Appellant for the cost of replacing service on the three routes. He made adjustments giving Appellant credit for work Appellant performed under the contracts (Finding 20) and determined an amount of damages asserted against Appellant for each contract. (AF 8 (pp. 184-188), 7 (pp. 176-180), 9 (pp. 192-196); Tr. 55-57, 72-75, 125-132, 147-149, 173; Tr. II 72-74, 79).

23. By letter from its counsel dated April 30, 2007, Appellant appealed the three February 26, 2007 final decisions (AF 5; Tr. 59). The Board docketed the appeal as PSBCA No. 5412 on May 16, 2007.

24. By Order dated June 4, 2007, the Board established PSBCA Nos. 6113 (HCR 310CC) and 6114 (HCR 335LC), leaving HCR 303JC covered by PSBCA No. 5412. The three appeals were consolidated.

25. In June 4, 2007 final decisions for each contract, the contracting officer asserted "corrected" claims for reprourement costs. In each he noted that it "replaces my letter dated February 26, 2007 which incorrectly stated the Default Damages due the USPS." In these letters he calculated the reprourement damages somewhat differently, and arrived at the "corrected" amount due Respondent. (AF 7 (pp. 173-175); 8 (pp. 181-183); 9 (pp. 189-191); Tr. 57, 122, 126-127, 129, 133-135, 147, 173; Tr. II 72-74, 79). Appellant did not appeal these final decisions (Tr. 59).

26. In March 2007, Respondent erroneously paid Appellant \$524,971.55 by direct deposit, which was the full amount Appellant would have earned had it completely performed all three of its contracts (Tr. II 121). The contracting officer called Appellant's president and asked for return of the erroneous payment. Appellant paid the money back by cashier's check, except it withheld \$39,551.19 for the contract price of the services it claimed to have performed under the contracts, plus interest, attorney fees, and "factor" (financing) fees incurred due to Respondent's delay in paying the amounts earned by Appellant's performance. (AF 6, 16 (pp. 264-265); Tr. 146, 148, 152-158; Tr. II 122-127).

27. By letter to the contracting officer dated April 30, 2007, Appellant submitted a claim under the contracts' Claims and Disputes clause for \$39,551.19 (AF 16 (p. 265); Tr. II 121-122, 150). The contracting officer wrote back asking for more information about the claim but never issued a final decision addressing the claim (AF 16 (p. 264); Tr. 78-79).

DECISION

Jurisdiction

Respondent argues that the Board is without jurisdiction to consider Appellant's challenge to its assessment of reprourement costs because Appellant did not appeal the final decisions at issue: those of June 4, 2007 (Finding 25). However, Appellant timely appealed the February 26, 2007 final decisions in which Respondent assessed reprourement costs (Findings 22, 23), establishing the Board's jurisdiction

over Respondent's claims. The contracting officer's purported "replacement" of the February 26 final decisions does not affect the jurisdiction thus obtained.

Jurisdiction over the issues presented in an appeal passes from a contracting officer to the Board upon the filing of an appeal, and thereafter a contracting officer is without authority to render a determination dispositive of these issues when they arise out of the same transaction. A contracting officer is also without authority to divest the Board of jurisdiction over a dispute by withdrawing or altering a final decision.

World Computer Systems, Inc., DOT BCA No. 2802, 95-1 BCA ¶ 27,399 at 136,597 (citations omitted); see Triad Microsystems, Inc., ASBCA No. 48763, 96-1 BCA ¶ 28,078 at 140,196. Moreover, the contracting officer's June 4 final decisions merely corrected what Respondent characterized as the incorrect calculations of the February 26 letters; the operative facts underlying Respondent's claim--Appellant's alleged default and Respondent's acquisition of replacement contract services--remained the same. Accordingly, the Board has jurisdiction to consider Appellant's challenge to Respondent's assessment of reprocurement costs. See Warren Beaves d/b/a Commercial Marine Services, DOT CAB Nos. 1160, 1324, 84-1 BCA ¶ 17,190 at 85,594.

In the course of considering Appellant's challenge to Respondent's claim for reprocurement costs, application of what is known as the "Fulford doctrine" permits us also to decide whether the terminations were valid, notwithstanding that Appellant did not appeal the final decisions terminating the contracts. See Fairfield Scientific Corp., ASBCA No. 21151, 78-1 BCA ¶ 13,082 (citing Fulford Mfg. Co., ASBCA No. 2144 (20 May 1955), 1955 WL 808 (A.S.B.C.A.)), recon. denied, 78-2 BCA ¶ 13,429, aff'd in part rev'd in part on other grounds, 611 F.2d 854 (Ct. Cl. 1979); RO. VIB. SRL, ASBCA No. 56198, 09-1 BCA ¶ 34,068.

Termination for Appellant's Repudiation

Respondent argues that the immediate termination of all three contracts effective December 6, 2006, was justified by Appellant's repudiation of its obligations to perform under each of the contracts.

With respect to HCR 303JC and HCR 310CC, we do not find that Appellant's conduct and the statements of Appellant's president in the telephone conferences of December 6, 2006, "manifested a positive, unequivocal and unconditional intent not to perform under the contract in any event or at any time," which is necessary to justify the default terminations on grounds of repudiation. P Star, Inc., PSBCA No. 4839, 04-1 BCA ¶ 32,514 at 160,839-840, citing Alta Constr. Co., PSBCA No. 1463, 90-1 BCA ¶ 22,527 at 113,066; see United States v. Dekonty Corp., 922 F.2d 826, 827-828 (Fed. Cir. 1991).

There is conflicting evidence regarding whether Appellant intended not to perform HCR 310CC. The contracting officer recalled the company president saying during the telephone conference on December 6 that Appellant would not perform HCR 310CC, while the contract specialist, who participated in one of the discussions with Appellant's president on that day, recalled that Appellant's stated intention not to perform related only to HCR 335LC, and not to the other two contracts (Finding 17). Additionally, Appellant's subsequent email stating that two of the trips on Decem-

ber 6 would be late but everything would be on schedule for the next day (Finding 18) suggests Appellant intended to perform if allowed to. Thus, Appellant did not manifest "a positive, unequivocal and unconditional intent" not to perform HCR 310CC.

While there is evidence in the record that Appellant was not fully performing 303JC, there is no direct evidence that it refused to perform that contract. The contracting officer surmised that the company president must have expressed Appellant's intention not to perform, but he could not recall the president saying so (Finding 17, n. 2). On this record, Respondent has not demonstrated the necessary "positive, unequivocal and unconditional intent" not to perform HCR 303JC.

Respondent argues that Appellant's performance of only a few trips on these two contracts after the conversations of December 6 bolsters Respondent's view that Appellant had repudiated its obligation to perform. However, in the December 6 conference, the contracting officer told Appellant's president unequivocally that he was terminating all of Appellant's contracts (Finding 17). Completing only a few trips over the next two days does not indicate that Appellant unreasonably refused to perform the contracts.

Accordingly, the default terminations of HCR 310CC and HCR 303JC based on a claim that Appellant repudiated its obligation to perform were not justified. See *Alta Constr. Co.*, PSBCA No. 1463, 90-1 BCA ¶ 22,527 at 113,066.

With respect to HCR 335LC, Respondent has shown Appellant's specific, unequivocal refusal to perform. Appellant's failure to provide trucks for two early morning runs (Finding 15), its email stating its inability to perform 335LC (Finding 16), and the company president's statement to the contracting officer and to the contract specialist that Appellant could not and would not perform HCR 335LC (Finding 17) demonstrate Appellant's "positive, unequivocal and unconditional intent" not to perform HCR 335LC. Respondent has shown that Appellant repudiated its obligation to perform HCR 335LC.

Appellant's repudiation establishes Respondent's right to terminate the contract, unless Appellant's refusal to perform was excusable or was caused by a material breach by Respondent. See *Justlogistics S.A., Inc.*, PSBCA No. 4926, 03-1 BCA ¶ 32,190 at 159,100; *Paul C. Popiel*, PSBCA No. 3150, 93-2 BCA ¶ 25,603; *G&G Western Painting, Inc.*, ASBCA No. 50492, 01-2 BCA ¶ 31,492. Under the facts in this record, we find that Appellant's refusal to perform HCR 335LC was excusable.

The solicitation's statement of the minimum vehicle requirements of two tractors and two trailers materially misrepresented the equipment necessary to perform the contract, and Appellant relied on the solicitation's statement of the minimum vehicle requirements in preparing its bid (Finding 8). [FN4] The contract required three northbound and three southbound trips daily of over 1100 miles each, and performance with the stated number of vehicles was impossible (Finding 13). [FN5]

There is substantial precedent establishing that in contracts of this type the contracting agency warrants that contract performance is possible if the Contractor complies with the requirements set forth in the contract specifications. See *Ithaca Gun Co. v. United States*, 176 Ct.Cl. 437, 442 (1966); *Datametrics, Inc.*, ASBCA

16086, 74-2 BCA ¶ 10,742 and the decisions cited therein. As related to these contracts, this precedent means that accomplishment of the scheduled services would not require the Contractor to furnish (i.e., have in service on specified routes) on any given day more than the number of tractors stated in the contract specifications.

LaBar Transportation Corp., PSBCA No. 487, 80-2 BCA ¶ 14,809 at 73,085.

Notwithstanding the dramatic discrepancy between the actual and stated equipment requirements necessary to perform contract HCR 335LC, we do not find under the circumstances of this appeal that Appellant had a duty to inquire about the number of tractors and trailers necessary to perform the contract before bidding. See Charles E. Blanton, PSBCA No. 1381, 86-1 BCA ¶ 18,723; B & E Mail Transport, Inc., PSBCA No. 972, 82-2 BCA ¶ 15,913. Respondent has not shown that Appellant should have been aware of the discrepancy before bidding and entering into the contracts. Appellant's president testified at the hearing that Appellant was not provided a copy of the route schedules before it submitted its initial electronic bid and that the electronic solicitation did not include the schedules. Respondent's witnesses testified that they entered the detailed schedules into Respondent's national database of transportation contracts, but none had visited the Combined Net web site and viewed the electronic solicitation and none could directly dispute Appellant's president's testimony. Appellant's president testified Appellant did not see the schedule until after receiving the formal award in mid-November 2006 (Finding 5), and although the record reflects Appellant received at least a few contract pages in October (Finding 4), Respondent has not shown that the detailed schedule was made available to Appellant at that time. As it has not been shown that Appellant had the detailed schedule before bidding or otherwise knew or should have known of the discrepancy regarding vehicle requirements, no duty on Appellant's part to inquire about the discrepancy before bidding or executing the contract has been established.

At the time Appellant refused to perform HCR 335LC, there was an adequate basis for its nonperformance--impossibility--and, thus, Appellant's refusal to perform was excusable and did not warrant the default termination of the contract. [FN6] See *College Point Boat Corp. v. United States*, 267 U.S. 12, 15-16, 45 S.Ct. 199, 200-201, 69 L.Ed. 490 (1925); *Seven Sciences, Inc.*, ASBCA No. 21079, 77-2 BCA ¶ 12,730 at 61,877.

Terminations of Contracts for Failure to Perform

Respondent argues that the terminations were justified by Appellant's "failure to perform service according to the terms of the contract[s]" (Finding 10). It is Respondent's burden to prove the propriety of its action in terminating Appellant's contracts for default, see *Charles West*, PSBCA No. 3655, 96-1 BCA ¶ 28,211; *Patricia J. Stevens*, PSBCA No. 3272, 94-1 BCA ¶ 26,419 at 131,429, recon. denied, 94-2 BCA ¶ 26,951, and it has not met its burden of demonstrating that Appellant's performance under HCR 303JC and HCR 310CC justified termination for default.

Although Respondent has offered some evidence that Appellant had difficulties beginning service on these contracts (Finding 14), Respondent has not demonstrated performance failures sufficient to justify termination of all of the contracts on

December 6 based on Appellant's performance up to that time. The record reflects that Appellant ran fewer trips than called for under the contracts but does not reflect that the missed trips were due to Appellant's fault. Except for the admission by Appellant that two of the trips for HCR 310CC on December 6 would be late (Finding 18), the record does not reflect performance failures by Appellant under contracts HCR 303JC and HCR 310CC. Accordingly, Respondent has not shown that, on the record of these appeals, Appellant's performance under these two contracts warranted default termination. See *The Swanson Group, Inc.*, ASBCA No. 44664, 98-2 BCA ¶ 29,896 at 147,994-995; *Douglas Cremer*, PSBCA No. 3108, 93-2 BCA ¶ 25,565.

The first two trips under HCR 335LC on December 6 were "no shows" on the morning of December 6 (Finding 15). In *Scharmoxco, Inc.*, PSBCA No. 2723, 91- 2 BCA ¶ 23,888, we found that the contractor's unexcused failure to begin performance under a mail transportation contract justified a default termination. However, we need not address whether the "no shows" would justify termination of HCR 335LC because, as discussed above, the contract as written was impossible of performance and, thus, Appellant's failure to perform was excusable.

Reprocurement Costs

Because we have found the terminations of the three contracts to be invalid, Respondent may not recover its claimed reprocurement costs.

Appellant's Damages

Respondent argues that to the extent the "Fulford doctrine," discussed above, is a basis for the Board's jurisdiction, it may only be applied defensively on behalf of Appellant. In other words, while we have relieved Appellant of liability for reprocurement costs because the terminations were invalid, Respondent argues that we may not take the next step and find Appellant entitled to damages stemming from the invalid default terminations. We need not address this issue because we have no damages claim before us. It would be premature to consider whether Appellant could recover on a claim for damages based on the overturned terminations for default. See *Linda Copman*, PSBCA Nos. 4889, 4903, 03-2 BCA ¶ 32,342 at 160,030; *Sunshine Development, Inc.*, PSBCA No. 4200, 99-1 BCA ¶ 30,149. [FN7]

Appellant's Claim for Work Performed

Appellant filed a claim for \$39,551.19 based on its performance under the three contracts, an amount it kept from the money Respondent erroneously paid Appellant (Finding 27). Respondent argues that the Board does not have jurisdiction to consider that claim, however, because the contracting officer did not issue a final decision thereon. The absence of a contracting officer's final decision on Appellant's claim does not defeat the Board's jurisdiction. A contracting officer's failure to issue a final decision on a claim within 60 days of receipt is deemed a denial of the claim, which authorizes the contractor to file an appeal with the Board. 41 U.S.C. § 605(c)(2) & (5); see *Rice King*, ASBCA No. 43352, 92-2 BCA ¶ 24,805; *Dawson Constr. Co.*, PSBCA No. 2852, 91-2 BCA ¶ 23,798. Appellant's pursuit of the claims in this proceeding is sufficient appeal, and the parties have tried the issue of Respondent's liability for the amounts claimed, so we will decide the issue. See *Lee Ann Wyskiver*, PSBCA No. 3621, 94-3 BCA ¶ 27,118 at 135,159; *Emerson*

Electric Co., ASBCA No. 31184, 86-2 BCA ¶ 18,979 at 95,856.

Respondent concedes Appellant earned \$20,922.45 under the contracts. That amount is supported in the record (Finding 20), and to that extent, the claim is granted. Appellant claimed it earned slightly more, but has failed to prove entitlement to any amount greater than found above for services performed. Appellant failed to demonstrate entitlement to the "factor" fee, interest or attorney fees included in the claim. Contract Disputes Act interest is not allowed, as Appellant has held the disputed fund since before it filed its claim (Findings 26, 27).

Conclusion

For its claim for services rendered, Appellant is entitled to \$20,922.45. To the extent Appellant's claim exceeds that amount, it is denied. The appeals are otherwise granted.

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. The hearing transcript was produced in two, separately-numbered volumes. Transcript references without preface ("Tr.") are to the transcript for the first day of the hearing. References preceded by "II" are to the transcript for the second day of the hearing.

FN2. The contracting officer recalled Appellant's president stating that Appellant also could not perform HCR 310CC. He could not recall Appellant's president saying Appellant would not perform HCR 303JC, but surmised that he did so because otherwise the contracting officer says he would not have terminated that contract (Tr. 35, 108). The contract specialist participating in the telephone conference understood the discussion to relate to HCR 335LC only, but the contracting officer had

another telephone conference with Appellant's president that day that the specialist did not participate in (Tr. II 11-13, 36-39).

FN3. It is not apparent whether this email occurred before or after the contracting officer told Appellant's president that he would be terminating the contracts.

FN4. See *Fruin-Colnon Corp. v. United States*, 912 F.2d 1426, 1430 (Fed. Cir. 1990); *Sharon F. Graves*, PSBCA No. 3399, 94-2 BCA ¶ 26,788.

FN5. A finding of impossibility is a finding of fact. *Maxwell Dynamometer Co. v. United States*, 386 F.2d 855, 870 (Ct. Cl. 1967). That a replacement contractor may have been able to perform satisfactorily does not lessen our conviction that Appellant's contract, as written, was objectively impossible of performance. See *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1294 (Fed. Cir. 2002); *Rowe Inc. v. General Services Admin.*, GSBCA No. 14211, 01- 2 BCA ¶ 31,630 at 156,275. The schedule was faxed to the replacement contractor after Appellant refused to perform, and from that schedule the replacement contractor was apparently able to calculate and provide sufficient vehicles. There is no evidence that the replacement contractor provided the scheduled service using only two tractors and two trailers, even though the procurement contract still reflected that as the minimum vehicle requirements. (Finding 21).

FN6. In *LaBar Transportation*, above, the issue was the contractor's claim for additional compensation to provide slightly more equipment than specified in the solicitation. There was no finding that the contract as written was impossible of performance. Because the understatement of the equipment requirements regarding HCR 335LC was substantial and was material to, and prevented, Appellant's performance of the contract as written, we find that Appellant's refusal to perform was justified. See *Seven Sciences, Inc.*, ASBCA No. 21079, 77-2 BCA ¶ 12,730 at 61,877.

FN7. Likewise, we need not consider whether the Board's conversion of a default termination of an emergency contract to a convenience termination (Finding 9) simply implements Respondent's authority to terminate on one day's notice without liability (Finding 11). Cf. *On Time Postal Services, Inc.*, PSBCA No. 2528, 90-2 BCA ¶ 22,698 at 113,996.