

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Chem-Care Company, Inc.) ASBCA No. 53614
)
Under Contract No. N00187-97-D-6890)

APPEARANCE FOR THE APPELLANT: Mr. Earnest Miller
President

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
Ellen M. Evans, Esq.
Trial Attorney
Naval Facilities Engineering Command
Litigation Headquarters
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD
ON MISCELLANEOUS GOVERNMENT MOTIONS

On 1 March 2001, Chem-Care, by counsel, submitted a certified claim for \$189,528.51 (R4, tab 16). On 19 November 2001, Chem-Care filed a notice of appeal from the failure of the contracting officer to issue a final decision and the appeal was docketed as ASBCA No. 53614. Appellant's claim has ten separate parts and, on 10 July 2003, the Government filed motions with respect to five of them. One of the motions referred to a separately filed motion to dismiss for lack of jurisdiction which was filed on 15 January 2004 along with a motion with respect to a sixth claim item. The motions were pending when hearing was held on 26-31 January 2004. The motions were discussed during those proceedings and it was decided that a decision on the motions would be issued prior to scheduling post-hearing briefs.

The 1 March 2001 Request for Equitable Adjustment included a Summary of Adjustments Requested¹ as follows:

¹ The item descriptions and amounts are quoted exactly as presented in the claim, however, we have omitted the notes from the claim summary matrix and have corrected Item No. K to read Item No. J.

No.	Item Description	Amount
A	Improper/Excessive/Unsupported Liquidated Damages	\$23,163.00
B	Lack of payment for additional days work due to Leap Year	\$4,735.88
C	Increase in supply prices due to gas and paper price increases	\$12,719.43
D	Failure to provide appropriate, working and locking dispensers requiring excessive materials	\$22,469.59
E	Excessive inspections and multiple inspections and Disruption to Unchanged work from Changes	\$64,682.14
F	Additional Insurance Costs directed by Government	\$42,199.35
G	Failure to Timely Exercise Option - Additional Start Up Costs	\$2,444.24
	Subtotal of Damages	\$172,413.63
H	Profit on Damages (10%)	Included in Item Calculations
I	Proposal Preparation Costs - Legal Fees	\$9,714.97
J	Time Value of Money (lost Financing Costs)	\$7,399.91
	TOTAL DAMAGES	\$189,528.51

(R4, tab 16 at 15 of 44)

I. Motion to Dismiss Claim B (Lack of Payment for Additional Day's Work Due to Leap Year) for Failure to State a Claim Upon Which Relief May be Granted and for Judgment on the Pleadings

On 15 September 1999, the Navy Public Works Office, Norfolk, Virginia, awarded Contract No. N00187-97-D-6890 (the contract) to Chem-Care Company, Inc. (Chem-Care) for custodial services at Naval Station, Norfolk (R4, tab 1 at 1, 48). It was a sealed bid procurement restricted to SBA section 8(a) eligible businesses (R4, tab 1 at 1, 58).

The contract award was for an “annual contract” for a base year and four one-year options. The bid was based upon square footages and frequencies (daily, weekly, monthly, etc.) and was made on a unit price basis resulting in a firm fixed price for the base year and for each option year (R4, tab 1 at 4 to 29). The contract was silent as to any difference between leap years and non-leap years.

The amended complaint states:

As part of the Contract, Chem-Care had to perform certain cleaning on regular schedules based on daily and monthly calendars. However, it is important to note that the bid is based on square footages of work to be performed which were provided to the contractor by the Navy in the solicitation package. These square footages are in turn based on room areas times 251 *work days* of effort. Chem-Care bid the amount of \$1,188,707.07 for the Base Year of the Contract. This translates to an average daily cost of the work

anticipated of \$4,735.88 based on the standard 251 work day year. During the past year, Chem-Care was also required to provide additional services on the 252nd day or Leap Year day, February 29, 2000. In reviewing the initial square footages supplied by the Navy, it was discovered that the Navy failed to include square footage for the additional day.

Chem-Care believes that it is entitled to be compensated for this additional work. Accordingly, Chem-Care requests payment in the amount of \$4,735.88 for performing work on one additional day due to the leap year.

(Am. compl. at 9 of 24) Similar language was included in the claim (R4, tab 16 at 18 of 44).

Chem-Care does not cite any provision in the contract that specifies or guarantees a specific number of days of performance and our review reveals no such provision. Nor does our review reveal any representation in the contract or in the solicitation that the square footage is based upon 251 days as alleged by appellant. In fact, the appellant's president confirmed at the hearing that he only learned that the square footage was based upon 251 days after the bid was submitted (tr. 2/28).

In its response to the Government's amended answer to the amended complaint, which averred that the contract was for various annual services, appellant states:

The work being performed was during the leap year is a question that when calculated appropriately cannot be denied. The basis of the conclusion is the 252nd day of this year, or February 29, 2000, was not calculated in the overall square footage presented within the bid schedule and the contract was never amended to provide compensation for the services performed by Chem-Care on that day.

(Resp. to am. answer, ¶ 9)

Discussion

A dismissal "for failure to state a claim should not be granted unless it appears beyond doubt that appellant cannot prove any set of facts in support of his claim that would entitle him to relief." Moreover, a motion to dismiss for failure to state a claim upon which relief can be granted may be converted to a motion for summary judgment. *Thai Hai*, ASBCA No. 53375, 02-2 BCA ¶ 31,971 at 157,920 *aff'd*, 82 Fed. Appx. 226 (Fed. Cir. 2003). The contract was awarded on an annual or yearly basis. In leap years,

the year includes an additional day. Thus the contract required performance on all required days during the year whether that year is a leap year or a non-leap year. However, if the number of square feet required by the contract to be performed was less than the square feet actually required to be performed, there might be a basis for relief.

The motions with respect to claim number B are denied.

II. Motion for Judgment on the Pleadings, and in the Alternative, for Summary Judgment as to Claim Item C (Increase in Supply Prices Due to Gas and Paper Price Increases)

Appellant seeks a contract adjustment of \$12,719.43 for gas and paper price increases incurred during performance. Appellant admits in its claim and in its complaint, that the contract does not contain a clause requiring adjustment for increased cost of materials to be provided under the contract.

Appellant contends in its claim that FAR 16.203-4 requires the insertion of the clause at FAR 52.216-2, ECONOMIC PRICE ADJUSTMENT – STANDARD SUPPLIES, and that when that clause is read into the contract, appellant is entitled to an adjustment due to the increase in the cost of paper and gas.

FAR 16.203-4 provides in part as follows:

(a) *Adjustment based on established prices — standard supplies.* (1) The contracting officer shall, when contracting by negotiation, insert the clause at 52.216-2, Economic Price Adjustment—Standard Supplies, or an agency-prescribed clause as authorized in subparagraph (a)(2) of this subsection, in solicitations and contracts

Discussion

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387 (Fed. Cir. 1987). The moving party bears the burden of establishing the absence of any genuine issue of material fact and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment.

The subject contract was entered into by competitive bid, not by negotiation. Therefore, FAR 16.203-4 does not apply and the Economic Price Adjustment clause was not required. As a matter of law, appellant may not recover increased prices of supplies in this fixed price, competitively bid procurement. As to this issue, there is no genuine issue as to a material fact and therefore, we grant the motion for summary judgment. At

the hearing, appellant conceded no entitlement to this claim item. (Tr. 2/28-29) The claim for gas and paper price increases is denied.

III. Motion in the Alternative for Judgment on the Pleadings as to Claim Item F (Additional Insurance Costs Directed by Government) (for which a decision is only requested in the event the Board does not grant the Government's Separately Filed Motion to Dismiss for Lack of Jurisdiction, and in the Alternative, for Summary Judgment)²

Appellant claims \$42,199.35 for additional health and welfare benefits paid at the Navy's direction. The Navy denies that it "directed or advised Chem-Care in any way other than to inform Chem-Care management they had to follow the law and to refer any questions about the Collective Bargaining Agreement . . . in the contract or any wage determination to the Department of Labor." (Am. answer ¶ 62) The parties agree that the solicitation required offerors to propose health and welfare benefits at the same level as paid under the then-existing Collective Bargaining Agreement (CBA) with Ryder Services, Inc. and that the CBA was included in the solicitation. They further agree that the solicitation required the payment of \$140 per month per employee. (Am. compl. ¶ 58; am. answer ¶ 58). Chem-Care says it intended to pay part-time employees a pro rata amount of the \$140 per month set forth in the CBA (am. compl. ¶¶ 58-60).

The solicitation and resulting contract incorporated by reference the clause prescribed at FAR 52.222-41, SERVICE CONTRACT ACT OF 1965, AS AMENDED (MAY 1989), which required Chem-Care to pay the wages and fringe benefits outlined in the CBA. FAR 52.222-41 further provided in part as follows:

(t) *Disputes Concerning Labor Standards.* The U.S. Department of Labor has set forth in 29 CFR Parts 4, 6, and 8 procedures for resolving disputes concerning labor standards requirements. Such disputes shall be resolved in accordance with those procedures and not the Disputes clause of this contract. Disputes within the meaning of this clause include disputes between the Contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

Discussion

² The separately filed motion to dismiss for lack of jurisdiction and in the alternative for summary judgment was filed on 15 January 2004; however, the basis for the motion to dismiss was included in the original filing.

As set forth in FAR 52.222-41, the matter in dispute is reserved for decision by the Department of Labor. *See DOSCO Manufacturing, Inc.*, ASBCA No. 40404, 91-2 BCA ¶ 23,955 (“We lack subject matter jurisdiction over matters associated with the classification of employees subject to wage determinations issued by DOL under the Service Contract Act which are reserved for the sole jurisdiction of the Secretary of Labor”).

At the hearing, appellant represented that the basis for this claim was a constructive change by the Navy decreasing the hours available to perform the work from 603.75 hours in the solicitation to 275 hours after award (tr. 2/19-20) which forced appellant into hiring more part-time employees to perform the work and thus increased its costs for health and welfare benefits under the CBA (tr. 2/21-22). Therefore, it is appellant’s view that the claim is ripe for Board, not DOL decision.

The government argued that this was an entirely different claim. According to the government, the claim before the contracting officer was based on the premise that the government directed appellant to pay additional fringe benefits not required under appellant’s interpretation of the CBA (tr. 2/22). The Government is correct. There is nothing in the claim about a reduction in the number of hours available to perform the work. The impetus for this item as explained in the claim, was a union complaint about Chem-Care’s policy of paying worker benefits on a pro rata basis according to the number of hours they worked and that the government directed them to pay the full amount set forth in the CBA.

The motion to dismiss for lack of jurisdiction is granted. Any claim based upon a reduction in the number of hours available to perform the work has not been presented to the contracting officer and therefore, is not properly before the Board.

IV. Motion to Dismiss Claim Item I (Proposal Preparation Costs – Legal Fees)

Appellant claims \$9,714.97 for proposal preparation costs. In its complaint appellant states:

In addition to the items listed above Chem-Care incurred additional cost in the assembling of this proposal through its use of Vandeventer Black LLP of Norfolk, VA. This is a reimbursable cost under FAR 31.205-33(a) which states that “cost of professional and consultant services rendered by persons who are not officers or employees of the contractor are allowable (subject to certain restrictions) . . . when reasonable in relation to the services rendered . . .[.]” The restrictions referred to pertain to the disallowance of cost of legal, accounting and consulting services when incurred in

connection with “the prosecution of claims or appeals” against the government. Accordingly Chem-Care request [sic] the amount of \$9,714.97 for pricing and scooping [sic] of the unadjudicated changes and for proposal preparation cost incurred on account of government responsible changes.

(Am. Compl. ¶ 70)

The Government asserts that the fees are claim prosecution costs. Appellant’s claim attempts to characterize this claim item as something other than claim prosecution costs. The basis for the motion is not sufficiently detailed and does not give us enough information to form a basis for deciding this motion. It is therefore denied.

V. Motion to Dismiss Claim Item J (Time Value of Money (Lost Financing Costs)) for Failure to State a Claim Upon Which Relief May be Granted, or for Judgment on the Pleadings, or in the Alternative, for Summary Judgment.

Claim Item J is a claim for \$7,399.91 and is explained in the complaint as an element of an equitable adjustment based upon the additional working capital necessary to finance the cost of changed work on the contract. The wrongs the government is said to have committed and which caused the contractor to finance more than anticipated are: (1) failure of contract payments to keep pace with work performed; (2) failure to write equitable adjustments for changes; and (3) taking improper deductions and liquidated damages. To cover the “underpayment” Chem-Care alleges in its complaint that it (1) used profit on other jobs to finance the effort; (2) it increased its borrowings and line of credit; (3) it failed to make timely payments due on long term borrowings; and (4) it increased its payables to its subcontractors and material suppliers.

The contract incorporated by reference DFARS 252.243-7001, PRICING OF CONTRACT MODIFICATIONS (DEC 1991) (R4, tab 1 at 53) which provided that “When costs are a factor in any price adjustment under this contract, the contract cost principles and procedures in FAR Part 31 and DFARS Part 231, in effect on the date of this contract, apply.” FAR 31.205-20 states “Interest on borrowings (however represented) . . . are unallowable.”

Discussion

The costs claimed by appellant for lost financing costs are simply interest on borrowings by different names. Where, as here, FAR Part 31 applies to a contract, interest on borrowings is simply not recoverable. *Tomahawk Construction Co.*, ASBCA No. 45071, 94-1 BCA ¶ 26,312. At the hearing, appellant’s president conceded that his company is not entitled to interest on borrowings and he now recognizes that appellant is

entitled to Contract Disputes Act interest on any amounts found due by the Board on the rest of the claim (tr. 2/33-34). Summary judgment is granted as to Claim item J.

VI. Motion for Summary Judgment as to Claim Item G

This motion relates to a claim of late exercise of an option. The motion is denied because it was filed too close to the hearing date to give appellant an opportunity to respond to it. It will therefore be decided on the merits.

Summary

Motions filed by the Government with respect to Item B (leap year claim), Item I (proposal preparation claim), and Item G (untimely option exercise claim) are denied. Summary judgment in favor of the government is granted with respect to Item C (gas and paper price escalation claim) and Item J (time value of money claim). The appeal as to Item F (health and welfare benefits) is dismissed for lack of jurisdiction.

In accordance with discussions at the conclusion of the hearing, the Board will schedule a conference call to establish a briefing schedule for claims that remain at issue.

Dated: 6 April 2004

RICHARD SHACKLEFORD
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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 No. 53614, Appeal of Chem-Care Company, Inc., rendered in conformance with the Board's Charter.

Dated:

DAVID V. HOUBE
Acting Recorder, Armed Services
Board of Contract Appeals