

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Genome-Communications) ASBCA No. 57267
)
Under Contract No. NNX09-TT43P)

APPEARANCES FOR THE APPELLANT: Mr. Eugene Koprowski
President
Ms. Nancy Bruening
Managing Director

APPEARANCES FOR THE GOVERNMENT: Vincent A. Salgado, Esq.
NASA Chief Trial Attorney
Troy Taylor, Esq.
Trial Attorney
Stennis Space Center, MS

OPINION BY ADMINISTRATIVE JUDGE YOUNGER
ON APPELLANT'S MOTION FOR SUMMARY JUDGMENT

In this appeal filed by Genome-Communications (Genome) for the recovery of the cost to provide instructional training materials for a seminar, appellant has moved for summary judgment. Genome contends that it submitted the training materials, has not been paid by the government and therefore is entitled to summary judgment. The government opposes the motion, contending generally that there are genuine issues of material fact regarding Genome's compliance with contract requirements and the effort required by each party to remedy problems with the materials. We deny the motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

A. The Contract

The National Aeronautics and Space Administration Shared Services Center (NASA or government) issued combined synopsis/solicitation number 332984 dated 17 July 2009 for a contract which required offerors to conduct a two-day, instructor-led Certified Authorization Professional (CAP) review seminar and CAP exam to be held at the Goddard Space Flight Center (Goddard) between 31 August 2009 and 1 September 2009. The seminar was to include: (1) an overview of compliance requirements under the Federal Information Security Management Act, 44 U.S.C. § 3541 *et seq.*; (2) documentation requirements; (3) instruction regarding performance of security testing; (4) evaluation of

security vulnerabilities; and (5) an opportunity to receive CAP certification. (R4, tab 2 at R-10-11) In response to the solicitation, Genome submitted a proposal dated 23 July 2009 (R4, tab 3 at R-15).

Effective 11 August 2009, NASA awarded a firm-fixed-price contract to Genome in the amount of \$18,000. The contract required Genome to provide training materials for 25 students to support a CAP Review Seminar, conduct the CAP Seminar at Goddard, and administer the CAP examination leading to CAP certification for each student. The delivery date for the training materials was 31 August 2009. The two-day seminar was scheduled to begin on the same date, with the examination to be scheduled at a later unspecified date. (R4, tab 6 at R-32-33) By date of 27 August 2009, the parties modified the contract to extend the dates, requiring that the training course be conducted on 10-11 September 2009, with the training materials to be delivered on 10 September 2009 (R4, tab 7 at R-39-40).

The contract contained various standard clauses, including FAR 52.212-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (MAR 2009) (R4, tab 6 at R-34).

B. Performance

By date of 1 September 2009, Genome sent PowerPoint slides to NASA via e-mail, setting forth its proposed course presentation (R4, tabs 8, 9A-9G). Thereafter, Goddard's senior training coordinator responded on 3 September 2009 with the following e-mail:

At this time the PowerPoint presentation does not meet the requirements as documented in the Statement of Work. The requested seminar and subsequent examination is for the Certification & Accreditation Professional [sic] (CAP). What you provided at this time is geared more toward the Certified Information Systems Security Professional (CISSP) review seminar. Yes, both are certifications managed by [the International Information Systems Security Consortium (ISC(2)), a not-for-profit organization providing vendor-neutral information on security education and certification], however, there is more specific focus on documenting your security posture in the CAP.

Additionally, we need to verify that the plan is, in fact, to provide each attendee with an official ISC(2) examination voucher for the CAP, as per the [statement of work], and on the

final purchase order.... [P]lease let me know when we can expect the updated PowerPoint presentation.

(R4, tab 10 at R-414) In a further e-mail exchange, the senior training coordinator assured Genome that NASA wanted the course delivered, but with a more specific content. Genome replied in an e-mail, also on 3 September, that it had requested a decision from the contracting officer, and stated:

We seek an immediate resolution to the question posed by this e-mail...from the senior training coordinator, as this issue raised will cause a delay in the performance of the contract terms, per the modification, i.e. training seminar next week at Goddard.

How do the PowerPoint slides specifically not represent the CAP Review content when they specifically follow the subject matter areas we outlined in our proposal to NASA and the [statement of work]?

E-mail from senior training coordinator is vague and does not provide specifics for action by us as the contractor, thus, we cannot comply with it at this time.

(R4, tab 11 at R-423) (emphasis in original)

Genome sent an invoice to NASA by e-mail on 3 September 2009 in the amount of \$18,000 (R4, tab 47). The invoice was later returned without action by letter on 19 January 2010 with a statement that the “[s]ervices required under the Purchase Order have not been performed” (R4, tab 48).

On 4 September 2009, Genome supplied additional slides and a draft agenda for the scheduled training (R4, tab 12 at R-426). By letter dated 9 September 2009, the contracting officer notified Genome that: (1) the CAP Review Seminar and Exam Training scheduled for 10-11 September 2009 had been cancelled; and (2) Goddard was still reviewing the presentation materials and would contact Genome when the review was completed. NASA also invited Genome to begin negotiations for reasonable and allowable cancellation charges. (R4, tab 18 at R-476) The contracting officer notified Genome on 18 September 2009 that a manager at Goddard, would be contacting Genome “regarding changes to your presentation materials along with a couple of questions about the testing/exam process” (R4, tab 21 at R-486).

On 22 September 2009, NASA sent Genome by e-mail a detailed comparison between the CAP Review Seminar it wanted and the draft schedule and slides that Genome

had submitted. Overall, NASA wanted the course to cover the five domains of the CAP: (1) understanding the purpose of certification; (2) initiation of the system authorization process; (3) certification phase; (4) accreditation phase; and (5) continuous monitoring phase. The CAP Review Seminar that NASA wanted resembled the content of a treatise that was “closest to the content we’re seeking.” (R4, tab 23 at R-495-96) NASA referenced yet another book, with eleven chapters specifically noted, as a further example of the type of content that it wanted. NASA observed that Genome’s proposed presentation “doesn’t seem to focus on the CAP content” and “is more geared to a CISSP review course, which our audience here has already taken earlier this year.” (*Id.*)

NASA scheduled a conference call for 23 September 2009 so that the parties could discuss the training materials and NASA’s detailed comments (R4, tab 27 at R-513). Shortly after the conference call began, Genome hung up, accusing the NASA representatives of attempting to renegotiate the contract (R4, tab 28 at R-518).

C. Claim and Appeal

Genome filed a claim with the contracting officer by date of 22 April 2010 in the amount of \$15,000 for “professional services performed in support of this contract” during August and September 2009. The contracting officer thereafter denied Genome’s claim by decision dated 14 June 2010, and Genome then filed a timely notice of appeal, together with a complaint for \$15,000 for services performed “during August and September 2009.” (R4, tabs 40, 41)

NASA did not terminate the contract for convenience (Appellant’s Motion for Summary Judgment (mot.) at 1). Instead, in an action that is not before us in this appeal, the contracting officer terminated the contract for default (compl. and answer ¶ 7).

DECISION

In moving for summary judgment, Genome contends that it is owed payment for the writing, editing and research services it performed to produce training materials and to prepare for the CAP Review Seminar and Examination, and that NASA has breached the contract by its failure to pay Genome’s claim. For its part, NASA takes the position that summary judgment must be denied because there are factual disputes regarding whether Genome produced training materials that complied with contract requirements, and regarding the effort provided by each party to remedy problems with the training materials.

We are guided by the familiar principles that summary judgment is appropriate where there is no genuine issue of material fact and the movant 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 that may affect the outcome of the decision. *Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). Our task is not to resolve factual disputes, but to ascertain whether material disputes of fact are present. *John C. Grimberg Co.*, ASBCA No. 51693, 99-2 BCA ¶ 30,572 at 150,969. Genome, as 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 NASA, as the party opposing summary judgment. *Mingus*, 812 F.2d at 1390-91. In this case, these familiar principles must be applied with a view to the Contract Terms and Conditions – Commercial Items clause.

To prevail on its motion, Genome must demonstrate that no genuine issue of material fact remains regarding its breach of contract claim. As articulated in its motion, that claim is that Genome “is allowed to recover for work performed,” and that NASA’s “refusal...to pay for *any* of the services rendered...is a material *Breach of Contract*.” Genome defines the services for which it seeks payment as “the preparation of 16 hours of lectures (i.e. two full business days of lectures) consisting of PowerPoint Slide presentations and other instructional materials, rendered [over] a three week period in August 2009.” (Mot. at 1)

On the present record, we cannot say that Genome has met its burden. Paragraph (a) of the Contract Terms and Conditions – Commercial Items clause obliged Genome only to “tender for acceptance those items that conform to the requirements of this contract.” Given that the claim is for work performed in August and September 2009, there are plainly triable issues regarding whether, as Genome contended in its 3 September 2009 e-mail, the work performed in August “follow[ed] the subject matter areas we outlined in our proposal...and the [statement of work]” (R4, tab 11 at R-423), or whether, as NASA asserted in an e-mail on the same date, “the PowerPoint presentation [did] not meet the requirements as documented in the Statement of Work” (R4, tab 10 at R-414). The same triable issues are present regarding the work done in September, in response to NASA’s objections to the August work. We cannot render judgment on these issues on the present record, and hence the motion must be denied.

CONCLUSION

Appellant's motion for summary judgment is denied.

Dated: 27 October 2010

ALEXANDER YOUNGER
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. 57267, Appeal of Genome-Communications, rendered in conformance with the Board's Charter.

Dated:

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