

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
BearingPoint, Inc.) ASBCA No. 55354
)
Under Contract No. RAN-C-00-03-00043-00)

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OPINION BY ADMINISTRATIVE JUDGE YOUNGER
ON THE GOVERNMENT'S MOTION TO DISMISS WITH PREJUDICE FOR LACK
OF JURISDICTION DUE TO WANT OF STANDING OR, IN THE ALTERNATIVE,
SUMMARY JUDGMENT

The government has moved to dismiss this cost case regarding a contract performed in Iraq, contending chiefly that we lack subject matter jurisdiction under the *Severin* doctrine. Alternatively, the government seeks summary judgment, urging that appellant BearingPoint, Inc. (BearingPoint) has failed to substantiate the allowability, allocability and reasonableness of the disallowed costs at issue. We deny both motions.

FINDINGS OF FACT FOR PURPOSES OF THE MOTIONS

1. Effective 18 July 2003, BearingPoint and the U.S. Agency for International Development (AID) entered into Contract No. RAN-C-00-03-00043-00 for "Technical Assistance for Economic Recovery, Reform and Sustained Growth in Iraq," a cost-plus-fixed-fee level-of-effort type contract (R4, tab 2 at 1). The record reflects that the contract was financed entirely with "funds [that] were appropriated by the U.S. Congress" (Declaration of Raymond Lewman at 2).

2. The contract contained various standard clauses, including FAR 52.215-2, AUDIT AND RECORDS – NEGOTIATION (JUN 1999); FAR 52.216-7, ALLOWABLE COST AND PAYMENT (DEC 2002); FAR 52.233-1, DISPUTES (JUL 2002); and FAR 52.244-2, SUBCONTRACTS, ALTERNATE II (AUG 1998) (R4, tab 1 at 34-35 of 120).

3. By date of 1 August 2003, BearingPoint sent a letter of authorization to Custer Battles, LLC (Custer Battles) “to begin work . . . [as of that date as a subcontractor] under the Prime Contract” between BearingPoint and the government. In its letter of authorization, BearingPoint stated that: (a) it “intend[ed] to issue an indefinite quantity subcontract to definitize this letter of authorization;” (b) the funds obligated and available aggregated \$85,000; and (c) allowable costs under the letter and any ensuing subcontract were limited to those “reasonable, allocable and necessary” under the Allowable Cost and Payment clause (*see* finding 2) and under FAR 52.216-7, PAYMENTS UNDER TIME-AND-MATERIALS AND LABOR-HOUR CONTRACTS (DEC 2002), as well as applicable AID regulations. BearingPoint defined the scope of work under the letter as providing “security, operations and logistics support for BearingPoint’s initial mobilization trip to Baghdad, Iraq beginning with the arrival of some BearingPoint team members in Amman, Jordan.” (R4, tab 11 at 9-10)

4. By date of 7 January 2004, Custer Battles sent to BearingPoint a letter agreement setting forth terms of payment for Custer Battles’ past performance and establishing a statement of work for the future. BearingPoint signed the letter. In pertinent part, the letter expressed the parties’ intention “to enter into a binding written Transition of Services Agreement;” provided that Custer Battles would furnish personal security details to BearingPoint employees working in Iraq, protect houses that BearingPoint was renting there, provide certain support services and assign certain leases to BearingPoint; and specified that Custer Battles would provide its services “through the close of business on February 15, 2004, unless this Agreement [were] terminated before” that date.

5. The letter agreement also “incorporates by reference and includes Attachment B, Transition of Services Agreement Terms and Conditions, which apply to this Letter Agreement and will apply to the Transition of Services Agreement.” Attachment B contained paragraph 3, Incorporation of Applicable Clauses of Prime Contract, which made various applicable clauses of the prime contract a part of the agreement.

6. The last date on which Custer Battles provided services to BearingPoint was 15 February 2004 (R4, tab 208, encl. 8 ¶ 5)

7. By date of 14 November 2005, the contracting officer rendered her final decision allowing in part and denying in part costs claimed by BearingPoint for alleged Custer Battles costs (R4, tab 24). In her decision, the contracting officer demanded

payment from BearingPoint of \$2,485,268 in disallowed costs (*id.* at 8). This appeal followed.

8. We find no evidence in the present record of a release of claims by Custer Battles in favor of BearingPoint (*see* R4, tabs 11, 77, 79).

DECISION

A. *Motion to Dismiss*

The government grounds its motion to dismiss in the proposition that BearingPoint lacks standing under *Severin v. United States*, 99 Ct. Cl. 435, 442 (1943) and ensuing cases. The government tells us that, inasmuch as there was no executed subcontract between BearingPoint and Custer Battles, and no formal limitation of payments to what would be allowable under FAR if a formal subcontract were in place, “BearingPoint had not obligated itself to pay for any USAID disallowed costs.” The government also asserts that following a dispute between BearingPoint and Custer Battles regarding outstanding invoices, BearingPoint “denied any liability for Custer Battles costs that were deemed unallowable” by the contracting officer. (The Government’s Motion to Dismiss With Prejudice for Lack of Jurisdiction Due to A Want of Standing Or, In the Alternative, Summary Judgment (gov’t mot.) at 66-67)

We articulated the test governing successful invocation of the *Severin* doctrine in *M.A. Mortenson Co.*, ASBCA No. 53761, 06-1 BCA ¶ 33,180 at 164,439. We recognized there that the government “bears the burden to prove that the doctrine applies. It must establish that an iron-clad release or contract provision immunizes the prime contractor completely from any and all liability to the subcontractor for the government action at issue. The *Severin* doctrine is construed narrowly.”

Dismissal on *Severin* grounds is unwarranted. We have seen no “iron-clad release” cited or quoted in the 63-page statement of facts contained in the government’s motion and we have found none on our own (finding 8). We have also seen no contract or subcontract provision precluding liability from BearingPoint to Custer Battles. Moreover, we cannot accept the government’s argument that the less formal subcontracting arrangements that were obtained here (*see* finding 4) are necessarily inconsistent with liability from BearingPoint to Custer Battles.

B. *Motion for Summary Judgment*

The government grounds its alternative motion for summary judgment in the propositions that BearingPoint “has provided no sufficient documentation to

substantiate” the reasonableness of disputed costs, and that it has not demonstrated that disputed costs “were incurred specifically for the contract” (gov’t mot. at 74, 80).

On summary judgment, we follow the familiar precept that “[o]ur task is not to resolve factual disputes, but to ascertain whether material disputes of fact – triable issues – are present.” *Conner Bros. Construction Co., Inc.*, ASBCA No. 54109, 04-2 BCA ¶ 32,784 at 162,143 quoting *John C. Grimberg Co.*, ASBCA No. 51693, 99-2 BCA ¶ 30,572 at 150,969. We also, of course, view “the inferences to be drawn from the underlying facts...in the light most favorable to the party opposing the motion.” *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

Summary judgment is unwarranted. Considering the government’s argument that BearingPoint has failed to establish the reasonableness of the claimed costs, it is familiar that “[i]ssues that require ‘the determination of the reasonableness of the acts and conduct of the parties under all the facts and circumstances of the case, cannot ordinarily be disposed of by summary judgment.’” *Matthews v. Ashland Chemical, Inc.*, 703 F.2d 921, 925-26 (5th Cir. 1983) quoting *Gross v. Southern Railway Co.*, 414 F.2d 292, 296 (5th Cir. 1969); *see also McKenzie Engineering Co.*, ASBCA No. 53374, 02-2 BCA ¶ 31,972 at 157,925. Considering the government’s argument regarding allocability, the welter of documents cited permit multiple inferences and, in the present procedural posture of the case, we resolve those inferences in favor of BearingPoint as the party against which the motion is directed.

CONCLUSION

The government’s motion to dismiss with prejudice for lack of jurisdiction due to want of standing or, in the alternative, summary judgment is denied.

Dated: 19 June 2008

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures Continued)

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. 55354, Appeal of BearingPoint, Inc., rendered in conformance with the Board's Charter.

Dated:

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