

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Chem-Care Company, Inc.) ASBCA No. 53614
)
Under Contract No. N00187-97-D-6890)

APPEARANCE FOR THE APPELLANT: Mr. Earnest Miller
President

APPEARANCES FOR THE GOVERNMENT: Craig D. Jensen, Esq.
Acting Navy Chief Trial Attorney
Ellen M. Evans, Esq.
Trial Attorney
Naval Facilities Engineering Command
Litigation Headquarters
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD

This is an appeal from the failure of the contracting officer to issue a final decision on a claim for an equitable adjustment under a janitorial services contract. A hearing was held on entitlement only and the parties were allowed to submit post-hearing briefs. We received a brief from the government, but not from appellant.

FINDINGS OF FACT

1. On 1 March 2001, Chem-Care Company, Inc., by counsel, submitted a request for equitable adjustment (REA), certified as a claim by its president, for \$189,528.51 (R4, tab 16). On 19 November 2001, Chem-Care filed a notice of appeal from the failure of the contracting officer to issue a final decision and the appeal was docketed as ASBCA No. 53614. The claim included a summary of adjustments requested as follows¹:

¹ The item descriptions and amounts are quoted exactly as presented in the claim; however, we have omitted the notes from the claim summary matrix and have corrected Item No. K to read Item No. J.

No.	Item Description	Amount
A	Improper/Excessive/Unsupported Liquidated Damages	\$23,163.00
B	Lack of payment for additional days [sic] work due to Leap Year	\$4,735.88
C	Increase in supply prices due to gas and paper price increases	\$12,719.43
D	Failure to provide appropriate, working and locking dispensers requiring excessive materials	\$22,469.59
E	Excessive inspections and multiple inspections and Disruption to Unchanged work from Changes	\$64,682.14
F	Additional Insurance Costs directed by Government	\$42,199.35
G	Failure to Timely Exercise Option - Additional Start Up Costs	\$ 2,444.24
	Subtotal of Damages	\$172,413.63
H	Profit on Damages (10%)	Included in Item Calculations
I	Proposal Preparation Costs - Legal Fees	\$9,714.97
J	Time Value of Money (lost financing costs)	\$7,399.91
	TOTAL DAMAGES	\$189,528.51

(R4, tab 16 at 15 of 44)

2. On 10 July 2003, the government filed motions with respect to five of the adjustments requested. The Board issued a decision on these motions on 6 April 2004. *Chem-Care Co., Inc.*, ASBCA No. 53614, 04-1 BCA ¶ 32,593. Of the government's five motions, summary judgment in favor of the government was granted with respect to Item C (gas and paper price escalation claim) and Item J (time value of money claim). The appeal as to Item F (additional insurance costs) was dismissed for lack of jurisdiction.

3. On 15 September 1999, the Navy Public Works Office, Norfolk, Virginia, awarded Contract No. N00187-97-D-6890 (the contract) to Chem-Care for custodial services at Naval Station, Norfolk (R4, tab 1 at 1). It was a sealed bid procurement restricted to Small Business Administration (SBA) section 8(a) eligible businesses (R4, tab 1 at 1, 58).

4. The contract contemplated an annual contract with a base year and four one-year options. The bid was made on a unit price basis and was for a firm fixed price for the base year and for each option year (R4, tab 1 at 1-29).

5. The contract described the contractor's duties in the contract schedule, subsection C.5.1, Basic Work Requirements. These work requirements explained the services required, such as vacuuming carpets and rugs, and then stated the degree to which the service was expected to be completed. For instance, when vacuuming, the "rugs/carpets shall be cleaned to a soil free condition. Particular attention shall be taken along baseboards, under furniture, in corners, and behind doors." (R4, tab 1 at 36)

6. Per contract schedule, section E, Inspection and Acceptance, the contractor was to maintain an inspection system acceptable to the government that included maintaining complete inspection records. While the overall duty for inspections belonged to the contractor, the government retained the right to conduct on-site inspection of all facilities. The contract also contained FAR 52.246-4, INSPECTION OF SERVICES--FIXED-PRICE (AUG 1996), as well as FAC 5252.246-9303, CONSEQUENCES OF CONTRACTOR'S FAILURE TO PERFORM REQUIRED SERVICES (MAR 1996). The second clause provided, at paragraphs (a) and (b) that the government could inspect and make assessments according to statistically extrapolated surveillance methods, and use other surveillance methods including: "100% inspection, random sampling without extrapolated deductions, and planned sampling as prime surveillance methods; and incidental inspections and validated customer complaints as supplemental surveillance methods." Further, subparagraphs c(2) and c(3) stated that in the event of unsatisfactory work, the government had the option of allowing the contractor an opportunity to reperform the unsatisfactory work and assess liquidated damages in the amount of 15 percent of the value of the defective work. If the government did not choose to exercise the reperformance option, the government could deduct from the contractor's invoice all amounts associated with the unsatisfactory or nonperformed work. (R4, tab 1 at 45-46; tr. 5/14-16) The government was under no obligation to allow the contractor the opportunity to correct its errors and avoid price deductions, although, there were occasions when the government reversed a withholding after reviewing the matter (tr. 5/21).

7. Chem-Care's president, Mr. Earnest Miller (Miller) relied upon Mr. Tony Short (Short), to prepare Chem-Care's bid. Miller described Short as an independent contractor working with Chem-Care, but who had his own company at the time. (Tr. 2/68-69) In preparing the bid estimate, Short, according to Miller, based it on a team concept (tr. 2/73), planning to utilize eight teams of three or four people each (tr. 2/99) for a total of 29 people to clean 143 buildings (tr. 2/97). Under the team concept, a team of people would clean many areas with each team member responsible for limited types of duty. For example, one person would be responsible for vacuuming, another for emptying trash and another for dusting. (Tr. 4/114)

8. As the person who prepared Chem-Care's bid, Short was in the best position to defend Chem-Care's numbers regarding staffing but he did not testify. As part of its claim, Chem-Care included a copy of the pricing worksheet. The pricing worksheet disclosed that Chem-Care bid the solicitation on the basis of 649,809 square feet for which it planned to employ 29 workers, working 7.5 hours per day for 251 days annually. In addition, three managers were included in the estimate. (R4, tab 16, encl. 2)

9. Prior to award, the government, believing that Chem-Care had underbid the solicitation, informed the contractor of its suspicion and asked Chem-Care to confirm its bid. Short checked the bid, and, on behalf of Chem-Care, confirmed it in writing without changes. (R4, tab 20; tr. 2/69)

10. The government submitted documentation which details the dates and locations of unsatisfactory work for the base year of the contract, which is the period of time for which claim is made. These documents also include the computation of liquidated damages associated with the unsatisfactory work. (R4, tabs 4-15) These contemporaneous inspection reports and the documentation of the liquidated damages withheld are supported by testimony of government personnel (tr. 4/246-248, 5/16-18, 5/107-110, 114-17, 6/9-11). Appellant has not disputed with credible evidence a single citation of unsatisfactory work nor demonstrated that the computation of liquidated damages was improper. To the extent Miller testified generally that the inspections were improper or excessive, we find that Miller was onsite only about once a month to meet with his management staff (tr. 2/118) and he was no position to testify about the nature of the inspections.

11. While appellant alleged that there were excessive and multiple inspections causing disruption to unchanged work (Item E), there is no credible evidence in this record to substantiate that allegation. We find that the government inspections were not excessive and the liquidated damages were properly assessed.

12. While Miller testified that he sought information from the government regarding inspection methods and the alleged deficiencies (tr. 2/56-58), the credible evidence in the record establishes that the government inspectors worked directly with the contractor's on-site staff and communicated with Miller in directing them to the appropriate contract requirements, apprising them of deficiencies, and affording Chem-Care the opportunity to make corrections when deemed appropriate. (Tr. 5/55, 69-76, 109, 113-117)

13. Under Section C, ¶ C.5.1(k), of the contract, Chem-Care was required to service rest rooms and that work included replenishing supply holders and dispensers with the proper size and type product for the dispensers and holders in those rest rooms. Item D of the REA sought additional compensation for the government's alleged failure to provide appropriate, working and locking paper dispensers; however the contractor failed to support these allegations with testimony or documentary evidence. One government witness, who worked for the Navy by day and appellant at night,² testified

² The witness received permission to work part-time with Chem-Care and with Ryder, Chem-Care's predecessor, because he was not employed in Navy management or quality control (tr. 4/155-56).

that he had no recollection of broken dispensers (tr. 4/172-73), and that he did not fill the dispensers because Chem-Care did not consistently provide sufficient quantities of paper supplies to do so (tr. 4/230-34). There was no requirement or representation under the contract that such dispensers should be of the locking type. (R4, tab 1 at 38)

14. Item I of the REA sought additional compensation for attorney fees. While Chem-Care contends that these costs were incurred as part of proposal (REA) preparations, the attorney invoices billed to Chem-Care, dated 30 November 2000 and 28 February 2001, do not support that view. Rather, they support the view that they were expenses incurred for claim preparation. According to the invoice entry for 26 May 2000, Chem-Care's attorney met with Miller "to discuss issues and formulate [a] plan of attack for filing informal, and then if necessary, formal claims." The 8 November 2000 entry says the attorney had a discussion with Miller on this date and Miller "is sending documents and check to try and get the claim completed." On 4 January 2001, the attorney met with Miller and others to "discuss claim." (R4, tab 16 at encl. 15)

15. At the hearing, Miller agreed with government counsel when asked if the invoices from the law firm represented the cost "to put together what became [his] claim" (tr. 3/98). Moreover, there is no credible evidence that the attorney fees were incurred for furthering contract administration or the negotiation process. The allegation in the claim that appellant was directed by the government to prepare the REA (R4, tab 16 at 31) was not proved.

16. Chem-Care's amended complaint states:

As part of the Contract, Chem-Care had to perform certain cleaning on regular schedules based on daily and monthly calendars. However, it is important to note that the bid is based on square footages of work to be performed which were provided to the contractor by the Navy in the solicitation package. These square footages are in turn based on room areas times 251 *work days* of effort. Chem-Care bid the amount of \$1,188,707.07 for the Base Year of the Contract. This translates to an average daily cost of the work anticipated of \$4,735.88 based on the standard 251 work day year. During the past year, Chem-Care was also required to provide additional services on the 252nd day or Leap Year day, February 29, 2000. In reviewing the initial square footages supplied by the Navy, it was discovered that the Navy failed to include square footage for the additional day. [Emphasis in original]

Chem-Care believes that it is entitled to be compensated for this additional work. Accordingly, Chem-Care requests payment in the amount of \$4,735.88 for performing work on one additional day due to the leap year.

(Am. compl. at 9)

17. In its response to the government's amended answer to complaint, appellant states:

The work being performed was during the leap year is a question that when calculated appropriately cannot be denied. The basis of the conclusion is the 252nd day of this year, or February 29, 2000, was not calculated in the overall square footage presented within the bid schedule and the contract was never amended to provide compensation for the services performed by Chem-Care on that day.

(Resp. to am. answer, ¶ 9)

18. Chem-Care does not cite any provision in the contract that specifies or guarantees a specific number of days of performance, and our review reveals no such provision. Nor does our review reveal any representation in the contract or in the solicitation that the square footage is based upon 251 days as alleged by appellant.

DECISION

Item A: Improper/Excessive/Unsupported Liquidated Damages; and

Item E: Excessive inspections and multiple inspections and Disruption to Unchanged work from Changes

Appellant seeks the return of liquidated damages withheld by the government. In its REA, appellant contends that (1) the deductions were excessive for items not unsatisfactory; (2) that work not required to be performed was rated unsatisfactory; (3) that multiple deductions were taken for the same items; (4) that deductions were taken for work that was satisfactorily completed; (5) that deductions were assessed against entire quantities rather than against the lesser quantities rated unsatisfactory; (6) that the government retaliated against appellant by taking further deductions when Chem-Care complained to the contracting officer; and (7) that the government required Chem-Care to go back to correct satisfactory work for which it did not receive compensation. (R4, tab 16 at 16-17; am. compl. 7-8)

In Item E, appellant contends the government performed excessive and multiple inspections outside the contract requirements causing disruption to the work (R4, tab 16 at 22; am. compl. 13). The government admits taking deductions on the contract, but states that they were proper and appropriate (gov't answer, ¶ 17) and denies the inspections were excessive and disruptive (gov't answer, ¶ 40 *et seq*).

When a contractor seeks remission of liquidated damages, the government has the initial burden of demonstrating that appellant failed to comply with the terms of the contract. Once the government has overcome the initial burden, it is incumbent upon appellant to show either that the government incorrectly assessed the damages under the contract, or that appellant's failure to comply with the terms of the contract was excusable. *See KEMRON Environmental Services Corp.*, ASBCA No. 51536, 00-1 BCA ¶ 30,664 at 151,399.

Based upon our findings, the government has met its initial burden. Appellant has not shown the damages were improper or that its failure to perform was excusable. Nor has appellant demonstrated that the inspections were excessive or otherwise improper. Accordingly, Items A and E of appellant's claim are denied.

Item B: Lack of payment for additional day's work due to Leap Year

The contract was awarded on a yearly basis. In leap years, the year includes an additional day. Thus, the contract required performance on all required days during the year whether that year is a leap year or a non-leap year. We previously held that "if the number of square feet required by the contract to be performed was less than the square feet actually required to be performed, there might be a basis for relief." *Chem-Care Co., Inc.*, ASBCA No. 53614, 04-1 BCA ¶ 32,593 at 161,252. However, on the merits we conclude that appellant has not proven any set of facts that would entitle it to costs incurred for working an additional day during a leap year.

Item D: Failure to provide appropriate, working and locking dispensers requiring excessive materials

Chem-Care argues that it is entitled to an additional \$22,469.59, because the contract required the government to provide "standard" dispensers which it did not do. Chem-Care states that industry standards require that paper product dispensers be both operable and lockable; however, of those provided, 86 toilet paper dispensers and 31 paper towel dispensers were either nonfunctioning or not lockable. It is appellant's belief that as a result, these paper products were dispensed too quickly or possibly looted by the customers, costing the contractor more money to keep the dispensers stocked, as well as the cost of the liquidated damages it was assessed when inspectors found the dispensers empty (am. compl. at 11-12).

In response, the government's defense is that appellant failed to provide any evidence that the contract required the government to provide locking dispensers, that there were any broken dispensers, or that anyone stole the paper products.

While appellant has alleged that broken paper dispensers required excessive amounts of paper products, it has offered no evidence in support of that position. In fact, the evidence shows that appellant did not provide sufficient quantities of paper to fill the dispensers (finding 13). In addition, the contract did not require locking dispensers (finding 13). Therefore, we deny this portion of appellant's claim due to a lack of credible evidence to substantiate the allegations. *IMS Engineers - Architects, P.C.*, ASBCA No. 53471, 06-1 BCA ¶ 33,231 (unsubstantiated assertions do not constitute proof or evidence).

Item G: Failure to Timely Exercise Option - Additional Start up Costs

At the hearing on this matter, appellant, through the testimony of its president, conceded this portion of its claim (tr. 6/50-51). Accordingly, Item G of appellant's claim, valued at \$2,444.24, is denied.

Item H: Profit on Damages (10%)

Appellant maintains it is entitled to a 10 percent profit on its claimed damages. While it is true that a successful appellant is entitled to recover a reasonable profit on an equitable adjustment, *C.H. Hyperbarics, Inc.*, ASBCA No. 49375 *et al.*, 04-1 BCA ¶ 32,568 at 161,159-160, since our decision does not grant entitlement to Chem-Care to any damages, there can be no award of profit. Item H of the contractor's claim is denied.

Item I: Proposal Preparation Costs – Legal Fees

Appellant claims \$9,714.97 in legal fees for proposal preparation costs. In its complaint appellant states:

In addition to the items listed above Chem-Care incurred additional cost in the assembling of this proposal through its use of Vandeventer Black LLP of Norfolk, VA. This is a reimbursable cost under FAR 31.205-33(a) which states that “cost of professional and consultant services rendered by persons who are not officers or employees of the contractor are allowable (subject to certain restrictions) ... when reasonable in relation to the services rendered ...[.]” The restrictions referred to pertain to the disallowance of cost of legal, accounting and consulting services when incurred in connection with “the prosecution of claims or appeals” against

the government. Accordingly Chem-Care request [sic] the amount of \$9,714.97 for pricing and scooping [sic] of the unadjudicated changes and for proposal preparation cost incurred on account of government responsible changes.

(Am. compl. at 20)

Under FAR 31.205-33, attorney fees may be reimbursable costs. However, such costs are unallowable if incurred in connection with the prosecution of claims. This is a factual question that is to be decided by examining why the contractor incurred the costs and whether they were genuinely incurred for the purpose of materially furthering the contract including preliminary negotiations, or to promote the prosecution of a claim. *Advanced Engineering & Planning Corp., Inc.*, ASBCA Nos. 53366, 54044, 03-1 BCA ¶ 32,157 at 158,992-995, *aff'd by Johnson v. Advanced Engineering & Planning Corp.*, 292 F. Supp. 2d 846 (E.D. Va. 2003); *see also Bill Strong Enterprises, Inc. v. Shannon*, 49 F.3d 1541 (Fed. Cir. 1995). Here the evidence strongly suggests the costs were incurred to prosecute a claim. The claim for attorney fees is therefore denied.

The appeal is denied.

Dated: 25 October 2006

RICHARD SHACKLEFORD
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

JACK DELMAN
Administrative Judge
Acting 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. 53614, Appeal of Chem-Care Company, Inc., rendered in conformance with the Board's Charter.

Dated:

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