

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Environmental Safety Consultants, Inc.) ASBCA No. 53485
)
Under Contract No. N62472-90-C-5164)

APPEARANCE FOR THE APPELLANT: Mr. Peter C. Nwogu
President

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
Ellen M. Evans, Esq.
Trial Attorney
Engineering Field Activity
Chesapeake
Washington, DC

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

Appellant Environmental Safety Consultants, Inc. (ESCI) has filed a motion for summary judgment on the grounds that the record in the appeal shows that there is no genuine issue as to any material fact and that it is entitled to judgment on its quantum claim of \$338,601.68 as a matter of law. The Government has opposed the motion on the basis that appellant's motion is not properly supported, it has not had an adequate opportunity to conduct discovery to present facts in opposition to the motion, and disputed material facts preclude summary judgment in appellant's favor. We deny the motion.

STATEMENT OF FACTS

On 21 September 2001, appellant filed its complaint in the subject quantum appeal with two pages attached entitled, "Environmental Safety Consultants, Inc. - ASBCA No. 53485 - Statement of Costs" that itemized costs claimed in the amount of \$338,601.68. Appellant's claim for additional work breaks down into the following elements of cost: equipment rental, labor, payroll taxes, travel and per diem, materials, overhead, profit, subcontractor surcharges, testing, on-site subcontractor labor, lab analysis, off-site transportation and disposal charges, remission of liquidated damages, and interest.*

* Interest is claimed in the amount of \$126,247.94 from the date of the certified claim. Appellant will be entitled to such interest as is allowed by the Contract Disputes Act, 41 U.S.C. § 611, on amounts to which it is found due from the date

Appellant's affidavit of Mr. Peter Nwogu in support of the motion for summary judgment states that the facts set forth in the said Statement of Costs are undisputed by reason of the failure of the Government to comply with the Board's Order on Proof of Costs to provide a complete and detailed response to appellant's statement of costs organized in the same schedule format.

The Government's response, dated 23 October 2001, to appellant's statement of costs denied the validity and accuracy of the costs because ESCI had allegedly not cooperated in the performance of a Government audit and had not produced original source documentation evidencing the costs. The purpose of the Board's Order on Proof of Costs in a quantum appeal is to obtain stipulations as to costs through the inspection of the documentation that is cited in support of or opposition to a claimed cost so that the introduction of cost and accounting records in evidence at the hearing can be avoided. Upon receipt of a statement of costs, the opposing party is entitled to audit the costs or otherwise examine the claimant's supporting books and records.

An Order on Proof of Costs usually contains the following provision:

The lack of response to any cost item or component thereof claimed by appellant shall be deemed an admission.

The form of order sent to the parties with the Board's Docketing Notice in the subject appeal did not include this provision. In a telephone conference call on 14 November 2001, the Board requested a compliant supplemental response. The Government asserted its inability to provide any significant response before an examination of appellant's books and records. The Board ordered the Government to file a supplemental response later.

On 18 January 2002, the Board ordered appellant to cooperate in making available for examination all financial documentation that the Government considers relevant to verifying the claim. On 30 April 2002, the Board ordered the Government to file its supplemental response on the basis of the examination of books and records that took place on 21-22 March 2002, no later than 28 May 2002.

On 28 May 2002, the Government filed a supplemental response to appellant's statement of costs restating its inability to respond due to appellant's lack of cooperation and lack of records. The Government explained:

the contracting officer received appellant's claim of 25 June 1992. This portion of the claim is premature. *Blake Construction Co., Inc.*, ASBCA No. 34569 *et al.*, 88-3 BCA ¶ 21,131; *Tenaya Construction*, ASBCA No. 27799, 87-1 BCA ¶ 19,449. Appellant's claim amount is more accurately stated as \$212,353.74.

[A]ppellant has never produced for the Government any original source documentation for contract costs or claim costs.

....

During the Government's attempted review of appellant's records in March, Mr. Nwogu produced no original source documents pertaining to costs on the . . . contract, or copies of same.

There are no reliable records establishing what the costs incurred for the project were, or what of these costs were ever actually paid. . . . [T]here is no way to establish what the costs expended or incurred actually were. Furthermore, appellant has consistently refused to identify which of the costs it allegedly paid were for work required under the contract.

....

Appellant has not established what, if any, costs it actually incurred for contract work or alleged claim related costs.

(Gov't answer to app. 26 March 2002 submission, dated 28 May 2002, at 2-4). The Government thus asserted its inability to evaluate the claimed costs because appellant has failed to segregate contract costs from costs claimed for additional work.

Appellant responded that it had cooperated with the Government in the examination of books and records and submitted a copy of the supplemental records it disclosed to the Board. The Board's Order, dated 19 July 2002, noted for appellant that to the extent its statement of costs may not have identified specific documents supporting items of costs claimed, the Board may be unable to find supporting documentation of claimed costs. The Order noted for the Government that as a result of its failure to file the response to the statement of costs that the Board ordered, the Board did not have in the record any specification of documentary evidence to support the Government's challenge to appellant's claim.

On 1 August 2002, the Government forwarded a copy of a Defense Contract Audit Agency (DCAA) memorandum, dated 19 June 2002 to Government counsel, to the Board. DCAA stated that as a result of the inadequacies in appellant's quantum claim and lack of supporting documentation, it recommended that the claim not be used as the basis for settlement. Government counsel has advised that no DCAA audit report has been or will be prepared.

The Board's Order, dated 26 August 2002, reiterated the requirement for response to the statement of costs and made clear that "[t]he failure to provide a written response in detail addressed to the cost, as with a request for admission, is an admission."

On 10 September 2002, the Government raised questions about having made admissions in its response to appellant's statement of costs, which the Board answered in a telephone conference call on 12 September 2002. Appellant has the burden of proof, and there is no presumption attached to the statement of costs. The Board granted the Government's request to submit a further response to appellant's statement of costs, which the Board anticipated receiving based on the Government's review of appellant's submission of supplemental documentation. In response to the Government's Motion to Compel Production of Records, the Board issued an Order on Discovery, dated 21 November 2002, for appellant to produce the documentation the Government has requested. Appellant subsequently represented to the Board that all its documentation of quantum has been disclosed. Appellant stated as follows:

All that ESCI has been asked to provide have [sic] been submitted to the Board. ESCI has cooperated by filing all that the company has and the government must request specific information needed, and that the government is not cooperating with ESCI. This is how the government is derailing the matter by not responding to ESCI's specific items in claim for quantum determination. The cost statement is straight forward, and were [sic] prepared in accordance to [sic] the Boards ruling of 3 March 2000.

(App. letter dated 28 April 2003, to the Board)

The parties failed to file status reports due 12 December 2002. On 29 April 2003, the Board ordered the parties to propose a schedule for processing the appeal. In response appellant filed its motion for summary judgment, and the Government stated its reasons for being unable to commit to a proposed hearing date other than considering May 2004 an appropriate time for hearing the appeal. On 27 May 2003, the Board issued its scheduling order providing for discovery to be completed by 9 September 2003, and the hearing to begin on 18 November 2003. In response to the Government's request, the Board has issued subpoenas for the Government to conduct depositions and document discovery in July 2003. On 18 June 2003, the Government filed its opposition to appellant's motion for summary judgment.

The Government has not filed a complete and detailed written response to appellant's statement of costs in schedule format with evidentiary support for its challenges to appellant's itemized costs pursuant to the Board's orders.

In further support of its motion, appellant has argued that “no fairness exist[s] at this time for a hearing” due to the Government’s admissions and “the Government derailing the case and causing the case to stagnate and grow stale, since August 1991.” Appellant asserts that the Navy has “unreasonably caused financial hardship and terror” to ESCI and Mr. Nwogu since the claim was filed on 26 August 1991. Appellant also asserts that “the Government was never interested in the resolution of Appellant’s entitlement award.” (App. mot. at 2) Aside from the entitlement portion of the appeal, which we do not address, the record in the quantum portion of the appeal reveals considerable delay on the part of both parties.

DECISION

Summary judgment is properly granted when there is no genuine issue of material fact, and the movant is entitled to judgment as a matter of law. 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 the party opposing summary judgment. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987); *The Swanson Group, Inc.*, ASBCA No. 52109, 01-1 BCA 31,164 at 153,929. In deciding a motion for summary judgment, we are not to resolve factual disputes, but ascertain whether material disputes of fact are present. *DynCorp*, ASBCA No. 49714, 97-2 BCA ¶ 29,233. 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); *Dillingham Construction Pacific Basin, Ltd.*, ASBCA Nos. 53284, 53414, 03-1 BCA ¶ 32,098.

A proper motion for summary judgment must set forth sufficient facts, shown by specific citation to the record, to establish that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *ITT Defense Communications Division*, ASBCA No. 44791, 94-2 BCA ¶ 26,931. Appellant has submitted the affidavit of Mr. Nwogu citing the facts in the complaint filed 21 September 2001, as undisputed. Appellant argues that the Government’s failure to comply with the Board’s orders for response to the statement of costs constitutes an admission, and for this reason the facts are undisputed.

To meet its burden of proof, appellant must establish the reasonableness of the costs claimed and their causal connection to the event on which the claim is based. *Metric Constructors, Inc.*, ASBCA No. 46279, 94-1 BCA ¶ 26,532, *motion for reconsid. denied*, 94-2 BCA ¶ 26,827. Where the contractor fails to provide accounting or other evidence to substantiate its allegations of a quantum recovery, it has not met its burden of proof and is therefore not entitled to payment. *American Mechanical, Inc.*, ASBCA No. 52033, 03-1

BCA ¶ 32,134. Appellant does not have the benefit of a presumption of correctness to its statement of costs, but is required to identify supporting evidence for the items of cost claimed.

The Government has disputed the availability of accounting evidence to substantiate the alleged facts in appellant's statement of costs by presenting facts in an affidavit of Government counsel that "the [accounting] documents that have been produced . . . are questionable copies of incomplete records, with significant omissions" and that appellant "has refused to provide supporting records which have been specifically requested." In its opposition to the motion for summary judgment, the Government argued that further discovery is required to respond to the motion. The Government wants to determine what "records exist (or did exist) which may establish the correct amount or amounts to which ESCI may be entitled, or which will negate much of what's included in the statement of costs." (Aff. of Ellen M. Evans, dated 18 June 2003). The Government has thus demonstrated its need for further discovery to support its challenge to appellant's evidence, which warrants denial of the motion for summary judgment.

Furthermore, on this record the Board ascertains that material disputes of fact are present. The Board cannot resolve any factual disputes as to the elements of cost and amounts thereof to which appellant is entitled at this time. The Board does not now consider appellant's supporting evidence, including the record in the entitlement portion of the appeal, to determine whether appellant has met its burden of proof.

In addition, appellant has failed to establish in this motion its entitlement to sanctions against the Government.

Appellant has failed to demonstrate the undisputed facts that would entitle it to the quantum recovery claimed as a matter of law, and the motion for summary judgment is, accordingly, denied. The parties shall proceed in accordance with the Board's Scheduling Order, dated 27 May 2003, as amended, so that appellant will have the opportunity to present its supporting evidence at the hearing scheduled to begin on 18 November 2003.

Dated: 1 July 2003

LISA ANDERSON TODD
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMLER
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 No. 53485, Appeal of Environmental Safety Consultants, Inc., rendered in conformance with the Board's Charter.

Dated:

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