GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

AMERICAN FLAG CONSTRUCTION, INC.	)	
	)	CAB No. D-1135
Under Contract No. 91-0037-AA-2-0-LA	)	

For the Appellant: Charles R. Jones, Esq., Jenkins & Jones. For the District of Columbia: Mark D. Back, Esq., Section Chief and Assistant Corporation Counsel.

Opinion by Administrative Judge Jonathan D. Zischkau, with Administrative Judge Matthew S. Watson, concurring.

OPINION

CourtLink Filing ID 822334

Appellant American Flag Construction, Inc., had a contract with the District of Columbia to provide moving and hauling services to District agencies. After exercising the contract's first option which extended the contract for an additional year, the District allowed the contract to expire at the end of the first option year. The District did not exercise the option for the second year because the Appellant failed timely to correct certain tax deficiencies. Appellant filed a claim with the contracting officer seeking $1,822,917.50 in damages and an order compelling the District to exercise the second year option. When the contracting officer denied the claim, Appellant filed its appeal here, arguing that the Appellant should have been awarded the second option year or an equivalent contract. The District has moved to dismiss for failure to state a claim or, in the alternative, for summary judgment. Because we conclude that the contracting officer had no obligation to exercise the second year option, the District is entitled to prevail on summary judgment.

BACKGROUND

The relevant facts are not in dispute. In July 1998, the District awarded the Appellant a contract to provide moving and hauling services. (Appeal File ("AF") Ex. 2). The contract was for one year, with the District having the option to extend the contract for three one-year option periods. (*Id.*). The District exercised the first option in July 1999, extending the contract for an additional year. (AF Ex. 4). By letter of May 31, 2000, the contracting officer notified Appellant that it intended to exercise the contract for a second option year. (Statement of Controversy, Appellant's Ex. 1). The District letter states that "[t]his preliminary notice does not obligate the District to actually exercise the option." (*Id.*). Also on May 31, the District's Office of Contracting and Procurement faxed to Appellant a tax certification affidavit that was to be completed and signed by Appellant and returned promptly to OCP to allow the Department of Employment Services and the Office of Finance and Revenue to determine whether Appellant had complied with its tax obligations. (AF Ex. 1; Appellant's Ex. 4). This was part of the contracting officer's effort to determine Appellant's present responsibility. Appellant did not respond. On June 12, 2000, OCP again faxed the tax certification affidavit to Appellant, stating on the

fax cover page:

> SEVERAL ATTEMPTS [HAVE] BEEN MADE TO RECEIVE THE TAX CERTIFICATION AFFIDAVIT FROM YOU, BUT TO NO AVAIL. Your tax certification affidavit is required to be evaluated . . . to determine whether your company is in compliance or not. There is not enough time, the contract expires 7-10-00. Please fill out the tax certification upon receiving and return ASAP for the Moving and Services Contract . . . [n]o later than the close of business today.

(AF Ex. 1). Appellant returned the completed affidavit to OCP the same day.

On June 14, 2000, the contracting officer learned from the Department of Employment Services that Appellant was not in compliance with the District's tax filing and payment requirements. (AF Ex. 2). By letter of June 14, the contracting officer notified Appellant of its noncompliance with the tax requirements and directed Appellant "to take measures immediately by June 21, 2000 to correct the noncompliance issues cited in the DOES verification document that is enclosed." (AF Ex. 2). On June 29, 2000, OCP learned from the Office of Tax and Revenue that Appellant still was not in compliance with the tax filing and payment requirements of District tax laws. (AF Ex. 3). OCP faxed the noncompliance notice to Appellant the same day. (*Id.*). On June 30, 2000, the contracting officer informed the Appellant that it still did not comply with District tax laws. The contracting officer further warned Appellant that its contract would expire on July 10, 2000, if the Appellant failed to either correct the tax deficiency within 5 days or furnished an acceptable explanation for its failure to correct the tax deficiency. (AF Exs. 4, 6; Appellant's Ex. 2).

In a letter of July 5, 2000, Appellant explained that when it had filed its tax returns it was not able to pay the outstanding tax at that time. Appellant's vice president states in the letter:

> I have made several attempts to contact the Office of [Finance and Revenue] and Dept. of Employment Services to make arrangement for payment. I have left several messages and have yet to receive a return call. I am prepared to make payment today if I can reach someone. Please give me a chance to clear this matter.

(Appellant's Memorandum in Opposition, Ex. 1). In an affidavit, Appellant's vice president states that she paid the Office of Finance and Revenue all but $300 of its tax liability on July 5, 2000, with the remaining amount being paid on July 11, 2000. (*Id.*, Ex. 2). The vice president says further that she contacted personnel at the Department of Employment Services on July 5, 2000, but the officials who could finalize the compliance papers were on vacation. Appellant did not correct the tax deficiency and did not come into tax compliance until after July 10, 2000. (*Id.*, Ex. 2; Appellant's Statement of Controversy ¶ 5).

The District allowed the contract to expire on July 10, 2000. (*Id.*; Complaint ¶ 5).

The Appellant filed a claim with the contracting officer seeking $1,822,917.50 and exercise of the second year option. The contracting officer denied this claim and the Appellant appealed here, arguing that the District should have exercised the second year option or entered into an equivalent

contract with Appellant. The District has moved to dismiss for failure to state a claim or, in the alternative, for summary judgment.

DISCUSSION

We exercise jurisdiction over this appeal pursuant to D.C. Code § 2-309.03(a)(2).

To be entitled to summary judgment, the District must show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Colbert v. Georgetown University*, 641 A.2d 469, 472 (D.C. 1994) (en banc); *Willis v. Cheek*, 387 A.2d 716, 719 (D.C. 1978). The record is viewed in the light most favorable to the party opposing summary judgment. *Colbert v. Georgetown University*, 641 A.2d at 472.

The key issue in this case is whether the District's contracting officer was legally obligated to exercise the second year option. Appellant argues that because the District employees who prepare tax compliance certifications were on vacation during the period from July 5-10, 2000, Appellant has demonstrated sufficient cause for its failure to correct its tax deficiency. Appellant concludes that the District improperly failed to exercise the second year option. The District argues that a contract option is a unilateral right that it may or may not exercise in its discretion. We conclude that the District had discretion in deciding whether to exercise the second year option and that it did not abuse its discretion by failing to exercise the option.

The pertinent portion of the contract states the following with regard to the option periods: "The District may extend the term of the contract for three (3) one (1) year option periods or any portion thereof by written notice to the Contractor before expiration of the contract." (AF Ex. 2, at 19). The phrase "may extend" indicates that exercise of the option is at the government's discretion. The District's procurement regulations define an option as "a unilateral right in a contract under which, for a specified time, the District may elect to purchase additional quantities or services called for by the contract, or may elect to extend the term of the contract." 27 DCMR § 2099.1. It is well-settled that for the type of option involved in the present contract the government has discretion in deciding whether to exercise the option, even when the government has provided the contractor preliminary notice of its intent to exercise the option. *Good Food Services, Inc.*, CAB No. P-0494, July 8, 1997, 44 D.C. Reg. 6846, 6847-48 (decision not to exercise an option contract is within an agency's discretion); *Government Systems Advisors, Inc. v. United States*, 847 F.2d 811, 813 (Fed. Cir. 1988).

The contracting officer did not abuse her discretion in declining to exercise the second year option. The undisputed facts show that the contracting officer repeatedly advised the Appellant to correct its tax deficiencies so that it could be found responsible. Despite the warnings, the Appellant did not timely correct its tax deficiencies. We can find no fault in the contracting officer's decision not to exercise an option when the contractor failed to demonstrate its present responsibility. Even viewing the record in a light most favorable to the Appellant, there is simply no basis for the assertion that the District was responsible for Appellant's delay in resolving its tax deficiency.

Finally, we reject Appellant's argument that the District had to exercise the option because Appellant provided an adequate explanation for failing to correct its tax deficiency. Even if we

could conclude as a matter of law that Appellant provided an adequate explanation (the record does not support such a conclusion), its argument would still fail. Where all preconditions have been met for the government to exercise an option, the government still is not legally obligated to exercise the option. In *Government Systems Advisory, Inc. v. United States*, the contract provided that the government could extend performance only if appropriated funds were available. The contractor argued that the government had to exercise the option because appropriated funds were available. The Federal Circuit affirmed the trial court's ruling on summary judgment against the contractor, holding that such a contractual stipulation serves as a passive exculpatory provision available to the government, not one that obligates the government to exercise the option. 847 F.2d at 813. In the present case, when the District requested the contractor to comply with the responsibility conditions, the District did not thereby obligate itself to exercise the option if the contractor complied with those conditions.

CONCLUSION

Because we conclude, as a matter of law, that the contracting officer had no legal obligation to exercise the second year option, the District is entitled to prevail on summary judgment. The appeal is denied.

SO ORDERED.

DATED: July 25, 2002

/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Administrative Judge

CONCURRING:

/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge