

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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Dillingham Construction Pacific Basin, Ltd.) ASBCA Nos. 53284, 53414
)
Under Contract No. F64133-99-C-0006)

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OPINION BY ADMINISTRATIVE JUDGE DICUS ON RESPONDENT'S SECOND
MOTIONS FOR SUMMARY JUDGMENT AND PARTIAL SUMMARY JUDGMENT

These appeals are taken from contracting officer's decisions denying appellant's claims for equitable adjustments under a contract for renovation and improvement of military housing. ASBCA No. 53284 involves interest costs related to the Government's refusal to pay for certain undistributed materials. The Government has again moved for summary judgment in that appeal. In ASBCA No. 53414, which involves an equitable adjustment claim comprised of several issues, the Government has, for the second time, moved for partial summary judgment on the issue of whether the contracting officer's denial of appellant's requests for weekend and holiday work rendered the assessment of liquidated damages improper. We grant the motion in ASBCA No. 53284 and deny the motion in ASBCA No. 53414.

FINDINGS OF FACT

The following findings are solely for the purpose of resolving the motions.

The Contract

1. Solicitation No. F64133-99-R0004 was issued by the 36th Contracting Squadron, Andersen AFB, Guam (Andersen) for the renovation of military housing units at Andersen. Prior to the submission of bids contractors were given the opportunity to ask questions

regarding the solicitation. (Respondent's Undisputed Proposed Findings of Fact (UPFF) 1, 8)¹

2. The following pre-proposal contractor questions and Government answers were incorporated into the solicitation and resulting contract by Amendment Nos. 0001 and 0003:

Question: Specifications 01011-9, 1.16 Storage Areas - Since the Government will not be responsible for the security of the materials, would the storage areas outside the base be allowed? Would the approval be required for any storage area and facility?

Response: Storage areas outside the base are authorized, but not required, as such the cost of the storage area is not a reimbursable expense. Approval for storage areas outside of the base is not required. Obtaining a storage area located in the laydown yard on Andersen AFB requires approval by the Contracting Officer.

....

Question: Is the Government going to pay for the undistributed materials (uninstalled materials on-site)?

Response: The Contracting Officer will make a determination on material payments on a case-by-case basis. In the past, the Contracting Officer has made the determination to allow material payments on large dollar items (i.e., windows, doors, A/C units).

(UPFF 9; R4, tab 1)

3. The contract, F64133-99-C-0006, was awarded to appellant on 28 March 1999 for the price of \$12,464,595.00 (UPFF 10; R4, tab 1).

4. The contract contained or incorporated the following relevant clauses: 52.211-12 LIQUIDATED DAMAGES - CONSTRUCTION (APR 1984) ALTERNATE I (APR 1984); 52.232-5 PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (MAY 1997) (Payment clause); 52.232-27 PROMPT PAYMENT FOR CONSTRUCTION CONTRACTS (JUN 1997) (the

¹ Appellant does not take exception to UPFFs 1-3, 7-10, and 13-21. All UPFF and Rule 4 citations are to ASBCA No. 53284.

Prompt Payment clause); 52.233-1 DISPUTES (OCT 1995); and 52.236-10 OPERATIONS AND STORAGE AREAS (APR 1984) (R4, tab 1). Liquidated damages were set at \$966 per increment for the first calendar day of unexcused delay, and \$885 per increment for each subsequent calendar day of unexcused delay for basic items; and, with respect to additive items, at \$233 for the first calendar day of unexcused delay and \$152 per day for each subsequent calendar day of unexcused delay (*id.*).

FINDINGS OF FACT - ASBCA No. 53284

5. The contract specification provided at paragraph 1.16, STORAGE AREAS:

The Contractor shall provide both open and covered storage space for protection to equipment and materials necessary for the project. The Government will not be responsible for the security of those materials.

(R4, tab 2)

6. By letter dated 3 September 1999, appellant provided a list to respondent of Undistributed Materials (UDMs) it alleges to have purchased for the contract. The total dollar amount of the UDMs presented was \$4,359,700.00. (UPFF 13)

7. By letter dated 3 September 1999, respondent approved reimbursement for UDMs regarding aluminum doors and frames, aluminum windows, sliding doors, A/C units and kitchen cabinets. The total amount approved was \$1,082,419.00. However respondent rejected appellant’s request for additional amounts. (UPFF 14) The rejected items included kitchen equipment. The prices of relevant items, including unit prices calculated by dividing total price by the number of items, are set out below:

<u>Item</u>	<u>No. of items</u>	<u>Total Price</u>	<u>Unit Price</u>
Sliding doors	106	\$ 61,000	\$
575.47			
Doors and frames	212	221,466	
1044.65			
Windows	592	149,487	
252.51			
A/C units	106	222,284	
2097.02			
Kitchen cabinets	1 lot	482,182	undetermined
Kitchen equipment	742	287,400	
387.33			

(R4, tab 4)

8. By letter dated 14 September 1999, appellant provided a second list to respondent of UDMs it alleges to have purchased for the contract and requested payment. The total dollar amount of this list was \$713,226.00. (UPFF 15) The list did not include any windows, doors or air conditioning units, and the highest unit cost was \$275.00 for bathtubs (R4, tab 7).

9. The contracting officer denied appellant's second list by letter dated 20 September 1999. The basis for the denial was that the request was for low dollar value items and that it was not Air Force policy to pay for such items (citing AFFARS Part 5336.291). The letter also noted that no one unit price exceeded \$275.00. (UPFF 16) The letter characterized the rejected items as "low dollar value items" (R4, tab 8).

10. By letter of 18 October 2000 appellant filed a claim in the amount of \$95,867.00 for interest costs incurred as a result of not receiving payment for UDMs. Appellant asserts in the claim at page 6 that it incurred interest expense because it "financed the cost and the interest expense on monies outstanding for undistributed materials Under FAR 52.232-27, the interest rate applicable to this issue is the 'Renegotiation Board Interest Rate.'" (R4, tab 12) The contracting officer denied the claim in an undated decision received by appellant on 1 December 2000. Appellant filed its appeal on 22 February 2001. (R4, tabs 13, 14)

11. Appellant does not contend that respondent declined to issue payment for windows, doors and air conditioning units before those items were installed.

12. Respondent's UPFF 6 cites a portion of AFFARS 5336.291. In its response, appellant takes exception only to the failure to include the entire regulation. From this we find it is undisputed that AFFARS 5336.291 constituted a statement of Air Force policy. It provides:

AFFARS 5336.291 Contract progress schedules and reports for construction contracts (OMB Approval Number 21-RO129).

(a) AF Form 3064, Contract Progress Schedule, shall be used to satisfy the requirements at clause FAR 52.236-15, Schedules for Construction Contracts. [Use of the AF Form 3064 is required for all delivery orders priced over the Simplified Acquisition Threshold (SAT) under requirements type or Indefinite Delivery/Indefinite Quantity contracts when the performance period of the order is 60 days or more. The contract officer [sic] may use the AF Form 3064 or an abbreviated progress schedule and method of progress

reporting for delivery orders under the SAT when the performance period is 60 days or more.] Additional copies of the form may be used to provide for a performance period in excess of the time frame available on the form. Upon submission of the initial AF Form 3064, the contracting officer and civil engineer shall carefully evaluate the percentage of the total job assigned to each work element. Particular attention shall be devoted to those elements to be performed in the early stages of the effort to preclude overstatement that would result in an imbalance in payments and exceed the value of work performed. Work elements shall be limited to those tasks which will indicate the progress of the work and which may be readily identified and measured by personnel monitoring the contractor's progress. Normally the percentage factors of each work element should be related to the total value of the contract. This may vary, however, depending on the percentage factor the contracting officer chooses to assign for materials stored on-site. Consideration for materials stored on-site should be limited to major high-cost items. It is not the policy of the Air Force to pay the contractor for miscellaneous low dollar value items prior to installation. Payment of materials stored off-site is generally discouraged, and is prohibited unless sound procedures are established for their accountability and control. Payments for materials in advance of installation will be substantiated with paid invoices.

(UPFF 6; appellant's response to UPFF 6)

DECISION-ASBCA No. 53284

Summary judgment is appropriate where no material facts are genuinely in dispute and the moving party 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 which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Inferences must be drawn in favor of the party opposing summary judgment. *Hughes Aircraft Co.*, ASBCA No. 30144, 90-2 BCA ¶ 22,847. In deciding a motion for summary judgment, we are not to resolve factual disputes, but to ascertain whether material disputes of fact are present. *General Dynamics Corp.*, ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851. The nonmovant may not rest on its conclusory pleadings, but must set out, by affidavit or otherwise, what specific evidence could be offered at trial. Failing to do so may result in the motion being granted. Mere conclusory assertions do not raise a genuine issue of fact. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624 (Fed. Cir. 1984). Under summary judgment procedures it is usually necessary for the nonmoving party to have an

adequate opportunity for discovery, and summary judgment should not be granted where the nonmovant has been denied the chance to discover information essential to its opposition. *Burnside-Ott Aviation Training Center, Inc. v. United States*, 985 F.2d 1574, 1582 (Fed. Cir. 1993). In our 19 December 2001 decision, *Dillingham Construction Pacific Basin, Ltd.*, ASBCA Nos. 53284, 53414, 02-1 BCA ¶ 31,718 (“*Dillingham I*”), we denied respondent’s motion for summary judgment because there had not been an adequate opportunity for discovery. We conclude that appellant by now has had an adequate opportunity for discovery. Accordingly, we proceed to the merits of the motion.

Respondent has not submitted affidavits. While the lack of affidavits may be a shortcoming, affidavits are not a prerequisite to granting a summary judgment motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Respondent relies principally on Rule 4 documents and bases its motion on three points: payment was not appropriate under the Prompt Payment clause; payments were not mandatory; and it is inappropriate to consider UDMs stored off-base under the contract and pertinent regulations. Appellant summarizes its response as based on law of the case, and arbitrary and capricious actions and abuse of discretion by the contracting officer regarding failure to consider long lead items, the remoteness of Guam, and in determining what items were “large dollar items.” Response at 2. We do not address all the issues as they are articulated in the motion, as we conclude the Prompt Payment Act is dispositive.

The Prompt Payment Clause

Although it is not clear from appellant’s claim what contractual basis it relies on for recovery of interest, the claim refers to FAR 52.232-27 as establishing the applicable interest rate (finding 10). That reference is to the Prompt Payment clause (finding 4), which provides in pertinent part at (a)(4):

(iv) Interest penalties are not required on payment delays due to disagreement between the Government and the Contractor over the payment amount or other issues involving contract compliance, or on amounts temporarily withheld or retained in accordance with the terms of the contract. Claims involving disputes, and any interest that may be payable, will be resolved in accordance with the clause at 52.233-1, Disputes.

Both the Prompt Payment clause and the law it implements, the Prompt Payment Act, 31 U.S.C. §§ 3901-07, require the Government to pay its bills on time or else pay an interest penalty when payments are made late. Neither, however, requires payment of interest penalties when there is a dispute between the parties over compliance with the contract. 31 U.S.C. § 3907(c). Decisional law has interpreted the Act and the clause, refining the requirement so as to limit the exception to “an objectively discernible dispute.” *E.g., Asbestos Free, Inc.*, ASBCA No. 50805, 98-1 BCA ¶ 29,488. The dispute as to

whether appellant was entitled to progress payments for all UDMs is objectively discernible; so much so that it is, as respondent argues, “the *sine qua non* of the appeal” (Gov’t mot. at 8).² We see no basis for recovery under the Prompt Payment clause. We grant respondent’s motion and deny the appeal.

FINDINGS OF FACT - ASBCA No. 53414

For purposes of this motion, findings of fact 12 through 25 in *Dillingham I* are adopted. Familiarity with that decision is assumed.

DECISION

In *Dillingham I* respondent sought partial summary judgment in ASBCA No. 53414 on, *inter alia*, the issue of whether appellant is entitled to remission of liquidated damages because the contracting officer improperly denied appellant’s requests to work on weekends and holidays. Although we granted the portions of respondent’s first summary judgment motion dealing with two other issues, we denied the motion with respect to weekend and holiday work. We did so because, in considering appellant’s abuse of discretion argument, we concluded there was a credibility issue which could only be resolved by observing the testimony and demeanor of the relevant witness or witnesses. In denying the motion, we said: “we think it reasonable to test the contracting officer’s reasons for denial through testimony at a hearing.” *Dillingham I* at 156,712. Although not articulated in *Dillingham I*, the granting of the motion would not have resolved many other issues for which further proceedings are necessary, so our holding hardly imposed an onerous burden on the parties. That situation remains unchanged.

In this second partial summary judgment motion respondent avers the same facts and raises the same issue: “[the] alleged improper assessment of liquidated damages on the basis of the denial of Appellant’s requests to work on (1) weekends and (2) federal holidays.” (Gov’t mot. at 1) Respondent has submitted no affidavits and, while it has submitted new attachments having principally to do with safety matters, none of the new attachments are cited as support for its proposed findings. Similarly, it has presented new arguments, but none go to the issue of abuse of discretion which was the basis for our denial of the first summary judgment motion in *Dillingham I*. Accordingly, the motion is denied.

SUMMARY

We grant respondent’s summary judgment motion in ASBCA No. 53284. We deny respondent’s motion for partial summary judgment in ASBCA No. 53414.

² While there may be some other basis for recovery, it has not been presented to the contracting officer and, thus, has not met a prerequisite to our jurisdiction.

Dated: 6 December 2002

CARROLL C. DICUS, JR.
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 Nos. 53284 and 53414, Appeals of Dillingham Construction Pacific Basin, Ltd., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals