



BOARD OF CONTRACT APPEALS

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_____)	
OLBETER ENTERPRISES, INC.,)	January 12, 2016
Appellant,)	
)	
v.)	
)	
UNITED STATES POSTAL SERVICE,)	
Respondent.)	PSBCA No. 6543
_____)	

APPEARANCE FOR APPELLANT: W. Michael Olbeter

APPEARANCE FOR RESPONDENT: Joseph B. Fray, Esq
United States Postal Service Law Department

OPINION OF THE BOARD

Olbeter Enterprises, Inc. contracted with the United States Postal Service for mail transportation services between two postal facilities in Pennsylvania. After the Postal Service closed one of the facilities in August 2012, it did not tender any mail under the fixed-price portion of the contract. Nonetheless, the Postal Service continued to pay Olbeter until May 2013. The Postal Service later recovered those payments by offsetting an equal amount from payments it owed Olbeter under other contracts. Olbeter now seeks the return of those offsets, while the Postal Service contends that it is entitled to keep them.

For the reasons set out below, the appeal is sustained. The Postal Service must pay Olbeter the \$91,483.40 that it offset from its other contracts.

FINDINGS OF FACT

1. On June 28, 2010, the Postal Service renewed Contract No. 156A2 with Olbeter for mail transportation services. The renewal period began on July 1, 2010, and continued until June 30, 2014. (AF 4 at 57).
2. The Contract required Olbeter to provide regularly scheduled shuttle services between the Greensburg Mail Processing Center and the Greensburg Post Office for a fixed annual rate of \$101,951.73 (AF 4 at 57, 75–78). In addition to the fixed-rate trips, the Contract authorized the Postal Service to order extra trips (AF 1 at 17; AF 4 at 58).
3. The Contract provided that the Postal Service would make automatic monthly payments for the regularly scheduled shuttle service. Olbeter did not need to submit an invoice for the monthly payments. (AF 1 at 6, ¶ 2.1.1.a; AF 4 at 58).
4. The Contract incorporated the *Highway Contract Route (HCR), Transportation Routes Only, Terms and Conditions, Issue 9 (Effective: February 26, 2010)* (AF 4 at 58, see Comments).
5. The *Terms and Conditions* included the alternative options of termination with notice or termination for convenience, with the provision that only one of the options would apply to a contract (AF 1 at 18). When the parties signed the Contract in June 2010, they agreed that the Termination with Notice Clause applied to this Contract (AF 4 at 58).
6. The Termination with Notice Clause provided that “[t]he contracting officer or the supplier, on 60 days written notice, may terminate this contract or the right

to perform under it, in whole or in part, without cost to either party.” (AF 1 at 18, ¶ 2.3.3a).

7. The Contract included Clause B-64 Accountability of Supplier (March 2006), which provided, in part:

The supplier is not liable for its failure to perform if the failure arises out of circumstances beyond its control, and without its fault or negligence....

* * *

The supplier shall, promptly upon discovery, refund (i) any overpayment made by the Postal Service for service performed, or (ii) any payment for services not rendered.

(AF 1 at 21, ¶ 2.3.9).

8. The Postal Service closed the Greensburg Mail Processing Center on August 10, 2012. Thereafter, the Postal Service did not require, and Olbeter did not perform, any regularly scheduled shuttle service. (Stipulations ¶ 4).¹ At the request of the Postal Service, however, Olbeter continued to provide extra trips under the Contract from August 2012 through May 2013 at other postal facilities in Pennsylvania. (Stipulations ¶ 5; Olbeter Decl. ¶¶ 6–10).

9. Although Olbeter did not perform regularly scheduled shuttle service after August 10, 2012, the Postal Service continued to pay it the fixed monthly rate from August 10, 2012, until May 1, 2013. These payments totaled \$91,483.40. (Stipulations ¶ 8). Olbeter remained ready, willing, and able to perform during this time period (Olbeter Decl. ¶¶ 4–5).

¹ The parties submitted ten stipulations of fact.

10. The parties signed an amendment terminating the Contract for convenience effective May 1, 2013. Olbeter signed the amendment on May 30, 2013, and the Postal Service signed it on July 17, 2013 (Stipulation ¶ 7; AF 5 at 122).²

11. On July 17, 2013, the Postal Service unilaterally issued a *Contract Route Service Order* stating that it had overpaid Olbeter by \$91,483.40 (AF 6).

12. On July 30, 2013, Olbeter's attorney asked the Postal Service to stop all collection efforts for the alleged overpayments (AF 3). Nonetheless, between October and December 2013, the Postal Service offset \$91,483.40 from payments otherwise due Olbeter under other contracts it had performed for the Postal Service (Olbeter Decl. ¶ 16; Stipulations ¶ 9).

13. In January 2014, Olbeter challenged the Postal Service's offset. The Contracting Officer forwarded that letter to the Board, which docketed it as PSBCA No. 6543.

14. In September 2014, the Contracting Officer issued a final decision asserting the Postal Service's right to keep the entire amount it previously offset to recoup the overpayments. Olbeter then appealed the final decision to the Board.³

DECISION

Between August 2012 and May 2013, the Postal Service paid Olbeter the contractually-required fixed monthly rate for scheduled services (Finding 9). According to the Postal Service, Olbeter is not entitled to the payments because it did not perform

² The parties agreed to the termination for convenience even though the Contract only provided for a termination with notice (Finding 5).

³ These documents were filed with the Board by Olbeter and are included in the Board's correspondence file for PSBCA No. 6543. The Board did not assign a separate docket number based on that filing.

any work associated with those payments. To recoup the alleged overpayments, the Postal Service offset payments otherwise due Olbeter under other contracts between the parties (Finding 12). Olbeter now seeks the return of the money offset by the Postal Service, asserting that it was entitled to the payments. Nonetheless, the crux of this appeal involves the Postal Service's claim for the return of the alleged overpayments it had offset. See *Coral Petroleum, Inc.*, ASBCA No. 27888, 86-1 BCA ¶ 18,533 at 93,103.

In support of its position, the Postal Service argues that the Contract was constructively terminated on notice 60 days after the Greensburg Mail Processing Center closed. Thus, even though the Contracting Officer's final decision asserted entitlement to the entire \$91,483.40 originally offset from Olbeter, the Postal Service now concedes that Olbeter is entitled to \$18,260.62, representing payment for 60 days of service under the Termination with Notice Clause. (Resp. Brief at 6–7).

To support the remaining offset, the Postal Service relies on the last sentence of the Accountability of Supplier Clause, which required Olbeter to refund any payment for services not rendered (Finding 7). The Postal Service, however, fails to read the clause as a whole by ignoring a key provision in Paragraph b.1. That paragraph provides that Olbeter is not liable for its failure to perform if the failure arises out of circumstances beyond its control and without its fault or negligence. Here, Olbeter did not perform the regularly scheduled shuttle services because the Postal Service did not tender any mail for delivery after the Greensburg Mail Processing Center closed (Finding 8). Olbeter's failure to perform the regularly scheduled shuttle services was beyond its control and not its fault or negligence. Its failure to perform resulted solely from the Postal Service's

decision to close the facility. Thus, the Accountability of Supplier Clause does not support the Postal Service's argument.

The parties also addressed the applicability of our decision in *Kenneth J. Hafdahl*, PSBCA No. 427, 1979 WL 2747 (Oct. 2, 1979), to this case. In *Hafdahl*, the Postal Service had contracted with two suppliers to provide daily trips over the same route. The Postal Service used one of the suppliers for most of the trips, leaving Hafdahl with only sporadic trips over several months. Nonetheless, the Postal Service paid Hafdahl the full fixed-price contract rate for these months. In the appeal, the Postal Service sought the return of what it deemed to be overpayments. In finding for Hafdahl, we held that the Postal Service could not retain deductions under a fixed-price contract for services not performed when the Postal Service caused the non-performance by failing to tender any mail for delivery. *Id.* Here, the Postal Service bore the risk that there would be sufficient mail to justify the automatic monthly payments to Olbeter. See *N. Chicago Disposal Co.*, ASBCA No. 25535, 82-1 BCA ¶ 15,488. These automatic payments were due as long as the Contract remained in effect, provided the non-performance arose from circumstances beyond Olbeter's control and without its fault or negligence.

The Postal Service seeks to distinguish *Hafdahl*. It argues that Hafdahl had to remain ready to perform during a period of sporadic performance; while here, Olbeter should have known that it would never again perform the scheduled shuttle services because the Greensburg Mail Processing Center was closed. According to the Postal Service, Olbeter had no reason to believe that it would ever perform shuttle service

again. Thus, according to the Postal Service, Olbeter acted unreasonably and is not entitled to the payments made after the processing center closed.

We disagree. The Contract allowed the Postal Service to terminate the Contract with notice, in whole or in part, if it no longer needed services. It did not do so, however. Rather, the Contract remained in place, and for reasons unexplained in the record, the Postal Service did not avail itself of its rights under the Termination with Notice Clause. Instead, it continued paying Olbeter and continued to order extra trips to other postal facilities.

We also do not believe that Olbeter's knowledge of the Postal Service's intentions regarding continued services changes the result. Whatever the Postal Service's intentions may have been, and regardless of Olbeter's knowledge of those intentions, the Postal Service could have avoided liability for the monthly payments by partially terminating the contract. Because it failed to do so, the Postal Service cannot evade its contractual obligation for the monthly payments.

The Postal Service cites a number of cases to support its position that even though it did not terminate the Contract when the Greensburg Mail Processing Center closed, it constructively terminated the Contract as of that date. Thus, according to the Postal Service, Olbeter is entitled to payment for 60 days of service.

The cases cited by the Postal Service do not support its argument. In *G.C. Casebolt Co. v. United States*, 421 F.2d 710 (Ct. Cl. 1970) and *John Reiner & Co. v. United States*, 325 F.2d 438 (Ct. Cl. 1963), the government had cancelled contracts shortly after award, and the contractors sought anticipatory profits. In denying both claims, the Court of Claims used the termination for convenience clause to limit the

government's liability for anticipatory profits because a valid basis for a termination for convenience existed when the contracts were cancelled. These cases thus stand for the proposition that a constructive termination may be applied when the basis upon which a contract was actually terminated is legally inadequate. In neither case, however, did the Court invoke a constructive termination to limit the government's damages after it had failed to take any action to end a contract, as was the case in this appeal.

The Postal Service's reliance on *Executive Airlines, Inc.*, PSBCA No. 1452, 87-1 BCA ¶ 15,594 and *On Time Postal Service*, PSBCA No. 2528, 90-2 BCA ¶ 22,698 is also misplaced. In *Executive Airlines*, the Postal Service terminated two contract segments for convenience, but it did not give the contractually required notice. During the appeal, the Postal Service agreed that it had not given adequate notice and paid the contractor accordingly. *Executive Airlines* thus stands for the proposition that the Postal Service must give a contractor the notice required by a termination for convenience clause when it actually issues a termination for convenience. In this appeal, however, the Postal Service did not issue a termination notice when the Greensburg Mail Processing Center closed. We therefore have no basis to apply the holding in *Executive Airlines* to this appeal. *On Time Postal Service* merely involved the conversion of an unjustified termination on one day's notice to a termination on 60 days notice based on the Postal Service's breach of the contract, thereby enabling the contractor to receive payment for 60 days of service from the date of the unjustified termination. It too does not support the Postal Service's arguments in this appeal.

Our holding in *Laney v. United States Postal Service*, PSBCA No. 6487, 14-1 BCA ¶ 35,562 is more on point. In that case, the Postal Service had terminated a contract on one day's notice. Nonetheless, to limit its damages, the Postal Service sought to invoke a retroactive termination effective as of an earlier date when it had suspended performance. In that appeal, we held that the Postal Service could not invoke a retroactive termination because the contract remained in force until either party terminated the contract under the termination clause in the contract. *Id.* That holding applies with equal force in this appeal. The Postal Service and Olbeter bilaterally terminated the Contract in May 2013. Until that time the Contract remained in force, and the Postal Service remained obligated to make the monthly payments. The Postal Service thus may not invoke a constructive termination to avoid its contractual obligation to make the monthly payments.

Citing *Justman Freight Lines, Inc.*, PSBCA No. 6428, 15-1 BCA ¶ 35,819, the Postal Service further contends that the Termination with Notice Clause should be applied constructively as of the date the Greensburg Mail Processing Center closed because the Postal Service terminated such a large part of the Contract. The Postal Service, however, misreads our decision in *Justman*. In *Justman*, we held that the Board will not disturb a voluntary, bilateral contract action in favor of a constructive termination. Here, the Postal Service did not take any contract action when the Greensburg Mail Processing Center closed in August 2012. Instead, the parties waited nine months and then took the affirmative step of bilaterally terminating the Contract in May 2013. As noted above, during that nine-month interval the Contract remained in effect, and the Postal Service had a continuing obligation to make the monthly

payments. Thus, as in *Justman*, the Board will not invoke a retroactive constructive termination on notice to supplant the bilateral termination agreed to by the parties in May 2013.

The Postal Service next posits that if Olbeter is entitled to any payments beyond the 60 days it now concedes, those payments should be limited to expectancy damages. Citing our decision in *Sharon Roedel*, PSBCA No. 6347, 12-1 BCA ¶ 35,015, the Postal Service would have us limit Olbeter's remedy to its lost profits plus the "supplier's wages."⁴

The Postal Service is correct that in *Roedel* we limited the contractor's recovery to expectancy damages following the Postal Service's breach. *Roedel*, however, does not control our decision here. In *Roedel*, the Postal Service breached the contract, whereas here, the Postal Service did not breach the Contract when it failed to tender mail for delivery under the fixed-price portion of the Contract. While the Postal Service did not tender any mail to Olbeter for delivery, it did continue paying Olbeter the monthly payments under the fixed-price portion of the Contract. By making those payments, and by ordering extra trips and terminating the Contract as of May 1, 2013, the Postal Service (and Olbeter) left the existing Contract in place until that later date. Having failed to terminate the Contract until May 1, 2013—and in the absence of a breach by Olbeter—the Postal Service remained obligated to make the monthly fixed-price payments even if it did not tender any mail for delivery, and Olbeter was entitled to keep the payments. See *N. Chicago Disposal*, ASBCA No. 25535, 82-1 BCA ¶ 15,488.

⁴ Supplier's wages are listed on line 17 of the Negotiated Cost Statement (AF 4 at 91).

We also reject the Postal Service's suggestion that requiring it to return the payments would unjustly enrich Olbeter or constitute a windfall. Unjust enrichment is an equitable doctrine that applies when the parties do not have an express contract. See *Aetna Casualty and Surety Co. v. United States*, 655 F.2d 1047, 1059 (Ct. Cl. 1981). Here, however, the parties had an express contract so the doctrine does not apply. See *The Public Warehousing Co.*, ASBCA No. 56022, 11-2 BCA ¶ 34,788 at 171,227. The Postal Service's right to retain the offsets is controlled by the Contract, which, as discussed above, does not provide a mechanism either to take or retain the offsets.

Finally, the Postal Service's brief alludes to the disputed payments as mistakes. The Postal Service did not, however, develop this argument or provide evidence to support it. Accordingly, we deem it abandoned.

ORDER

The appeal is sustained. The Postal Service must return \$91,483.40 to Olbeter.



Alan R. Caramella
Administrative Judge
Board Member

I concur:



Gary E. Shapiro
Administrative Judge
Chairman

I concur:



Peter F. Pontzer
Administrative Judge
Board Member