

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Green Dream Group) ASBCA Nos. 57413, 57414, 57565
)
Under Contract No. W91GDW-08-D-0005)

APPEARANCE FOR THE APPELLANT: Celeste R. Gamache, Esq.
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Denver, CO

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
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Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TUNKS

Green Dream Group (GDG) seeks additional costs of \$791,275 in connection with the termination for convenience of two task orders under a multiple award task order contract (MATOC). ASBCA No. 57565 is a claim for \$224,400 in machinery rental costs under Task Order (TO) 0259. ASBCA No. 57413 is a claim for \$554,400 in machinery rental costs under TO 0260. ASBCA No. 57414 is a claim for \$12,475 in security costs under the same TO. Both entitlement and quantum are before us.

FINDINGS OF FACT

1. On 24 May 2008, the Joint Contracting Command-Iraq/Afghanistan (government) awarded MATOC Contract No. W91GDW-08-D-0005 for "a broad range of apprenticeship training and construction work projects" to be described in the individual TOs (ASBCA Nos. 57413, 57414 (57413/14), R4, tab 1 at 1-3 of 31; ASBCA No. 57565 (57565), R4, tab 1 at 1-3 of 31).

2. The contract contained the following FAR clauses which pertain, in part, to these appeals:

FAR 52.236-5, MATERIAL AND WORKMANSHIP (APR 1984).

(a) All equipment, material, and articles incorporated into the work covered by this contract shall be new and of the most suitable grade for the purpose intended....

(b) The Contractor shall obtain the Contracting Officer's [CO's] approval of the machinery and mechanical and other equipment to be incorporated into the work. When requesting approval, the Contractor shall furnish to the [CO] the name of the manufacturer, the model number, and other information concerning the performance, capacity, nature, and rating of the machinery and mechanical and other equipment....

FAR 52.249-2, TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (ALTERNATE I) (MAY 2004).

(a) The Government may terminate performance of work under this contract...if the [CO] determines that a termination is in the Government's interest....

(57413/14, R4, tab 1 at 8, 22 of 31; 57565, R4, tab 1 at 8, 22 of 31)

3. The contract also included a clause entitled "CONTRACTOR PERSONNEL IN THE UNITED STATES CENTRAL COMMAND AREA OF RESPONSIBILITY (DEVIATION 2007-O0010)." The clause required the contractor to provide a list of personnel for whom authorization to carry a weapon was requested. (57413/14, R4, tab 1 at 27 of 31; 57565, R4, tab 1 at 27 of 31)

TO 0259

4. On 25 September 2008, the government awarded TO 0259 to GDG for the "CSC [Civil Service Corps] Road Repair Apprenticeship, Benadrani, Iraq" for 50 students at a lump sum of \$2,247,320 (57565, R4, tab 3 at 3 of 5, attach. 1, Statement of Work (SOW) ¶ 2). The apprenticeship was six months long. The first five weeks consisted of classroom instruction with the rest of the six months consisting of on-the-job training. (Tr. 1/105)

5. The SOW provided, in part, as follows:

10. CONTRACTOR FURNISHED ITEMS AND SERVICES:

....

a. The contractor is responsible for security measures at all training/work sites...throughout the period of performance of the task order.

-
- c. The contractor shall ensure that all equipment and vehicles are fully functional and operational throughout the period of performance of the task order....

(57565, R4, tab 3, attach. 1, SOW, ¶ 10)

6. On 20 October 2008, Capt Heather Marmion, the Disarmament, Demobilization and Reintegration (DDR) Manager of the 37th Engineering Brigade, notified Mr. Sam Waleed of GDG that she was in charge of the Buharat (TO 0260), Benadrani (TO 0259), Chaka, and Muehla projects and that she had received GDG's "list of equipment and machineries." Those lists are not in the record and Capt Marmion did not testify. (57565, compl., tab 21)

7. The notice to proceed (NTP) was issued on 22 November 2008, establishing a completion date of 22 May 2009 (57565, R4, tab 4). On 18 March 2009, the CO suspended work on TO 0259 until further notice (57565, R4, tab 14).

8. On 24 May 2009, the government terminated TO 0259 for the convenience of the government (57565, R4, tab 18).

9. On 13 August 2009, GDG submitted a termination settlement proposal in the amount of \$790,376.31 which we infer was received on that date (57565, R4, tab 19). Schedule B of the proposal provided, in part, as follows:

2. Machinery Rental - \$224,400

On November 27, 2008, GDG entered into a contract with its equipment supplier to provide the equipment required by the Contract. A copy of the equipment contract is attached hereto as Exhibit A. The rate of rental, for all of the required equipment, was \$56,100.00 per month. The contract required GDG to pay the full amount of payment at the beginning of the month....

(57565, R4, tab 19 at 5) GDG claimed overhead of 8% and profit of 15% on its direct costs, including machinery rental (*id.* at 8).

10. Exhibit A was an agreement with Al Shara Company, dated 27 November 2008, for the rental of a water truck, a dump truck, a wheel loader, a grader, a compactor,

and an asphalt paver. The rental period was six months and the rent was \$56,100 per month. GDG also submitted copies of its monthly receipts, which indicated that it made four payments of \$56,100, totaling \$224,400. The receipts were dated 26 November 2008, 29 December 2008, 29 January 2009, and 28 February 2009. (57565, R4, tab 19a)

11. On 20 December 2010, Capt Jake Alverson, the termination contracting officer (TCO) at the time, issued a final decision allowing a total amount of \$69,452.32 on the claim including \$3,740.00 for machinery rental. The TCO stated on this item:

Item 2—Four months of Machinery Rental for \$224,400.00 at \$56,100 per month. According to the records and reports from interviews of the master trainers, Journeymen and students the following equipment was only available to the students...for two days:

- A. Road Grader
- B. Asphalt Spreader
- C. Sheeps Foot Roller
- D. Air Compressor

...[E]ach trainee was allowed approximately 10 minutes on the grader, but not allowed to use the other items.... No other equipment was provided on site or at any other location for training purposes. No road construction was completed or approved. Also in accordance with the contract Clause 52.236-5 "Material and Workmanship" the contractor was to obtain the [CO's] Approval for the machinery and other equipment to be incorporated into the work. No approval was ever requested and no approval was ever given.... [The government] offers a settlement of two days rental...for a total of \$3,740.00.... The [TCO] believes the sum requested for rental equipment is a false claim actionable under US Law.

(57565, R4, tab 45) The TCO accepted the overhead rate of 8% and used a profit rate of 10% on allowed costs (*id.*). We find that a profit rate of 10% is reasonable. Applying those rates to the amount of \$224,400 results in a total of \$266,587.

12. Capt Alverson did not testify.

TO 0260

13. The government awarded TO 0260 in the amount of \$6,405,917 to GDG to provide a similar road repair apprenticeship to 200 students on the Buharat Road on

27 September 2008. Section B, Supplies or Services, included Item No. 0001AF, Asphalt Equipment Rental, for a period of six months at \$300,000.00 per month. (57413/14, R4, tab 2 at 1, 3 of 6)

14. The SOW provided, in part, as follows:

10. CONTRACTOR FURNISHED ITEMS AND SERVICES:

....

a. The contractor is responsible for security measures at all training/work sites...throughout the period of performance of the task order.

....

c. The contractor shall ensure that all equipment and vehicles are fully functional and operational throughout the period of performance of the task order....

(57413/14, R4, tab 2A at 6 of 8)

15. At the request of Capt Daniel DiCamillo, DDR Manager of the 172nd Brigade and the contracting officer's representative (COR) for these TOs, GDG submitted an equipment list on 22 December 2008. The list was rejected and there is no evidence that GDG submitted another list. (57413/14, R4, tab 10c at 2) Capt DiCamillo did not testify.

16. The NTP was issued on 11 November 2008, which established a completion date of 11 May 2009 (57413/14, R4, tab 3).

17. On 13 January 2009, the government suspended work on TO 0260 (57413/14, R4, tab 4).

18. On 4 March 2009, the government issued a cure notice (57413/14, R4, tab 5).

19. On 24 May 2009, the government terminated TO 0260 for the convenience of the government (57413/14, R4, tab 6).

20. On 9 July 2009, GDG submitted a termination settlement proposal in the amount of \$1,841,326 in connection with TO 0260. We infer the proposal was received on that date. (57413/14, R4, tab 7 at 4, 5) Schedule B provided, in part, as follows:

4. Machinery Rental - \$554,400

On November 8, 2008, GDG entered into a contract with its equipment supplier to provide the equipment required by the Contract. A copy of the equipment contract is attached hereto as Exhibit A, together with an English translation. The rate of rental, for all of the required equipment, was \$252,000.00 per month. The contract required GDG to pay a 20% down payment at the beginning of the month, and the remaining 80% was paid at the end of the month. GDG required the equipment for November and December 2008, and January 2009. GDG paid the full \$252,000.00 for November and December, but only the 20% down payment (\$50,400.00) in January....

....

14. Security - \$12,475

Costs for local security at the work site, the Mussayeb office, and for the surveying work.

(57413/14, R4, tab 7 at 9-10) GDG claimed overhead of 8% on its direct costs and profit of 15% (*id.* at 12). We accept the overhead rate of 8% and find that a profit rate of 10% is reasonable. Applying those rates to the amount of \$554,400 results in a total of \$658,627.

21. In support of its machinery rental claim, GDG submitted an agreement with SEC Co. (SEC) dated 8 November 2008 for 4 water trucks, 8 dump trucks, 3 wheel loaders, 1 bulldozer, 2 graders, 3 compactors, and 1 asphalt paver for a period of six months at \$252,000 per month (57413/14, R4, tab 7 at 16). The agreement called for payments of 20 percent (\$50,400) of the rental amount at the beginning of each month and payments of 80% of the rental amount (\$201,600) at the end of each month (57413/14, compl., tab 4). GDG made payments of \$50,400 on 9 November 2008, 8 December 2008, and 8 January 2009, and payments of \$201,600 on 12 December 2008 and 8 January 2009, for a total of \$554,400 (*id.*).

22. Capt Mark L. Harris, the TCO who ultimately decided these claims, testified that the advance payment arrangement in the SEC agreement was unusual. However, he agreed that "having the 20 percent advanced payment does not give [the government] a reason to not pay this claimed item in and of itself." (Tr. 2/37-38)

23. According to unsigned meeting minutes, at a meeting on 13 December 2008, GDG's representative stated that no equipment had been rented or used for training. In a declaration, GDG's Director of Finance, Mohammed Talib, stated that he does not know why a representative would have made that statement, since GDG had already rented the machinery. We find the declaration more credible than the unsigned meeting minutes.

24. In support of its security claim, GDG submitted a copy of a security agreement with Sheikh Jamal dated 23 November 2008. The agreement required Sheikh Jamal to provide four security personnel armed with AK-47s and one vehicle for a period of six months at a cost of \$12,475. The price was to be paid in a lump sum at the beginning of the agreement. (57413/14, compl., tab 5)

25. In his declaration of 16 January 2011, Sheikh J'afar Hussein Danan Al-Masudi, the lead sheikh in the area, stated that he had provided security and protection for the project and that, as of the date of his statement, he had not been paid (57413/14, R4, tab 53; tr. 1/63).

26. GDG provided excerpts from its accounting records in English and Arabic which show that GDG made the following payments:

| <u>Date</u> | <u>Subject</u> | <u>Amount</u> |
|-------------|----------------------------|---------------|
| 11/9/08 | 20% advance payment to SEC | \$ 50,400 |
| 11/23/08 | Security for 6 months | 12,475 |
| 12/8/08 | 20% advance payment to SEC | 50,400 |
| 12/12/08 | 80% payment to SEC | 201,600 |
| 01/8/09 | 20% advance payment to SEC | 50,400 |
| 01/8/09 | 80% payment to SEC | 201,600 |

(57413/14, compl., tab 45; ex. A-2b; tr. 2/35-36)

27. The government has not challenged the authenticity of the entries in GDG's accounting book.

28. On 8 March 2010, Capt Patrick A. Graham, Capt Harris' predecessor, prepared a draft reply to GDG's proposal. He indicated that he would disallow the first advance payment for rental machinery (\$50,400) on the ground that the government did not receive any benefit from it and allow the remaining \$504,000. He also indicated that he would allow \$12,475 for security, noting in the Remarks column "Paid Receipt Provided." (57413/14, compl., tab 13) The receipt is not in the record. The government did not explain what happened to the missing receipt at the hearing or in its briefs. Capt Graham did not testify.

29. Capt Harris became the TCO in April 2010 (tr. 1/97). He requested GDG to provide, among other things, Sheikh Jamal's full name and contact information. GDG was unable to produce this information. (Tr. 1/132-35) Capt Harris also contacted the Human Intelligence Team (HUMINT), the group that compiled information on people of importance within the relevant five-province area, to see if it could locate Sheikh Jamal. HUMINT was unable to locate him. (57413/14, compl., tab 12 at 2) Capt Harris testified that GDG had one or two armed guards at the school (tr. 1/141). He denied the claim because he "believe[d] in every ounce of [his] body, that it's a fake document" (*id.*). Capt Harris did not address the security receipt referenced by Capt Graham in his 8 March 2010 draft determination.

30. On 6 August 2010, Capt Harris disallowed GDG's equipment rental and security claims in their entirety (57413/14, R4, tab 9). He explained his decision as follows:

[I]tem # 4[--] "Machinery Rental for 2 months" for...\$554,400.00. After looking through all the documents[,]...the government [finds] that no equipment was ever used for...this contract. [GDG's country manager] stated on 13 Dec 2008, that no equipment had been rented or used.... The [COR] requested [GDG] to provide a list of equipment with model number, year of manufacture and description.... That list was rejected by the COR. [GDG] never requested [CO] approval for the...list sent to the COR...and has not provided adequate proof that [the] equipment was used.... [A]s no equipment was ever approved for use on this contract the USG will not pay [for] this item. The claimed costs are unsubstantiated and the TCO believes this is a possible false claim actionable under U.S. Law.

...Item # 14 "Security" for...\$12,475.00. The TCO requested payroll information [and] the full name of Sheik Jamal. [GDG] stated they did not have that information.... The TCO contacted [its] Human Intelligence [HUMINT] Team [and] request[ed] a listing of all Sheiks [in the five-province area] and there is no Sheik Jamal. The TCO does know that security was provided for the survey...based on pictures and information from the [COR].... The information provided by [GDG] was...[a] contract, signed by Sheik Jamal for six (6) months of security for \$12,475.00 beginning on 23 November 2008. Only two months of contract performance was accomplished.... The claimed costs are unsubstantiated and the TCO rejects the[m] until [more] information is

provided.... The TCO believes this is a possible false claim or false receipt actionable under U.S. Law.

(*Id.*)

31. On 1 November 2010, GDG appealed the denial of its machinery rental and security claims under TO 0260. The machinery rental claim was docketed as ASBCA No. 57413 and the security claim was docketed as ASBCA No. 57414. Both appeals were docketed on 8 November 2010.

32. On 17 March 2011, appellant appealed the denial of its claim for machinery rental costs under TO 0259. The appeal was docketed as ASBCA No. 57565 on 18 March 2011 and consolidated with ASBCA Nos. 57413 and 57414 for hearing.

33. The government elected to have an oral hearing which was held at the offices of the Board on 4-5 October 2011. GDG elected to submit its case on the written record pursuant to Rule 11. GDG's counsel, Ms. Gamache, conducted cross-examination via Skype from Colorado, and GDG's corporate representatives, Mr. Ares Morita and Mr. Mohammed Talib, listened to the proceedings via Skype in Iraq. Both parties submitted briefs.

ADDITIONAL FACTS

34. On 15 December 2010, the government moved to dismiss ASBCA No. 57413 for lack of jurisdiction, alleging that Mr. Mohammed Talib, GDG's Director of Finance, lacked authority to certify the claim and that the certification contained defects. We denied the motion, finding that Mr. Talib was authorized to sign the certification and that the defects were correctable. *Green Dream Group*, ASBCA No. 57413, 11-1 BCA ¶ 34,739. GDG has supplied the Board with corrected certifications (Bd. corr. ltr. dtd. 19 March 2013).

35. On 15 January 2010, the Defense Contract Audit Agency (DCAA) issued Audit Report Nos. 2131-2009F17100002 ("Revised"), -00002R-1, and -00003. On 19 August 2011, DCAA withdrew the reports, stating that it had come to DCAA's attention that evidence relied upon during the course of its examination had been altered (Bd. corr., encl. to 19 September 2011 letter). DCAA did not indicate what information it believed had been altered. No one from DCAA testified.

36. On 26 January 2011, the Board requested counsel for the government to advise it of the status of the government's investigation, if any, into the government's assertion in ASBCA No. 57413 that GDG's equipment claim was "a possible false claim actionable under U.S. Law." On 18 March 2011, the government advised "that there is

currently no formal investigation pending regarding the Contracting Officer's assertion that the machinery claim was [fraudulent]." (Bd. corr. file)

37. On 9 November 2011, the government moved to dismiss the appeals for lack of jurisdiction, asserting that GDG was not the same party that signed the contract. We denied the motion on 12 September 2012. *Green Dream Group*, ASBCA No. 57413 *et al.*, 12-2 BCA ¶ 35,145.

DECISION

GDG seeks \$791,275 in additional costs plus profit in connection with the termination for convenience of two task orders for road repair apprenticeships in Iraq. ASBCA No. 57565 is a claim for machinery rental costs of \$224,400 under TO 0259. ASBCA No. 57413 is a claim for machinery rental costs in the amount of \$554,400 under TO 0260. ASBCA No. 57414 is a claim for security costs of \$12,475 in connection with TO 0260. GDG argues that it incurred the costs, that they are reasonable, allowable, and allocable, and that they should be paid. The government argues that the claims should be denied because GDG (1) failed to obtain the CO's approval of its equipment lists (br. at 24-26); (2) failed to comply with the contract terms concerning security (br. at 31); (3) used the rental equipment for only a few days (br. at 26-31); (4) rented the equipment for six months, rather than by the day and so the costs were unreasonable (br. at 31); (5) failed to incur any security costs and fabricated the existence of its security contractor (br. at 32-33); and (6) falsified a portion of its documents supporting its claims so the appeals should be dismissed, citing *Daewoo Engineering and Construction Co. v. United States*, 73 Fed. Cl. 547 (2006), *aff'd*, 557 F.3d 1332 (Fed. Cir. 2009) (br. at 24, 33-36).

Preliminarily, the government incorrectly asserts that the TOs were terminated for convenience due to GDG's "poor performance" (gov't br. at 1). Capt Harris, the TCO for TO 0260, testified as follows:

[T]here [were] issues with...the COR going outside of his bounds a little bit on making some decisions, and that was due to lack of communication and lack of understanding what his responsibilities were until it was brought up to the Contracting Office, where they reined him in and tried to resolve any issues.

There [were] performance problems [with the work]. There was issues with not having trainers, qualified trainers at the site, but taken all in a big picture, the Government was more worried about the COR going outside of his bounds in other issues.

So they went for a termination for convenience instead of a [termination] for default, so that way they could alleviate any blame on the Government....

(Tr. 2/11)

A termination for convenience under FAR 52.249-2 converts the terminated portion of a fixed-price contract into a cost-reimbursement contract and provides for reimbursement of allowable costs incurred in the performance of the terminated portion of the contract subject to limitations such as FAR 49.203 (adjustment for loss). *New York Shipbuilding Co., A Division of Merritt-Chapman & Scott Corp.*, ASBCA No. 15443, 73-1 BCA ¶ 9852 at 46,019 (predecessor standard clause); *Caskel Forge, Inc.*, ASBCA No. 7638, 1962 BCA ¶ 3318 at 17,108. Since the costs of producing defective work are normally reimbursable under a cost reimbursement contract, a contractor that has been terminated for convenience is entitled to be reimbursed the costs of defective work incurred in performing the terminated portion of the work unless the government establishes that the expense resulted from the contractor's gross disregard of its contractual duties. *Alfair Development Co.*, ASBCA Nos. 53119, 53120, 05-2 BCA ¶ 32,990 at 163,511, *aff'd*, 208 F. App'x 840 (Fed. Cir. 2006). To hold otherwise "would be inconsistent with the nature of a termination for convenience which is not based upon any fault or negligence on the part of the contractor." *New York Shipbuilding*, 73-1 BCA ¶ 9852 at 46,020. The contractor bears the burden of proving that it is entitled to a greater termination settlement amount than that determined by the TCO. *General Dynamics Land Systems, Inc.*, ASBCA No. 52283, 02-1 BCA ¶ 31,659 at 156,411.

In his declaration of 16 January 2011, Sheikh J'afar Hussein Danan Al-Masudi, the lead sheikh in the area, stated that he provided security for the project and that, as of the date of his statement, he had not been paid (finding 25). We find this evidence persuasive. Accordingly, GDG's claim for \$12,374 is denied.

GDG has proven that it is entitled to the additional machinery rental costs it seeks. It provided rental agreements and receipts supporting the costs. It submitted pages from its accounting book for TO 0260. Although Capt Harris was not familiar with the advance agreement arrangement used in TO 0260 (20% of the monthly rental amount at the beginning of the month), he agreed "[that] having the 20 percent advanced payment does not give [the government] a reason to not pay this claimed item in and of itself" (finding 22).

The government's arguments are without merit. The equipment list referenced in FAR 52.236-5 applies to equipment that is going to be "incorporated" into the work. Bulldozers, road graders, and sheeps foot rollers and the like are not incorporated into the work. The SOW required GDG to provide equipment "throughout the period of

performance.” The period of performance was six months. Thus, GDG reasonably “prepaid” these items. Moreover, any failure to meet its training obligations does not bar GDG’s recovery of costs following a termination for convenience. *New York Shipbuilding*, 73-1 BCA ¶ 9852 at 46,020.

We lack jurisdiction over whether appellant submitted false documents in support of its claim. The Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-09, provides that “[i]f a contractor is unable to support any part of the contractor’s claim and it is determined that the inability is attributable to a misrepresentation of fact or fraud by the contractor, then the contractor is liable to the Federal Government...” 41 U.S.C. § 7103(c), formerly 41 U.S.C. § 604. It is well settled that the Board does not have jurisdiction under the CDA of government claims arising under this provision. *Martin J. Simko Construction, Inc. v. United States*, 852 F.2d 540, 545 (Fed. Cir. 1988). The Board also does not have jurisdiction under the CDA of claims pursuant to the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733. The CDA provides that the dispute resolution process does not extend to a claim or dispute for penalties, or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine. 41 U.S.C. § 7103(1)(5), formerly 41 U.S.C. § 605(a). The False Claims Act is such a statute. *Martin J. Simko Construction, Inc.*, 852 F.2d at 547. *Daewoo Engineering*, cited by the government, is inapposite because the Court awarded damages to the government under these provisions and 28 U.S.C. § 2514, the forfeiture statute, as to which the Board also does not have jurisdiction.

ASBCA No. 57565 is sustained in the amount of \$266,587 with interest pursuant to the CDA from 13 August 2009. ASBCA No. 57413 is sustained in the amount of \$658,627 with interest pursuant to the CDA from 9 July 2009. ASBCA No. 57414 is denied.

Dated: 25 March 2013


ELIZABETH A. TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

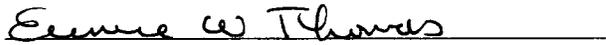
(Signatures continued)

I concur



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

I concur



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. 57413, 57414, 57565, Appeals of Green Dream Group, rendered in conformance with the Board's Charter.

Dated:



JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals