

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -- )  
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Dillingham Construction Pacific Basin, Ltd. ) ASBCA Nos. 53284, 53414  
 )  
Under Contract No. F64133-99-C-0006 )

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OPINION BY ADMINISTRATIVE JUDGE DICUS ON RESPONDENT'S MOTIONS FOR SUMMARY JUDGMENT AND PARTIAL SUMMARY JUDGMENT

These appeals are taken from contracting officer’s decisions denying appellant’s claims for equitable adjustments under a contract for renovation and improvement of military housing. ASBCA No. 53284 involves interest costs related to the Government’s refusal to pay for certain undistributed materials. The Government has moved for summary judgment in that appeal. In ASBCA No. 53414, which involves an equitable adjustment claim comprised of several issues, the Government has moved for partial summary judgment. We deny the motion in ASBCA No. 53284 and grant the motion in ASBCA No. 53414 in part.

FINDINGS OF FACT

The following findings are solely for the purpose of resolving the motions.

The Contract

1. Solicitation No. F64133-99-R0004 was issued by the 36th Contracting Squadron, Andersen AFB, Guam (Andersen) for the renovation of military housing units at Andersen. Prior to the submission of bids contractors were given the opportunity to ask questions

regarding the solicitation. (Respondent's Undisputed Proposed Findings of Fact (UPFF) 1, 8, ASBCA No. 53284)\*

2. The following pre-proposal contractor questions and Government answers were incorporated into the solicitation and resulting contract by Amendment Nos. 0001 and 0003:

Question: Specifications 01011-9, 1.16 Storage Areas - Since the Government will not be responsible for the security of the materials, would the storage areas outside the base be allowed? Would the approval be required for any storage area and facility?

Response: Storage areas outside the base are authorized, but not required, as such the cost of the storage area is not a reimbursable expense. Approval for storage areas outside of the base is not required. Obtaining a storage area located in the laydown yard on Andersen AFB requires approval by the Contracting Officer.

\* \* \* \*

Question: Is the Government going to pay for the undistributed materials (uninstalled materials on-site)?

Response: The Contracting Officer will make a determination on material payments on a case-by-case basis. In the past, the Contracting Officer has made the determination to allow material payments on large dollar items (i.e., windows, doors, A/C units).

(UPFF 9, ASBCA No. 53284)

3. The contract, F64133-99-C-0006, was awarded to appellant on 28 March 1999 for the price of \$12,464,595.00 (UPFF 1, 2, ASBCA No. 53414). It provided for an initial 120 day period to mobilize and procure materials. Following the mobilization period the contract provided for the issuance of housing units in increments, with completion deadlines set 90 calendar days after receipt of notice to proceed by appellant for each increment. An increment is defined as two housing units. (UPFF 4, ASBCA No. 53414)

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\* Where the proposed undisputed findings are cited the opposing party has not objected.

4. The contract contained or incorporated the following relevant clauses: 52.211-12 LIQUIDATED DAMAGES - CONSTRUCTION (APR 1984) ALTERNATE I (APR 1984); 52.232-5 PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (MAY 1997) (Payment clause); 52.232-27 PROMPT PAYMENT FOR CONSTRUCTION CONTRACTS (JUN 1997); 52.233-1 DISPUTES (OCT 1995); and 52.236-10 OPERATIONS AND STORAGE AREAS (APR 1984) (R4, tab 1, ASBCA No. 53284). Liquidated damages were set at \$966 per increment for the first calendar day of unexcused delay, and \$885 per increment for each subsequent calendar day of unexcused delay for basic items; and, with respect to additive items, at \$233 for the first calendar day of unexcused delay and \$152 per day for each subsequent calendar day of unexcused delay (*id.*).

FINDINGS OF FACT - ASBCA NO. 53284

5. The contract specification provided at paragraph 1.16, STORAGE AREAS:

The Contractor shall provide both open and covered storage space for protection to equipment and materials necessary for the project. The Government will not be responsible for the security of those materials.

(R4, tab 2)

6. By letter dated 3 September 1999, appellant provided a list to respondent of Undistributed Materials (UDMs) it alleges to have purchased for the contract. The total dollar amount of the UDMs presented was \$4,359,700.00. (UPFF 11, ASBCA No. 53284)

7. By letter dated 3 September 1999, respondent approved reimbursement for UDMs regarding aluminum doors and frames, aluminum windows, sliding doors, A/C units and kitchen cabinets. The total amount approved was \$1,082,419.00. However respondent rejected appellant's request for additional amounts. (UPFF 12, ASBCA No. 53284)

8. By letter dated 14 September 1999, appellant provided a second list to respondent of UDMs it alleges to have purchased for the contract and requested payment. The total dollar amount of this list was \$713,226.00. (UPFF 13, ASBCA No. 53284)

9. The contracting officer denied appellant's second list by letter dated 20 September 1999. The basis for the denial was that the request was for low dollar value items and that it was not Air Force policy to pay for such items (citing AFFARS Part 5336.291). The letter also noted that no one unit price exceeded \$275.00. (UPFF 14, ASBCA No. 53284)

10. By letter of 18 October 2000 appellant filed a claim in the amount of \$95,867.00 for interest costs incurred as a result of not receiving payment for UDMs. In

the claim there is a list showing, *inter alia*, 742 items of kitchen equipment at a total cost of \$287,400.00 or \$387.33 per item. (R4, tab 12) The contracting officer denied the claim in an undated decision received by appellant on 1 December 2000. Appellant filed its appeal on 22 February 2001. (R4, tabs 13, 14)

DECISION-ASBCA NO. 53284

Under summary judgment procedures it is usually necessary for the nonmoving party to have an adequate opportunity for discovery, and summary judgment should not be granted where the nonmovant has been denied the chance to discover information essential to its opposition. *Burnside-Ott Aviation Training Center, Inc. v. United States*, 985 F.2d 1574, 1582 (Fed. Cir. 1993). Appellant argues it has not had that opportunity (opp. at 19), and respondent does not state otherwise while arguing that appellant expresses only a “speculative hope” of discovering evidence to support its claim (resp’t reply at 13).

At issue here is whether, as asserted by appellant, the contracting officer acted in an arbitrary and capricious manner in establishing that \$275 was the cutoff for establishing the dollar level of items qualifying for payment prior to installation. It also points, *inter alia*, to the rejection of items apparently costing more than \$275. Appellant contends that other considerations should have been part of the contracting officer’s determination. As we understand appellant’s argument, it needs to ascertain the factual bases for the contracting officer’s actions if it is to establish that the contracting officer was arbitrary and capricious in rejecting its requests for payment (opp. at 19). We agree that evidence as to whether the contracting officer’s actions were arbitrary and capricious is normally under the Government’s control. As we think such information is essential to appellant’s opposition, we hold that an adequate opportunity for discovery should be afforded to appellant. Respondent’s motion in ASBCA No. 53284 is denied.

FINDINGS OF FACT - ASBCA No. 53414

11. The contract specification at section 01011, subparagraph 1.4.3, required appellant to install safety fencing around each increment as follows:

- a. As a minimum, the Contractor shall use high visibility 4’0” high mesh safety fence made from high density polyethylene with a breakload at least 480 pounds per foot (Services & Material brand LWBF 4100 or approved equal). The fence shall be secured to a 2 x 4 wood frame. The spacing of the frame supports shall not be more than 6’0” on center. The minimum limits of the fence shall be shown on the project drawings or as designated by the Contracting Officer.
- b. The use of ribbon/surveyor’s tape for marking construction zones is unacceptable.

(UPFF 6, ASBCA No. 53414)

12. Regarding normal work hours, the specification provided at 01011, paragraph 1.32:

Working hours will normally be between the hours of 7:30 a.m. and 4:30 p.m., Monday through Friday, excluding Federal holidays. No work will be performed outside normal duty hours. The Contractor must request weekend/holiday work no later than three (3) workdays prior to the requested date. If inspectors are required to perform in excess of their normal duty hours, solely for the benefit of the Contractor, the actual cost of inspection at overtime rates ~~will~~ **may** be charged to the Contractor and ~~will~~ **may** be deducted from the final payment of the contract amount. (cross-outs in original)

(UPFF 7, ASBCA No. 53414)

13. Regarding holidays, the specification provided at 01011, subparagraph 1.32.1:

Federal Government Holidays are as follows. No work shall be accomplished without written authorization from the Contracting Officer.

JAN - New Year's Day	SEP - Labor Day
JAN - Martin Luther King Day	OCT - Columbus Day
FEB - President's Day	NOV - Veterans' Day
MAY - Memorial Day	NOV - Thanksgiving Day
JUL - Independence Day	DEC - Christmas Day

(UPFF 8, ASBCA No. 53414)

14. In 1999, the Christmas Day and New Year's Day Federal holidays were officially observed on 24 and 31 December 1999, as the holidays fell on Saturdays (UPFF 9, 10, ASBCA No. 53414).

15. Amendment 0003 of the contract incorporated proposal offerors' questions and Government responses, including the following:

Question: Specifications 01011-11, 1.32 - If the overtime is required, what occasion is it solely for the benefit of the

contractor? What is the overtime rate for the Government inspector that the contractor needs to pay?

Response: The occasion where overtime would benefit the contractor would be when the contract may be behind schedule and the contractor has to work weekends or holidays. The contractor may or may not have to pay the overtime rate, depending on the Contracting Officer's decision. Reference revised specification section 01011-11, paragraph 1.32.

(UPFF 11, ASBCA No. 53414)

16. Appellant failed to complete any of the first 12 increments within the allotted 90 days (UPFF 12, ASBCA No. 53414).

17. Liquidated damages were assessed against appellant (UPFF 13, ASBCA No. 53414).

18. Appellant requested to work weekends on several occasions during the contract performance period (UPFF 14, ASBCA No. 53414).

19 Regarding Guam's climate, the contract specification provided at 01011, paragraph 1.32:

Guam's climate is pleasantly warm year-round. The mean annual temperature is 81 degrees F.; generally the range is from the low 70's to the middle 80's. The coolest and least humid months, marked by prevailing westerly tradewinds, are in December through February. The annual rainfall totals 80 to 110 inches. There are two seasons, dry and rainy. The dry season is December through June. Although it is considered the "dry season," it still rains frequently. The rainy season falls within the remaining months.

(UPFF 17, ASBCA No. 53414)

20. On 2 December 1999, Appellant requested time extensions for three days of "rainout" which "resulted in total shutdown of project." Appellant claimed that the three days are excusable delay due to the rain. The three days were 14 September 1999, 19 October 1999, and 8 November 1999. In appellant's claim, appellant stated that it was able to accomplish some work on 14 September 1999, 19 October 1999, and 8 November 1999. (UPFF 18, 19, ASBCA No. 53414)

21. According to the Andersen Air Force Base Official Precipitation Progress Report, the mean inches of rain for September, October, and November 1999 were 13.3., 13.1 and 8.8 inches, respectively. The actual inches of precipitation for the same months were recorded at 13.16, 8.96, and 8.6, respectively. (UPFF 20, ASBCA No. 53414)

22. On 15 December 2000, appellant filed a claim requesting an equitable adjustment. On 20 April 2001, the contracting officer issued his decision denying appellant's claim. On 5 June 2001, appellant filed its notice of appeal to the Board. (UPFF 21, 22, 23, ASBCA No. 53414)

23. Appellant's claim, *inter alia*, sought (1) \$19,974 for an allegedly inequitable fence specification; (2) remission of liquidated damages for 14 September, 19 October and 8 November 1999 due to rain; (3) remission of liquidated damages for days when it had requested and was denied permission to work on weekends; and (4) remission of liquidated damages for days when it had requested and was denied permission to work on holidays (R4, tab 113, ASBCA No. 53414). Respondent moves for summary judgment with respect to these claim elements.

24. Appellant has filed the declaration of its former general manager, John M. Robertson. According to Mr. Robertson, the contract was bid relying on an interpretation of the solicitation as allowing weekend and holiday work so long as proper notice was given. He further asserts that the Navy, under a contract with identical language, permitted weekend and holiday work to be performed by another contractor at Andersen. That contractor was doing construction work at an elementary/middle school. He further asserts that appellant offered to perform only inside work with doors and windows closed on weekends and holidays, and that appellant was still denied permission. Mr. Robertson states that all requests were timely. (Robertson decl.)

25. There is a dispute of fact as to whether respondent denied most of appellant's requests to work weekends and holidays, or all of appellant's requests to work weekends and holidays. Respondent asserts and has submitted evidence supporting the safety and rest and relaxation of the military families nearby as reasons for the contracting officer's denials. Mr. Robertson declares the reason given to appellant by the contracting officer was the chief of engineering flight's disapproval. Although the chief of engineering flight subsequently agreed to permit weekend and holiday work and the contracting officer expressed no disagreement according to Mr. Robertson, the contracting officer nonetheless continued to withhold permission, giving the above reasons. There is also a dispute of fact as to whether appellant worked extended hours on weekdays. (R4, tabs 28.1, 39, 45, 51, 116, 118; UPFF 15, 16, ASBCA No. 53414; Robertson decl.)

DECISION-ASBCA NO. 53414

Summary judgment is appropriate where no material facts are genuinely in dispute and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Inferences must be drawn in favor of the party opposing summary judgment. *Hughes Aircraft Co.*, ASBCA No. 30144, 90-2 BCA ¶ 22,847. In deciding a motion for summary judgment, we are not to resolve factual disputes, but to ascertain whether material disputes of fact are present. *General Dynamics Corp.*, ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851. The nonmovant may not rest on its conclusory pleadings, but must set out, in affidavit or otherwise, what specific evidence could be offered at trial. Failing to do so may result in the motion being granted. Mere conclusory assertions do not raise a genuine issue of fact. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624 (Fed. Cir. 1984).

With respect to the first two claim elements, the inequitable fence specification and remission of liquidated damages for three days when it rained, appellant does not oppose respondent's motion (opp. at 2). Accordingly, respondent's motion is granted on those two items. However, appellant "strenuously" opposes the remaining two claim elements, which arise from rejection of its requests to work on weekends and holidays (*id.*).

For purposes of resolving this motion we accept as undisputed appellant's factual assertions as to the timeliness of its requests, its reliance on the interpretation at issue at time of bidding, the granting of weekend and holiday work by the Navy contracting officer, the contracting officer's change in rationale for denying appellant's requests, appellant's offer to perform inside behind closed doors and windows, and the denial of all requests for weekend and holiday work by the Air Force contracting officer here. Appellant has presented several variations in arguing its position which all come down to the same essential point: that we must conclude its interpretation of the relevant contract provisions at time of bidding was reasonable. In our view, reasonableness here must be evaluated in the context of the contracting officer's discretion. The governing provisions (findings 12, 13, 15) specifically excluded work on weekends and Federal holidays, while also providing that weekend and holiday work must be requested three days in advance. With respect to Federal holidays, written authorization from the contracting officer was a prerequisite, and payment of Government inspectors working outside normal hours could be charged to the contractor, although perhaps not at the inspectors' overtime rate (*id.*). The provisions, as we interpret them, grant broad discretion to the contracting officer and impose no duty to grant requests for weekend and holiday work.

Appellant argues that it offered to perform indoors behind closed doors and windows and that this, combined with a Navy contracting officer's granting another contractor's request for weekend and holiday work, made the contracting officer's decision not to allow weekend or holiday work because of the safety, rest and relaxation of the families in the community arbitrary and capricious (opp. at 14). Appellant also appears to argue, based on the contracting officer's change in his reason for denying the request (finding 25), that the

contracting officer's real motive was not the safety of the families. It is also appellant's contention that the contracting officer's actions were arbitrary, capricious or an abuse of discretion. *Fraass Surgical Mfg. Co. v. United States*, 571 F.2d 34 (Ct. Cl. 1978). We conclude that the actions of a Navy contracting officer on another contract lack probative value in this dispute, as the actions of another contracting officer with another agency on a different contract are not material to whether the Air Force contracting officer here was arbitrary, capricious, or abused his discretion. However, we think it reasonable to test the contracting officer's reasons for denial through testimony at a hearing. Accordingly, we deny respondent's motion on items 3 and 4, refusal to grant weekend and holiday work.

SUMMARY

We deny respondent's summary judgment motion in ASBCA No. 53284. We grant respondent's motion for partial summary judgment in ASBCA No. 53414 with respect to the fence specification and rain days. We deny the motion with respect to weekend and holiday work.

Dated: 19 December 2001

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CARROLL C. DICUS, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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MARK N. STEPLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

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EUNICE W. THOMAS  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 53284 and 53414, Appeals of Dillingham Construction Pacific Basin, Ltd., rendered in conformance with the Board's Charter.

Dated:

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EDWARD S. ADAMKEWICZ  
Recorder, Armed Services  
Board of Contract Appeals