UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY JUDGMENT DENIED: March 25, 2021

CBCA 6519, 6994

IN AND OUT VALET COMPANY,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Joseph A. Camardo, Jr. of Camardo Law Firm, P.C., Auburn, NY, counsel for Appellant.

Hank W. Askins III, Office of General Counsel, Department of Veterans Affairs, Charleston, SC; and Neil S. Deol, Office of General Counsel, Department of Veterans Affairs, Decatur, GA, counsel for Respondent.

Before Board Judges **BEARDSLEY**, **DRUMMOND**, and **O'ROURKE**.

DRUMMOND, Board Judge.

Respondent, the Department of Veterans Affairs (VA), has filed a motion for summary judgment. Appellant, In and Out Valet Company, opposes the motion. For the reasons stated below, we deny respondent's motion for summary judgment.

Background

In August 2018, the VA issued a solicitation seeking quotes to provide valet parking services at the VA Medical Center in Salem, Virginia. The solicitation stated the successful contractor would provide valet parking services for an estimated 375 vehicles per day, five

days per week, excluding federal holidays or days declared a federal holiday by the President. The solicitation identified Christmas as the only holiday in December. It explained that there were two one-way lanes leading to the entrance of the medical center. The right-hand lane would be used by patients to drop off their vehicles, and the left-hand lane would be used by the VA and commercial vehicles. It stated that the successful contractor would have control of the front entrance so that the contractor could facilitate smooth operations and park and retrieve all vehicles within ten minutes of arrival at the valet booth. The solicitation further stated that the successful contractor would be responsible for providing adequate staff and working with the medical center to deal with traffic interruptions. In addition, it required the successful contractor to provide monthly reports to the VA about the number of vehicles parked by date and any unusual events.

In November 2018, the VA awarded a contract to appellant in the amount of $322,027.75 to perform the base contract work from November 2, 2018, to September 30, 2019. The contract contained terms that differed from the solicitation. The differences included a lower estimated number of cars to be parked daily (275), the number of parking lots available, the commencement of the ten-minute drop-off time, and the designation of valet lots. At various times after award, the parties attempted to address the changes in the contract and the issue of commercial vehicles blocking access to the valet lane which impacted the ten-minute wait time. The parties were unable to resolve these issues.

In February 2019, the contracting officer issued a cure notice after appellant temporarily shut down the valet parking once the 275-vehicle limit was met. The VA took no further action on the cure notice because appellant resumed parking vehicles.

On March 4, 2019, appellant submitted a claim for $54,710 to the contracting officer alleging breach of contract. Appellant subsequently certified its claim for $128,887.50. Appellant alleged that the unanticipated changes to the contract required it to increase the workforce at a cost of $10,612.50 per month.

First, appellant asserted that the VA attempted to force appellant into signing a bilateral modification to address the inconsistency in the number of vehicles. Appellant claimed that the VA withheld payment and attempted to terminate the contract in order to force appellant to agree to the modification. Second, appellant objected to the VA's alleged refusal to address all of the discrepancies between the solicitation and the contract in one modification. Specifically, appellant pointed to inconsistencies with the ten-minute wait time and the impracticability of meeting that requirement when appellant had no control over the traffic at the front entrance. Appellant claimed that the ten-minute requirement was defective and forced it to bring on additional staff. Appellant also pointed to discrepancies with the number of available parking lots and lost key policy as additional issues that needed to be resolved.

Third, appellant demanded payment for costs incurred working on December 24, 2018. Appellant argued that a presidential executive order making December 24, 2018, a holiday excused appellant from working that day. However, the VA required that appellant work because the hospital remained open, and the VA argued that the executive order only applied to federal employees and not contractors. Fourth, appellant sought payment for the additional staff it brought on and administrative and legal costs associated with the February 2019 cure notice and other discussions between the parties.

By letter dated April 2019, the contracting officer issued her final decision, denying the claim in full. The decision rejected the claim for the holiday work, finding that the executive order did not affect the hospital so it was simply a regular workday. Additionally, the decision rejected the claim about the modifications, finding that appellant was uncooperative when the VA attempted to address the issues. Finally, the contracting officer outright rejected the claims for administrative and legal fees.

On December 3, 2020, the VA filed a motion for summary judgment and a statement of undisputed facts. The VA contended that appellant had not pled sufficient facts to prove that the issues encountered were the fault of the Government. Concerning the number of vehicles, the VA asserted that it tried modifying the contract, but appellant would not agree. The VA asserted that because of the incorrect contract specifications, appellant should have agreed to modify the contract. Regarding the ten-minute wait time, the VA argued that it offered to increase the time limit, but appellant refused. The VA further argued that appellant did not conduct a thorough enough site visit before award and so was not prepared to handle the volume at the front entrance. The VA asserted that appellant was restricted to the right lane but used both lanes and encountered most of the issues with traffic in the left lane. Finally, the VA asserted that the executive order making December 24, 2018, a federal holiday only applied to federal employees and not to contractors.

Appellant opposes the VA's motion.

Discussion

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The moving party has the initial burden of informing the tribunal of the basis for its motion and identifying those portions of the pleadings, depositions and affidavits, admissions, and answers to interrogatories, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Only disputes over facts that might affect the outcome of the case under governing law will properly preclude the entry of summary judgment. *Anderson*, 477 U.S. at 248. The party moving for summary judgment bears the burden of demonstrating that there is no

genuine dispute as to any material fact, and all justifiable inferences must be made in favor of the non-moving party. *Celotex*, 477 U.S. at 322-23. In considering summary judgment, the tribunal will not make credibility determinations or weigh conflicting evidence. *Anderson*, 477 U.S. at 249.

The VA contends that appellant has not pled sufficient facts to prove that the issues it encountered were the fault of the Government. The record is replete with conflicting evidence about who is at fault for the issues that arose with this contract. It is undisputed that the VA inadvertently used the wrong specifications when reducing the agreement to writing in that the contract specifications are different from the solicitation. However, the remaining facts are almost all disputed. The VA contends that it attempted to resolve issues, but appellant was uncooperative and experienced problems because it did not adhere to the contract specifications. But appellant has submitted evidence rebutting the VA's claims and arguing that the VA was uncooperative and refused to give appellant control of the front entrance so that appellant could perform efficiently. Moreover, appellant submitted an affidavit with its response to the VA's motion and referenced specific evidence supporting its main argument that it had no control over the front entrance. The parties highlight correspondence between the VA and appellant and deposition testimony purportedly reflecting the alleged understanding of the contract and the required services to be performed. As to the VA's statement of facts, appellant has responded to each, highlighting points of dispute, with references to the contract, appeal file, and deposition testimony.

The parties disagree as to the material facts regarding the ten-minute wait time, the thoroughness of the site visit, the control of the front entrance, the use of both lanes of traffic, and the application of the executive order making December 24, 2018, a holiday. There are also material facts in dispute regarding the modification negotiations and entitlement to premium pay for working on a holiday. We find that genuine issues of material fact preclude us from granting summary judgment.

Decision

The VA's motion for summary judgment is **DENIED**. The parties will continue with the hearing set in April.

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge

We concur:

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge