

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
AshBritt, Inc.) ASBCA Nos. 56145, 56250
)
Under Contract No. W912P8-05-D-0025)

APPEARANCES FOR THE APPELLANT:

William J. Spriggs, Esq.
John H. Korn, Esq.
Katherine A. Allen, Esq.
Rachel W. McGuane, Esq.
Buchanan, Ingersoll & Rooney PC
Washington, DC

APPEARANCES FOR THE GOVERNMENT:

Thomas H. Gourlay, Esq.
Engineer Chief Trial Attorney
Lanny R. Robinson, Esq.
Engineer Trial Attorney
U.S. Army Engineer District,
Vicksburg

OPINION BY ADMINISTRATIVE JUDGE SCOTT
ON APPELLANT’S MOTIONS FOR SUMMARY JUDGMENT AND TO SHIFT
BURDEN OF PROOF

Appellant AshBritt, Inc. appealed under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, from the contracting officer’s (CO’s) denial of certain of its claims under its captioned contract with the United States Army Corps of Engineers (Corps) for the removal, reduction and disposal of debris generated by Hurricane Katrina in Mississippi. ASBCA No. 56145 is AshBritt’s appeal from the CO’s deemed denial of its claim that certain of its tree and stump work, including backfilling voids, had not been paid. ASBCA No. 56250 is AshBritt’s appeal from the CO’s decision denying the claim, issued after an agreed stay of Board proceedings to allow the CO time to decide. Appellant has moved for summary judgment on liability that:

1. Under the T&S [tree and stump] Modifications to the -025 Contract, the subCLIN [subContract Line Item No.] 0005AB “Leaners and Stump Extraction” work required removal of both the tree and its affiliated stump.

2. The removal of a tree and the affiliated stump, and the removal of an unattached stump, leaves [sic] a stump excavation cavity in the ground, which the T&S Mods required AshBritt to backfill.

3. The T&S Tickets completed by the Government determined that AshBritt had removed more than 183,000 leaners and affiliated stumps and had removed more than 24,000 unattached stumps. As the work had been defined and recorded by the Government, this meant that AshBritt had created more than 207,000 stump excavation cavities, which were required to be backfilled. However, the Government recorded and has paid for only 42,000 stump cavity backfills, and has failed to pay for the vast majority of AshBritt's work backfilling stump cavities.

4. The T&S Mods and the Government-completed T&S Tickets establish that AshBritt backfilled the number of excavated stump holes equal to the total of SubCLIN 0005AD Leaners and Stump Extractions plus SubCLIN 0005AD Unattached Stumps Requiring Extraction recorded by the Government on the T&S Tickets during performance of the work of the T&S Mods.

5. It would be extremely difficult, if not impossible, to attempt now to either reevaluate the correctness of the T&S Tickets' numbers regarding leaners and affiliated stumps removed or unattached stumps removed based on recollections of what occurred then or on re-examination now of documents or the actual areas where this work had been done, years after the fact.

6. Given the Government's Actions and Inactions, including failure to comply with the duties of good faith, fair dealing and cooperation in recording backfills, AshBritt is entitled to be paid for backfilling all the stump cavities which the Government's T&S Tickets show were created by removal of leaners and affiliated stumps and removal of unattached stumps.

7. Alternatively, AshBritt is entitled to be paid for backfilling all the stump excavation cavities which the Government's records show were created by removal of leaners and affiliated stumps and by removal of unattached stumps, except to the extent that the Government can meet the high burden of proof to prove that particular recorded leaner and affiliated stump removals and unattached stump removals did not result in backfilling stump excavation cavities by AshBritt.

(App. mot. at 1-2)

Appellant relies upon the contract, documentary exhibits, deposition testimony and the sworn declaration of its former contract administrator in support of its summary judgment motion.

Appellant moves, in the alternative, that:

If the Board Does Not Grant AshBritt's Motion for Summary Judgment on the Government's Liability to AshBritt and If the Government Contends That the Number of Stump Cavity Backfills Was Not Equal to the Total of Leaners and Stump Extractions and Unattached Stumps Extracted Recorded on the T&S Tickets, Then The Government Should Have The Burden of Proof To Demonstrate the Number Of Instances In Which Such Stump Extraction Work Recorded on the T&S Tickets Was Incorrect and The Number of Instances in Which Such Work Did Not Result in Stump Cavity Backfills.

(App. mem. in support of mot. at 33)

The Corps opposes appellant's motion for summary judgment on the ground that there are material facts in dispute. It relies upon the contract, documentary exhibits, deposition testimony and the sworn declaration of its former management analyst and debris resident engineer. The government has not addressed appellant's alternative motion pertaining to burden of proof.

We deny appellant's motions for the reasons stated below.

STATEMENT OF FACTS (SOF) THAT ARE UNDISPUTED FOR PURPOSES OF APPELLANT'S SUMMARY JUDGMENT MOTION

The following facts are undisputed, for purposes of appellant's summary judgment motion:

1. On 15 September 2005, AshBritt entered into the captioned contract with the Corps to assist with clean-up efforts in Mississippi following Hurricane Katrina. The contract incorporated AshBritt's proposal dated 10 September 2005. (App. mot., statement of undisputed facts (Fact) No. 1; gov't opp'n at 3; app. reply at 4)

2. AshBritt and the Corps entered into a series of 11 modifications adding CLIN 0005, for Leaners, Hangers, Stump Removals, and Backfilling Stump Holes, also known as "tree and stump" or "T&S" work (Fact No. 2; gov't opp'n at 3; app. reply at 4).

3. SubCLINs varied in numbering format. For the amendment/modifications, identified by appellant as "T&S Mods," listed as "a" through "i" below, the subCLINs read generally as: 0005AB - Leaners and Stump Extraction; 0005AC - Stump Cavity backfill; 0005AD - Unattached Stumps Requiring Extraction. For the two amendment/modifications listed below as "j" and "k," a different CLIN numbering sequence was used. For those, the subCLIN for "Leaners and Stump Extraction" was further divided into individual subCLINs 0005AB through 0005AF for the varying leaner sizes; subCLIN 0005AG provided for "Stump Cavity Backfill;" and the subCLIN for "Unattached Stumps Requiring Extraction" was divided further into individual subCLINs 0005AH through 0005AM for the varying stump sizes. The agreed list is as follows:

a. Amendment/Modification 08 to Order Number W912P8-05-D-0025-DE01 for Jackson County, Mississippi...;

b. Amendment/Modification 07 to Order Number W912P8-05-D-0025-DE03 for Forrest County, Mississippi...;

c. Amendment/Modification 06 to Order Number W912P8-05-D-0025-DE04 for Hancock County, Mississippi...;

d. Amendment/Modification 03 to Order Number W912P8-05-D-0025-DE05 for George County, Mississippi...;

e. Amendment/Modification 06 to Order Number W912P8-05-D-0025-DE06 for Perry County, Mississippi...;

f. Amendment/Modification 08 to Order Number W912P8-05-D-0025-DE07 for Lamar County, Mississippi...;

g. Amendment/Modification 05 to Order Number W912P8-05-D-0025-DE08 for Covington County, Mississippi...;

h. Amendment/Modification 05 to Order Number W912P8-05-D-0025-DE09 for Lincoln County, Mississippi...;

i. Amendment/Modification 07 to Order Number W912P8-05-D-0025-DE13 for City of Pass Christian, Mississippi...;

j. Amendment/Modification 05 to Order Number W912P8-05-D-0025-DE14 for Pike County, Mississippi...;

k. Amendment/Modification 06 to Order Number W912P8-05-D-0025-DE16 for Walthall County, Mississippi....

(Fact No. 3; gov't opp'n at 3-4; app. reply at 4)

4. The number of recorded leaners is 177,620 and the number of unattached stump extractions is 18,203, for a combined total of 195,823 (Fact No. 5; gov't opp'n at 6; app. reply at 4-5).

5. The Corps has paid for 42,359 total backfills under CLIN 0005AC "Stump Cavity Backfill" or CLIN 0005AG "Stump Cavity Backfill" (Fact No. 6; gov't opp'n at 6-7; app. reply at 5).

6. Prices varied from one county to another. However, with the numbering format exception noted in SOF ¶ 3, the T&S Mod language is uniform throughout all of the T&S Mods. (Fact No. 8; gov't opp'n at 8; app. reply at 6)

7. The T&S Mods required that "stump holes" or "stump cavities" be backfilled following extraction of the stumps. The scope of work provides that "Stump holes shall be backfilled with clean topsoil to match the existing grade." There was no requirement as to the source of the clean topsoil or as to whether or not it was purchased from a third party. (Fact No. 19; gov't opp'n at 18; app. reply at 9)

8. In a Corps e-mail sequence, Corps personnel acknowledged that problems might exist when T&S work performed on a site was recorded over multiple days (Fact No. 22; gov't opp'n at 20; app. reply at 10).

9. Physical work under the T&S Mods was completed on 29 August 2006 (Fact No. 24; gov't opp'n at 21; app. reply at 10).

10. On 24 May 2007, AshBritt submitted its claim in the amount of \$28,302,836 – “Claim Under Contract Number W912P8-05-D-0025, Payment for Services Provided – Backfilling Voids and Various Other Tree and Stump CLINs” (Fact No. 25; gov't opp'n at 21; app. reply at 10).

DISPUTED FACTS

The government disputes at length at least 18 of appellant's 25 proposed Facts and, except to the extent that appellant agreed to certain modifications, reflected in the undisputed facts above, and withdrew its Facts Nos. 20 and 21 (app. reply at 9), appellant challenges the basis for each dispute. A few examples follow.

The government disputes appellant's Fact No. 4, that the Corps developed a T&S ticket to track the numbers of leaners/stumps removed, of unattached stumps removed, and of backfills completed at each location (Fact No. 4; app. reply at 4). The government contends that the creation of the T&S ticket format was a collaborative effort between the Corps and AshBritt, which adopted a similar version of the form and used it during contract performance, and that appellant's Fact hinges upon the faulty premise that the government was totally in control of documenting the work process (gov't opp'n at 6).

The government disputes appellant's Facts Nos. 7, 10, 11, and 12, concerning, among other things, contract pricing for removal of a leaner tree and its attached stump and appellant's contention that each leaner tree included stump removal and backfilling of the resultant stump cavity (Facts Nos. 7, 10, 11, 12; app. reply at 5-7). The government contends that the price included stump removal only to the extent that the contract required that removal. It alleges that both the Corps and AshBritt were constrained by Federal Emergency Management Agency (FEMA) regulations and guidelines, which affected whether a leaner tree would be removed or flush cut. The government urges that appellant's “current position that every leaner requires a stump removal is untenable” (gov't opp'n at 7-8). The government alleges that an assertion that leaner modifications required stump removal is not supported by FEMA regulations, AshBritt's proposal, or AshBritt's own interpretation during contract performance (*id.* at 9-10). The government further alleges, among other things, that documents cited by appellant reflect the following: confusion over the issue; different understandings; a

proposal by AshBritt and performance by AshBritt and its subcontractors that are contrary to its current claim; AshBritt's failure to request correction contemporaneously of allegedly inaccurate T&S tickets; and comments that were not from authorized government officials (*id.* at 10-12).

The government disputes appellant's Fact No. 15, that appellant relied upon the Corps' tickets and did not create an independent system to track its work, and allegedly contradictory Fact No. 16, that AshBritt loaded the data from the T&S tickets into its own "DIMS" (Debris Information Management System) and used it to calculate the basis of its claim (Facts Nos. 15, 16; app. reply at 8-9). The government alleges, among other things, that the parties' exhibits reflect that AshBritt maintained contemporaneous records, created its own worksheet, intended to use it to track its work internally, and did so (gov't opp'n at 15-16).

The government disputes appellant's Facts Nos. 17 and 18, that the Corps did not record most of the stump cavity backfills appellant performed under CLIN 0005AC and that the Corps failed to do so out of animus towards AshBritt and its subcontractors (Facts Nos. 17, 18; app. reply at 9). The government contends that the difference between the combined number of leaners and unattached stump extractions and the lesser number of backfills for which appellant was paid resulted from its flush cutting of leaner trees or its failure properly to backfill the stump excavation cavities. The government asserts that the parties' exhibits demonstrate that both agreed upon the numbers to be recorded on appellant's worksheets and the T&S tickets and that, while five reports out of thousands prepared for the contract reveal that AshBritt was aware of some isolated problems concerning T&S tickets, it did not bring the matters to the CO's attention. The government also denies appellant's accusation of animus, noting that, in its performance assessment reports, the Corps rated AshBritt as satisfactory in all applicable evaluation areas. (Gov't opp'n at 17-18)

DISCUSSION

It is well-established that summary judgment is appropriate only when there is no genuine issue of material fact and the movant demonstrates that it is entitled to judgment as a matter of law. In deciding a summary judgment motion, we do not resolve factual disputes but ascertain whether there is a genuine issue of material fact, drawing all reasonable inferences against the movant. However, the nonmovant cannot rest upon conclusory pleadings or assertions but must demonstrate that there is a genuine issue of material fact. A disputed fact is only material if it might make a difference in the appeal's outcome. There is a genuine issue of material fact that will bar summary judgment if a reasonable fact finder could find in favor of the nonmovant based upon the

evidence. *Dick Pacific/GHEMM, JV*, ASBCA No. 55829, 08-2 BCA ¶ 33,937 at 167,941-42 (collecting cases).

Appellant contends that some of the disputed issues of fact raised by the government are irrelevant or that they involve legal issues of contract interpretation, rather than fact. The government alleges that all of the remaining factual disputes are material. The parties' submissions demonstrate that there are obvious disputed issues of material fact concerning, among other things, the manner in which the T&S tickets were recorded, the work appellant and its subcontractors actually performed, and appellant's allegations of animus and that the government breached its duty of good faith and fair dealing. The latter allegations, in particular, are "very fact-intensive, revolving around the Government's subjective intentions and motives, and do not lend themselves readily to disposition by summary judgment." *J.A. Jones Construction Co.*, ASBCA No. 43344, 96-2 BCA ¶ 28,517 at 142,422; *see also Lockheed Martin Aircraft Center*, ASBCA No. 55164, 08-1 BCA ¶ 33,832 at 167,447.

Further, with respect to contract interpretation, the parties' original contracting intent and contract construction as evidenced by their contemporaneous actions are at issue. Their contemporaneous construction of the contract, before it became the subject of dispute, is entitled to great weight in its interpretation. *Petrofsky v. United States*, 488 F.2d 1394, 1402 (Ct. Cl. 1973); *AshBritt, Inc.*, ASBCA Nos. 55613, 55614, 09-1 BCA ¶ 34,086 at 168,536. When the meaning of a contract and the parties' intentions are both relevant and in dispute, there are mixed questions of fact and law that pose triable issues precluding summary judgment. *Osbourne Constr. Co.*, ASBCA No. 55030, 09-1 BCA ¶ 34,083 at 168,514; *International Source and Supply, Inc.*, ASBCA Nos. 52318, 52446, 00-1 BCA ¶ 30,875 at 152,435.

Finally, appellant asks that we place the burden of proof upon the government to establish that particular recorded leaner and affiliated stump removals and unattached stump removals did not result in appellant's backfilling of stump excavation cavities. Both parties are relying upon the same T&S tickets. The government alleges that appellant had a contemporaneous opportunity to review them and to challenge the accuracy of the government's payments for backfills. Appellant has not persuaded us that it is appropriate here to vary from the rule that it bears the burden to prove its claim by a preponderance of the evidence, showing the government's liability, causation, and resultant injury. *Servidone Constr. Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991).

DECISION

We deny appellant's motions for summary judgment and that we shift the stated burden of proof to the government.

Dated: 28 October 2009

CHERYL L. SCOTT
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. 56145, 56250, Appeals of AshBritt, Inc., rendered in conformance with the Board's Charter.

Dated:

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