UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: May 12, 2009

CBCA 1095

SECTEK, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Jeffrey Weinstein of Jeffrey Weinstein, PLLC, Washington, DC, counsel for Appellant.

Michael J. Davidson, Office of the Chief Counsel, Commercial and Administrative Law Division, United States Immigration and Customs Enforcement, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **STERN**, and **HYATT**.

HYATT, Board Judge.

This appeal is from a contracting officer's decision denying appellant SecTek, Inc.'s claim for payment of additional monies in connection with its provision of guard services at the Old Post Office Pavilion in Washington, DC. The parties in this appeal have filed cross motions for summary relief. For the reasons addressed below, we deny SecTek's motion and grant the Government's motion, thus denying the appeal.

Findings of Fact

1. In September 2003, respondent, the Department of Homeland Security (DHS), Federal Protective Service, awarded contract number GS-11P-03-MPD-0820 to SecTek. The contract, which called for SecTek to furnish guard services at the Old Post Office Pavilion in Washington, D.C., was awarded for a base period of one year, commencing on October 1, 2003. In addition to the base year, the contract included two one-year options. The Government exercised both of the option years provided for under the contract. The total period of performance under the contract, including options, was three years, from October 1, 2003 through September 30, 2006. Appeal File, Exhibit 1.

2. The contract included Federal Acquisition Regulation (FAR) clause 52.217-9, OPTION TO EXTEND THE TERM OF THE CONTRACT (undated),which provided that the total duration of the contract, including the exercise of any option to extend the term, "[s]hall not exceed three (3) years." Nearly identical language appears in clause F.3 of the contract, which provided that "[t]he total duration of this contract, including the exercise of any options, shall not exceed **3 years**. Appeal File, Exhibit 1 (emphasis in original).

3. FAR 52.217-9 also specified the limits within which the Government could exercise the contract's two option periods. It read as follows:

> [T]he Government may extend the time of this contract by written notice to the Contractor within **30 days** provided that the Government gives the Contractor a preliminary written notice of its intent to extend at least **60 days** before the contract expires.

Appeal File, Exhibit 1 (Emphasis in original).

4. In addition, the contract included FAR clause 52.217-8, OPTION TO EXTEND SERVICES (Nov. 1999), which provided as follows:

> The Government may require continued performance within the limits and at the rate specified in the contract. These rates may be adjusted only as a result of revisions to the prevailing labor rates provided by the Secretary of Labor. The option provision may be exercised more than once, but the total extension of performance hereunder shall not exceed 6 months. The

> Contracting Officer may exercise the option by written notice to the Contractor within **30 days**.

Appeal File, Exhibit 1(emphasis in original). This clause is generally included in contracts for recurring and continuing services that must be ongoing in the event the agency is not in a position to award a newly-competed follow-on contract in time to ensure continuous provision of the needed services. FAR 37-111. Both parties, in response to an inquiry from the Board, confirmed that the Government did not exercise its rights under this clause.

5. On June 10, 2006, while SecTek was performing the second option year of the contract, a DHS contract specialist contacted SecTek via electronic mail (e-mail). The message advised in pertinent part:

> The contracting officer requested that I contact you regarding the extension of the above contract as follows: Base extension: October 1, 2006 through January 31, 2007; First Option period: February 1, 2007 through April 30, 2007; Second Option period: May 1, 2007 through July 31, 2007; and Third Option period: August 1, 2007 through September 30, 2007.

Appeal File, Exhibit 14 at 4. Two days later, on June 12, 2006, the DHS contract specialist sent a follow-up e-mail message, specifically asking for a proposal for the stated periods of performance referenced in the June 10 e-mail message. *Id*. at 3.

6. On September 20, 2006, SecTek's Chief Financial Officer (CFO) responded to the Government's request for pricing, transmitting the company's proposal via e-mail to the contracting officer. The message stated that "I have attached the pricing for FY [fiscal year] 2007 for the above contract [number GS-11P-03-MPD-0820]. If you have any questions please contact me." Appeal File, Exhibit 6.

7. On Saturday, September 30, 2006, the DHS contracting officer transmitted a document identified as modification P00014 to SecTek's contract administrator. The modification stated an effective date of October 1, 2006 and provided that: "The purpose of this modification is to list the guard services that will be allocated and funded under fiscal year (FY) 2007 for the Option III period of October 1, 2006 through September 3[0], 2007 at the Old Post Office [Pavilion]." The modification identified FAR 52.217-9 as the authority for its issuance, and specified the existing rates for payment purposes. The modification was signed by the contracting officer on September 29, 2006. SecTek did not sign this document. Supplemental Appeal File, Exhibit 15.

8. After September 30, 2006, SecTek continued to provide guard services. Appeal File, Exhibit 12.

9. On October 2, 2006, SecTek's contract administrator resubmitted the proposed pricing it had furnished on September 20, 2006, requesting that the Government confirm receipt of the transmission. Appeal File, Exhibit 14.

10. On October 3, 2006, SecTek's contract administrator sent the following e-mail message to DHS's contract specialist:

> I'm in receipt of Mod 14 and it does not match what SecTek is currently working. I've attached the current exhibits that we are working and also a Post Matrix that may be helpful. Please call me when you get a chance.

Supplemental Appeal File, Exhibit 16. The exhibits referenced in this e-mail are not provided in the supplemental appeal file.

11. On October 27, 2006, the contract specialist transmitted modification P000015 to SecTek. This modification had an effective date of October 1, 2007; did not include SecTek's new proposed rates in its September 20 submission; and stated that "the purpose of this modification is to exercise Option III for the period October 1, 2006 through September 3[0], 2007 for the referenced contract. . . ." FAR clause 52.217-9 was listed as authority for the modification. The contract specialist also requested that SecTek:

> Please sign and return. If you have generated the exhibits/calculations forward them to me. Otherwise I will establish new next week, if time permits.

Appeal File, Exhibit 14.

12. On October 30, 2006, SecTek's CFO signed modification 15 and, on that same date, SecTek's contract administrator forwarded the signed copy of the modification to the DHS contract specialist, with a request that the contract specialist confirm receipt. Appeal File, Exhibit 14.

13. On December 1, 2006, the contracting officer signed modification P00018 to contract GS-11P-03-MPD-0820 for the purpose of "incorporat[ing] funding in the amount of $3,263,930.24 for guard services" for the Old Post Office Pavilion. The period of performance was specified to be from October 1, 2006 through September 30, 2007. This

was a funding document, issued to obligate money against the contract. The contractor was not required to sign this amendment. Appeal File, Exhibit 2.

14. On January 23, 2007, SecTek's contract administrator sent an e-mail message to the contracting officer, alluding to a recent conversation with the contract specialist in which he was informed that the agency planned to end the contract as of March 30, 2007 and inquiring what had changed in light of Modification 18 which had stated that the contract would extend through September 30. Appeal File, Exhibit 14.

15. A follow-up e-mail message, sent on February 2, 2007, went from appellant's contract administrator to the DHS contracting officer. This message stated SecTek's understanding that "this contract will end on 3/31/07 and any further negotiations will be off the GSA schedule." The message also requested a copy of the signed modification for appellant's files. Supplemental Appeal File, Exhibit 17.

16. Also on February 2, 2007, SecTek's CFO signed Modification P00017. This modification was subsequently signed by the contracting officer on February 7, 2007. The modification contained the old rates, but had an effective date of October 1, 2006 and a performance period beginning October 1, 2006 and ending March 31, 2007. Modification 17 cited FAR clause 52.217-9 as authority. Appeal File, Exhibit 3.

17. On March 28, 2007, both DHS and SecTek signed a document identified as Modification P00023. The period of performance was revised to be October 1, 2006 through September 30, 2007. All other terms and conditions, including the old rates that had been incorporated into Modification 17, remained the same. Modification 23 stated that it was authorized by "mutual agreement of the parties." Appeal File, Exhibit 5. The modification was also the vehicle used for obligating an entire year's worth of funding to the contract. *Id.*, Exhibit 14.

18. SecTek provided the requisite guard services from October 1, 2006 through September 30, 2007. Declaration of Todd Wanner, DHS Contract Specialist (May 29, 2008), ¶ 15.

19. In a letter dated March 12, 2007, SecTek submitted a certified claim to the contracting officer addressing disputes under several contracts, including the one at issue in this appeal. In the claim, SecTek states that it had submitted pricing for an equitable adjustment to the "Option III" period, but that DHS had made no determination of entitlement to an equitable adjustment. Appeal File, Exhibit 4.

20. On July 19, 2007, Todd Wanner, a DHS contract specialist, contacted SecTek, stating that the rates reflected in SecTek's September 20 proposal could not be adopted by DHS in light of modifications 17 and 23 and asking instead for prices pursuant to a collective bargaining agreement or wage determination that might be applicable to the period from October 1, 2006 through September 30, 2007. Appeal File, Exhibit 7.

21. In response to Mr. Wanner's request, in a letter dated August 2, 2007, SecTek's controller declined to provide wage adjustment information. He confirmed his understanding that modifications 17 and 23 were final, and binding on the parties, and asserted entitlement to the higher rates under the September 20 proposal. Appeal File, Exhibit 8.

22. After September 30, 2007, a follow-on bridge contract was negotiated with SecTek to continue services from October 1, 2007 through November 30, 2007. Subsequently, the bridge contract was extended by bilateral modification through January 3, 2008. The bridge contract contained rates that were lower than those contained in modification 17. Wanner Declaration, ¶ 15.

Discussion

Both parties assert that the pertinent facts are not in dispute and agree that this matter is suitable for resolution on the motions for summary relief. SecTek asserts that as a matter of law it is entitled to be paid the rates quoted in its September 20 proposal. DHS contends that it is entitled to judgment as a matter of law based on SecTek's actions in signing two bilateral agreements adopting the existing rates for providing guard services from October 2006 through September 2007.

In addressing the standard for resolving an appeal on motions for summary relief, the Board has recently observed:

> Summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justiciable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). When both parties move for summary relief, each party's motion must be evaluated on its own merits and all reasonable inferences must be resolved against the party whose motion is under consideration. *Anderson*, 477 U.S. at 248; *First Commerce Corp. v.*

> *United States*, 335 F.3d 1373, 1379 (Fed. Cir. 2003); *DeMarini Sports, Inc. v. Worth, Inc*., 239 F.3d 1314, 1322 (Fed. Cir. 2001). The fact that the parties have cross-moved for summary relief does not impel a grant of one of the motions; each motion must be independently assessed on its own merit. *California v. United States*, 271 F.3d 1377, 1380 (Fed. Cir. 2001).

Government Marketing Group v. Department of Justice, CBCA 964, 08-2 BCA ¶ 33,955, at 107,990-91; *accord*, *Government Marketing Group v. Department of Justice*, CBCA 71, 08-1 BCA ¶ 33,834, at 167,454. Here, the parties are in fundamental agreement with respect to the relevant facts and consider this dispute to present solely a legal question. Their differences as to the undisputed facts they have each proposed are acknowledged by both to be minor and over matters that are immaterial to the outcome of the dispute. Based on a review of the undisputed facts, the Board agrees that this case is appropriate for resolution on summary relief.

Before addressing the positions of the parties, we note that much discussion has been dedicated to the Government's purported attempt to exercise the nonexistent Option III and to the case law on the proper exercise of an option. Both parties agree at this point that there was no Option III and that the final option term of the contract expired effective September 30, 2006. Accordingly, we need not address that case law here, because the Government recognizes that there was no additional option under FAR 52.217-9 to exercise. DHS also concedes that it overlooked the option provided in FAR 52.217-8 and did not provide the requisite thirty days written notice to proceed under that clause, which authorizes the Government to extend for up to six months a contract that would otherwise expire.

SecTek's principal argument is that by its terms the underlying contract expired on September 30, 2006. Prior to that date, SecTek had presented a proposal offering the same guard services at higher rates. By directing and accepting SecTek's continued performance, appellant maintains that the Government created an implied-in-fact contract under SecTek's September 20 proposal offering to perform at the higher rates set forth therein. Appellant further contends that since the contract expired, it could not be modified thereafter to bind SecTek to perform at the old rates. As such, SecTek contends, its own unqualified agreement to the terms of the documents described as modifications to the expired contract can have no legal import and the implied-in-fact contract continued in effect.

Appellant relies heavily on the decision in *NVT Technologies, Inc.*, EBCA C-0401372, 04-2 BCA ¶ 32,660, as precedent supporting its position.[1] In that appeal, the Nuclear Regulatory Commission (NRC) awarded a contract for facilities maintenance and repair services to NVT. The contract was for a base period plus four option years. The final option year would have extended from December 1, 2002 through November 30, 2003. In a letter dated November 27, 2002, respondent requested that NVT execute a proposed modification under which the Government purported to extend the contract for three months from December 1, 2002 though February 28, 2003. NVT declined to execute that modification. Instead, NVT advised the Government that the period for exercising the option had expired and stated that continued performance should be compensated on a cost plus ten percent fixed fee basis. Shortly thereafter the Government issued a unilateral modification extending the contract period through November 30, 2003 at the option rates.

In granting NVT's motion for summary judgment, the board observed that because the underlying contract had expired after NRC's failure to exercise the final option year, NVT was not obligated to perform at the option year prices. Instead, having been directed to continue performance, NVT was potentially entitled to a price adjustment for any changed costs that it experienced in performing.

SecTek urges that the *NVT* decision is controlling here. There are, in fact, some parallels. Like the subject appeal, *NVT* involved a services contract with option years. The Government sought, through the issuance of contract modifications, to extend performance under the contract after the contract had ostensibly expired. The differences, however, are much more compelling. Most notably, the modifications in *NVT* were unilateral -- with no binding impact on NVT as far as its entitlement to assert its claims was concerned. Moreover, the board did not conclude that NVT's request to be paid on a cost plus ten percent fee basis was binding -- it simply held that NVT could recover any increased costs it had incurred in performance -- the customary equitable adjustment for increased costs incurred under a change order. Thus, the *NVT* decision does not persuade us that SecTek is entitled to judgment as a matter of law.

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[1] SecTek also cites a Comptroller General protest decision as supporting its contention that the contract expired and could not be extended. *Washington National Arena Limited Partnership*, 65 Comp. Gen. 65 (1985). In that case, the Government and its contractor, Ticketron, entered into a modification after their contract had expired. This action was protested. The Comptroller General agreed that once the contract expired the Government could not extend it retroactively by issuing an amendment. Thus, the contract was not extended but, rather, a new contractual relationship was created noncompetitively.

In contrast, respondent maintains that regardless of the contractual vehicle that was used, whether a negotiated extension of the existing contract or creation of a new contractual arrangement, the bilateral modifications essentially ratified an arrangement under which SecTek had actually performed following the expiration of the underlying contract on September 30, 2006. The modifications, which SecTek willingly acquiesced to, definitized the pricing of the services provided by appellant. Given that SecTek took no exceptions to the terms of the bilateral agreements, respondent contends that SecTek waived whatever right it may have been able to assert with respect to its September 20 proposal and the expiration of the contract and bound itself to the terms of those express agreements.

In the case at hand, when the Government issued modifications extending performance first through March 2007 and then through September 2007, SecTek signed these modifications without addressing the claim it now pursues for reimbursement of its services on the basis of rates contained in its proposal dated September 20, 2006. At no time prior to the submission of its claim, which was submitted shortly after SecTek agreed to modification 17, did SecTek suggest that it was reserving a right to seek additional payments outside of the terms of the two modifications that it signed. Although appellant's counsel says that SecTek signed the modifications solely in order to get paid for its work, there is no suggestion in the contemporaneous written record that SecTek was told it must sign the modifications in order to be paid for its work or to otherwise support the notion that SecTek signed the modifications without reserving its claim under duress.

In addition to its reliance on *NVT*, appellant contends that since its contract with the Government expired on September 30, 2006, under the contract clause stating that the Government could not extend the contract beyond a total of three years, the Government had no authority to extend the contract under the same terms and conditions. Consequently, the Board must interpret appellant's continued provision of guard services to have occurred pursuant to the Government's "acceptance" of SecTek's "offer" to perform at the significantly higher prices contained in the proposal that SecTek prepared at the Government's request. Respondent disagrees, pointing out that the contracting officer had issued Modification 14 on September 30, using existing rates, and that SecTek's performance was an "acceptance" of those terms, which were offered subsequent to SecTek's proposal.

Given the necessary nature of the guard services provided, we are not entirely persuaded that the agency had no authority to extend the original contract for a reasonable period of time, regardless of the language specifying that the contract term could not exceed the base year plus the two option years. The contract contained FAR clause 57.217-8, permitting the contracting officer to extend the contract notwithstanding the expiration of

all options. Although DHS did not formally exercise the option provided under clause 52.217-8, the underlying authority for that option is explained in the FAR as follows:

> 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.

FAR 37.111. This provision recognizes that a contract for the type of services provided here may in fact be extended either through exercise of the option or by negotiation of short extensions. Thus, even though the option to extend provision in FAR 52.217-8 was not formally exercised, the argument that the expiration of the contract prevented its extension by issuance of a modification is inconsistent with the guidance provided in the above FAR provision.

Appellant's suggestion that the bilateral agreements entered into by the parties have no effect because they are denominated as modifications to an expired contract asks us to elevate form over substance. Regardless of the label used on the face of the documents, the contents of the "modifications" reveal that the parties expressed a clear intent to extend performance of the services at the stated rates. The precedent governing bilateral modifications is, thus, apropos. The Board has recognized that absent a reservation of the right to submit a claim for additional monies, a bilateral modification of a contract operates as an accord and satisfaction on the subject matter of that modification. *Corners and Edges, Inc. v. Department of Health and Human Services*, CBCA 762, 08-2 BCA ¶ 33,961, at 168,021, citing *Trataros Construction, Inc. v. General Services Administration*, GSBCA 15344, 03-1 BCA ¶ 32,251, at 159,459. That principle is equally applicable here.

Whether the relationship of the parties is characterized as an extension of the existing contract, or as a stand alone new contract, the principle is the same -- SecTek agreed without reservation to the rates specified in modification 17, and then to the time frame as

revised in modification 23. Appellant has not provided any evidence that its signature was coerced or in any way obtained under duress. SecTek could not sign the agreement and remain silent about its belief that it was entitled to higher rates.

Finally, although SecTek also argues that its actions in seeking the higher rates and the Government's requests for more pricing information both before and after the "modifications" were executed show that the Government understood that the pricing in the modifications was not binding, the documents pointed to by SecTek appear to seek information on proper wage adjustments due to changes under a collective bargaining agreement or a new wage determination, events that would customarily result in a change to the contract rates. These communications do not suggest that DHS was considering adopting the rates contained in SecTek's September 20 proposal.

Decision

Appellant's motion for summary relief is denied. Respondent's motion for summary relief is granted. The appeal is **DENIED**.

CATHERINE B. HYATT
Board Judge

We concur:

JERI KAYLENE SOMERS
Board Judge

JAMES L. STERN
Board Judge