

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
AGES GROUP) ASBCA No. 55318
)
Under Contract Nos. DAAJ09-96-C-0388)
 F34601-96-C-0725)

APPEARANCES FOR THE APPELLANT: Peter F. Garvin, III, Esq.
Grant H. Willis, Esq.
Jones Day
Washington, DC

APPEARANCES FOR THE GOVERNMENT: E. Michael Chiapas, Esq.
Chief Trial Attorney
Charles W. Goeke, Esq.
Senior Trial Attorney
Defense Contract Management
Agency
Philadelphia, PA

OPINION BY ADMINISTRATIVE JUDGE DELMAN ON MOTION FOR
SUMMARY JUDGMENT

AGES GROUP (appellant) moves for summary judgment in this appeal, contending that the government is not entitled to recover on its claim of \$1,123,771 as a matter of law. The government opposes the motion. The parties have filed memoranda in support of their positions, and the Board has heard oral argument. For reasons stated, we deny appellant's motion.

STATEMENT OF FACTS FOR PURPOSES OF MOTION

On 11 September 1996, the Department of Army (Army or government) awarded Contract No. DAAJ09-96-C-0388 to appellant. The contract required appellant to provide maintenance and repair services for certain Army, Navy, and Air Force aircraft around the world, and contained both firm fixed-price and cost-reimbursable contract line item numbers ("CLINs"). (R4, tab 1; tr. 9-11) After award, the contract was divided into contracts with the Army, Navy, and Air Force. The Army contract retained the above contract number. The Air Force contract was identified as Contract No. F34601-96-C-0725. (R4, tab 2, P00001)

On or about 9 May 1997, appellant and ASRC Contracting Company, Inc. (ACCI) entered into Subcontract No. AGG-97-LCCS-0100 (“Subcontract”), which required ACCI to provide maintenance support at each site where the military based its aircraft (app. mot., ex. 5).

During the course of the contracts appellant invoiced, and received payment from the government for work performed by ACCI, including work under the cost-reimbursable CLINS, but it did not pay ACCI’s invoices in full by cash or check, contending that ACCI was responsible for damages to appellant for which appellant was entitled to offset/setoff against the full amounts due and owing ACCI. ACCI disputed appellant’s claimed setoffs (*e.g.*, app. mot., exs. 44, 64, 94).

On or about 19 August 1999, ACCI filed suit against appellant in federal district court, contending, *inter alia*, breach of contract, misrepresentation and failure to make payments of its invoices under the subcontract. ACCI’s complaint, as amended, sought in excess of \$12,000,000. (App. mot., exs. 6, 7) On or about 1 November 1999, appellant filed its answer, asserting affirmative defenses and a counterclaim, seeking in excess of \$15,000,000 from ACCI on various grounds, including breach of contract, negligent misrepresentation, fraudulent suppression and concealment (*id.*, ex. 8).

On 30 August 2001, the parties executed a Stipulation of Settlement (“SOS”) in the court action. Insofar as pertinent, appellant agreed to pay ACCI the amount of \$7,000,000 to resolve the parties’ respective claims, and the parties agreed to execute a mutual release, releasing all claims with exclusions not relevant here. (App. mot., ex. 12) Appellant paid this settlement amount to ACCI.

Effective 10 September 2001, the parties entered into a “Mutual Release and Settlement Agreement” (“Release”), which in pertinent part, provided as follows:

RECITALS

A. ACCI and The AGES Group, n/k/a Volvo Aero Services LP entered into Subcontract Agreement AGG-97-LCCS-0100 with an effective date of May 9, 1997 (the “subcontract”); and

B. ACCI and Volvo have been engaged in litigation over their respective rights and obligations arising under and relating to the Subcontract in the case styled ASRC Contracting Company, Inc. v. The AGES Group, et al., no. 99-8646, in the United States District Court for the Southern District of Florida (the “Litigation”); and

C. ACCI and Volvo now desire to dismiss the Litigation and enter into this Release to fully and finally settle and release each other from any and all claims, demands or causes of action they may have against each other in connection with the Subcontract and the Litigation, save for the Exceptions as defined below.

NOW, THEREFORE, for the premises and mutual agreements set out below, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by Volvo and ACCI, the parties hereby agree as follows:

1. **General Release.** Subject to the Exceptions set forth in paragraph 2 below, ACCI and Volvo hereby remise, acquit, release and forever discharge each other and each of their past and present officers, directors, employees, affiliates, subsidiaries, agents, partners, limited partners, parents, successors, assigns and representatives (collectively the “Releasees”) from any and all claims, demands, indebtedness, agreements, promises, causes of action, obligations, damages or liabilities of any nature whatsoever, in law or in equity, whether known or unknown, asserted, liquidated, suspected or claimed, that ACCI or Volvo ever had, has claimed to have, now has or may hereafter have or claim to have against each other.

.....

3. **No Admissions.** Nothing contained herein shall be construed as an admission of guilt, liability or responsibility.

(App. mot., ex. 13)

Neither the SOS nor the Release identified the respective claims of the parties that were paid, in whole or in part, through appellant’s \$7,000,000 payment to ACCI.

In appellant’s reply papers, it offers the affidavit of Mr. Richard P. Murad, Vice-President and General Counsel, who participated in the negotiations that led to the settlement. Mr. Murad states, based upon his notes of the negotiations, that AGES did

not dispute the validity of ACCI's invoices; rather, the negotiating parties applied the value of AGES' affirmative damage claims under fixed-priced line items of the contracts against the value of ACCI's invoice claim to reach a bottom-line settlement figure. (App. reply, attach. 4)

In furtherance of an audit of appellant's 1999 indirect cost rates, the Defense Contract Audit Agency (DCAA) on 24 May 2001 requested that appellant provide "copies of the public vouchers [to the government] containing the invoices for ACCI costs billed under [cost-reimbursable] CLINS 14 and 23" and "access to the cancelled checks documenting your payment of these amounts" (app. mot., ex. 15). By letter to DCAA dated 7 June 2001, appellant advised in pertinent part as follows:

Please note that these checks will not be in amounts exactly equal to ACCI's [cost-reimbursable] CLIN 14 and 23 invoices for several reasons, including but not limited to the following:

- ACCI's CLIN 14 and 23 costs were sometimes invoiced together with other CLIN costs.
- AGES' checks were not drawn on a CLIN basis (i.e., a check may have paid several invoices, including those for CLINs other than 14 and 23.
- ACCI's invoices were either paid by actual check or, in some cases, not paid by actual check because they were offset against overpayments [emphasis in original] to ACCI, pursuant to [the Subcontract] . . . These contractual offsets constitute "other form of actual payment" in accordance with FAR 52.216-7(b)(1)(i), the Allowable Cost and Payment clause^[1]

(App. mot., ex. 16)

On 12 July 2001, the DCAA auditor sent appellant a spreadsheet listing roughly 40 ACCI cost-reimbursable invoices that the DCAA identified as unpaid by appellant.

¹ The Allowable Cost and Payment clause, FAR 52.216-7(b)(1)(i), cited by appellant, allows for the government's reimbursement of allowable "recorded costs that, *at the time of the request for reimbursement, the Contractor has paid* by cash, check, or other form of actual payment for items or services purchased directly for the contract." (Emphasis added). The record at this time contains no evidence showing that appellant's claimed offsets met this requirement. See text of Opinion for other relevant excerpts from this clause.

Appellant replied on 17 July 2001, stating, in part, that “The list you have compiled appears to be reasonable. . . . Keep in mind we have informed ACCI that we have offsets to these unpaid invoices.” (App. mot., ex. 25)

The DCAA issued a draft report, dated 3 May 2002, asserting, insofar as pertinent, that the government had reimbursed appellant for work performed by ACCI under cost reimbursable CLINs for which appellant had not paid ACCI, and hence the government was entitled to recoup overpayments (app. mot., ex. 17). Appellant disputed this matter by letter to DCAA dated 21 June 2002, contending *inter alia*, that its \$7,000,000 payment to ACCI constituted payment of ACCI’s invoices, including those for the cost-reimbursable work, against which was offset a settlement of appellant’s claimed damages under the fixed priced items of work. In this letter to DCAA appellant did not discuss or disclose any AGES accounting records, demonstrating that appellant applied the \$7,000,000 payment to any specific ACCI invoices, in whole or in part. (App. mot., ex. 20)

The DCAA issued a revised draft audit report to AGES dated 7 August 2002, maintaining its general position but revising the amounts questioned (app. mot., ex. 18). On or about 13 September 2002, DCAA issued its final audit report, reasserting that the government had reimbursed appellant during the contract for work performed by ACCI under cost-reimbursable CLINs for which appellant had not paid ACCI, and which the government was now entitled to recoup. DCAA applied the \$7,000,000 payment to ACCI against all of ACCI’s claimed unpaid invoices, in the amount of \$11,260,455, and applied that fraction (62.16%) against the alleged unpaid cost-reimbursable invoices in issue, in the amount of \$1,068,176, to arrive at a questioned cost of \$404,198. The DCAA issued a notice of “Contract Costs Suspended and/or Disapproved” (“Form 1”) with this final audit report, notifying appellant that DCAA was recommending a disallowance of \$425,216 (\$404,198 plus G&A expenses of \$21,018). (App. mot., ex. 21)

On 18 November 2002, the ACO notified appellant of her intent to issue a Demand for Payment for \$425,216 within 30 days unless appellant could provide evidence that appellant paid ACCI for the cost-reimbursable CLINs (app. mot., ex. 23). By response dated 17 December 2002, appellant again disputed the government’s contentions, contending, *inter alia*, that the subject invoices were paid in full through cash, check and offset. Specifically, appellant contended that it never disputed these invoices of ACCI, but offset the amounts admittedly due ACCI against the damages for which ACCI was responsible pursuant to their subcontract under ACCI’s fixed-price work. Appellant did not provide any AGES accounting records showing the application of the \$7,000,000 check to the subject invoices, in whole or in part. (App. mot., ex. 24)

The ACO replied to appellant's letter on 9 May 2005, reiterating the government's position and stating, in pertinent part, as follows:

The solution that I see is that AGES must prove that it actually paid by cash, check, or other forms of actual payment (not your offset arrangement) the costs it claimed via the vouchers it submitted to the Government for payment. My earlier proposal to agree to the settlement by accepting the same percentage sustained in your settlement proposal with ACCI was only proposed to achieve an expedient settlement between AGES and the Government. If AGES insists that all cost recognized by the settlement agreement were fixed price cost, then AGES must prove that it paid the costs it claimed were incurred via its cost-type vouchers submitted to the Government for payment. You are hereby reminded that the Government is looking for support of the \$1,068,176.

If you are willing to pursue an amicable settlement please advise me of your concurrence to my November 18, 2002 correspondence in which I proposed a settlement in the amount of \$425,216 for direct costs and associated G&A expenses. Otherwise, if not, it is my intention to issue a Contracting Officer's Final Decision and Demand for the entire \$1,068,176 within 30 days after receipt of this letter.

(App. mot., ex. 25 at 2) Appellant replied by letter dated 28 June 2005, reiterating its position. It did not provide the ACO any AGES accounting records showing the application of the \$7,000,000 to the subject invoices, in whole or in part. (App. mot., ex. 26)

By decision dated 19 October 2005 (R4, tab 8), the ACO determined that appellant was indebted to the government in the amount of \$1,123,771.15 (\$1,068,176 plus G&A). This appeal followed.

By letter dated 23 February 2006, the Defense Finance and Accounting Service (DFAS) advised appellant that the government had offset \$494,685.68 from funds the government owed appellant under another contract and applied it against this claim, leaving a balance owed of \$629,085.47, plus interest (app. mot., ex. 28).

Appellant's reply in support of its motion included an undated computer printout entitled "Vendor Account Inquiry" from its "JAMIS" financial system, which purported to show that AGES applied roughly 1.1 million dollars of its \$7,000,000 million dollar settlement payment to the subject cost-reimbursable invoices of ACCI (app. reply, attach.

2). At oral argument, appellant's counsel stated that this printout was an authentic business record, reflecting real time entries and transactions, and first came to counsel's attention in the course of responding to the government's pleadings (tr. 43-45). No affidavit or other attesting evidence was presented with this exhibit. The government questioned the authenticity and probative nature of the printout (tr. 79).

The contracts contained the following clause, FAR 52.216-7, which in pertinent part states as follows (app. mot., ex. 114):

**ALLOWABLE COST AND PAYMENT
(JUL 1991)**

(a) *Invoicing.* The Government shall make payments to the Contractor when requested as work progresses, but (except for small business concerns) not more often than once every 2 weeks, in amounts determined to be allowable by the Contracting Officer in accordance with Subpart 31.2 of the Federal Acquisition Regulation (FAR) in effect on the date of this contract and the terms of this contract. . . .

(b) *Reimbursing costs.* (1) For the purpose of reimbursing allowable costs (except as provided in subparagraph (2) below, with respect to pension, deferred profit sharing, and employee stock ownership plan contributions), the term "costs" includes only —

(i) Those recorded costs that, at the time of the request for reimbursement, the Contractor has paid by cash, check, or other form of actual payment for items or services purchased directly for the contract;

(ii) When the Contractor is not delinquent in paying costs of contract performance in the ordinary course of business, costs incurred, but not necessarily paid, for --

(A) Materials issued from the Contractor's inventory and placed in the production process for use on the contract;

(B) Direct labor;

(C) Direct travel;

(D) Other direct in-house costs; and

(E) Properly allocable and allowable indirect costs, as shown in the records maintained by the Contractor for purposes of obtaining reimbursement under Government contracts; and

(iii) The amount of progress payments that have been paid to the Contractor's subcontractors under similar costs standards.

....

(c) *Small business concerns.* A small business concern may be paid more often than every 2 weeks and may invoice and be paid for recorded costs for items or services purchased directly for the contract, even though the concern has not yet paid for those items or services.

With respect to (c) above, appellant has offered evidence to show that that it was a "small business concern" for purposes of billing and payment under the contracts (app. reply, attach. 7-12). The government has offered evidence disputing appellant's small business status (gov't resp. to app. supp., exs. 9, 11).

DECISION

As we stated in *Lockheed Martin NESS-Akron*, ASBCA No. 54193, 04-2 BCA ¶ 32,728 at 161,896:

We grant summary judgment where there are no disputed material facts and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, [33 CCF ¶ 75,126] 812 F.2d 1387, 1390-92 (Fed. Cir. 1987). The burden is on the movant to establish the absence of any issues of material fact. A material fact is one that may make a difference in the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Factual inferences are to be drawn in favor of the party opposing summary judgment. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Alvarez & Associates Construction Co., Inc.*, ASBCA No. 49341, 96-2 BCA ¶ 28,476. Our task is not to evaluate or weigh competing evidence but only to determine whether a genuine disputed issue of material fact exists that is suitable for resolution at trial. *Alvarez, supra*.

With respect to appellant's motion, the key issue is whether the record undisputedly shows that appellant paid the roughly 40 ACCI cost-reimbursable invoices

for which the government reimbursed appellant². If the record so shows, there are no overpayments for the government to claim, and appellant is entitled to summary judgment. Appellant contends that this is indeed the case, that is, that there are no material facts in dispute and the record shows that all amounts under these invoices were paid by appellant by cash, check or offset, and therefore appellant is entitled to judgment as a matter of law.

We do not agree. The government, *inter alia*, offers the DCAA audit report and related exhibits in support of its position that all the subject invoices were not paid. Appellant contests the government's evidence, and offers evidence in support of its position that the invoices were paid. It is not our task at this time to weigh the competing evidence of the parties, but only to ascertain whether there are material fact disputes that need to be resolved at trial. *Lockheed, supra*. This is such a material fact dispute.

Appellant's contemporaneous accounting records would be the best evidence of which ACCI invoices, if any, were paid by appellant, in what amounts and in what manner. Appellant has tendered an undated "Vendor Account Inquiry" computer printout for this purpose as an attachment to its reply papers, but the government has challenged the authenticity of the document. Appellant has failed to offer any evidence on this record (as opposed to counsel argument) supporting the authenticity of this document or any evidence showing proof of real time entries or other indicia of reliability, nor has it provided a reasonable explanation as to why this information was not provided to DCAA in the 2001-2002 time frame or to the ACO thereafter.

In assessing appellant's motion for summary judgment, we must draw all factual inferences in favor of the non-moving party. *Lockheed, supra*. We conclude that this record contains a dispute of material fact as to whether the roughly 40 ACCI cost-reimbursable invoices were paid by appellant, in whole or in part. Based upon the foregoing, we conclude that appellant is not entitled to judgment as a matter of law.³

Appellant's motion for summary judgment is denied.

² Even if appellant was a small business concern as it contends in its motion papers, see Allowable Cost and Payment clause, FAR 52.216-7(c), *supra*, it would still need to demonstrate that it ultimately paid ACCI. See *Patel Enterprises, Inc.*, ASBCA No. 41529, 93-2 BCA ¶ 25,863 at 128,681 (use of the word "yet" in subparagraph (c) of the clause implies that the costs must ultimately be paid by the contractor).

³ Given our conclusion, we need not address at this time the various legal issues raised by the parties in the motion papers.

Dated: 6 February 2008

JACK DELMAN
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. 55318, Appeal of AGES GROUP, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals