

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
SERDI, LLC ) ASBCA No. 58507  
Under Contract No. HHM402-10-C-0140 )

APPEARANCE FOR THE APPELLANT: Eden Brown Gaines, Esq.  
Brown Gaines, LLC  
White Plains, MD

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.  
Army Chief Trial Attorney  
MAJ Samuel E. Gregory, JA  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TUNKS  
ON THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT  
AND MOTION TO STRIKE

SERDI, LLC (SERDI) requests payment of \$545,052.41, the balance allegedly due for the base year of a firm-fixed price, level of effort (FFP/LOE), commercial items contract. The contract required SERDI to provide financial and project management support services to the Defense Intelligence Agency (DIA or Agency). DIA moves for summary judgment, alleging that it is undisputed that SERDI failed to provide 9,600 hours of support services as required by the contract. Thus, DIA argues that it is entitled to summary judgment as a matter of law. SERDI opposes summary judgment, alleging that DIA prevented it from staffing the project at the required levels. As a result, SERDI concludes that there are disputed issues of material fact which preclude summary judgment. SERDI also argues that DIA illegally de-obligated funds from its contract and applied them to another contract leaving DIA without sufficient funds to pay SERDI. SERDI's opposition is supported by the affidavits of Ms. Sabrina Poole, President and CEO of SERDI, and Ms. Andrea Elliott-Dixon, a Senior Contract Specialist.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. On 7 September 2010, DIA awarded SERDI a FFP/LOE, commercial items contract in the amount of \$786,862.00 to provide financial and project management support services (R4, tab 2). The contract contained a base year and one option year. This appeal relates only to the base year (R4, tab 52). At award, the base year extended from 1 October 2010 through 30 September 2011 (R4, tab 2 at 001, 003).

2. Section 5.0 of SERDI’s proposal (pricing), which was incorporated into the contract at award, provided as follows:

BaseYear			
Program Manager	\$104.18	1,920	\$200,026
Senior Program Support Specialist	\$75.76	1,920	\$145,459
Senior Program Support Specialist	\$75.76	1,920	\$145,459
Senior Program Support Specialist	\$75.76	1,920	\$145,459
Senior Program Support Specialist	\$75.76	1,920	\$145,459
		9,600	\$781,862 <sup>1</sup>

(R4, tab 1 at 009, tab 2 at 003)

3. The Statement of Objectives (SOO) in the contract required all contractor personnel to have top secret clearances with access to sensitive compartmented information (R4, tab 2 at 011-012).

4. The contract incorporated FAR 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (JUN 2010) by reference (R4, tab 2 at 006). Subsection (f) of that clause, provided, in part, as follows:

(f) *Excusable delays.* The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers.

5. SERDI did not submit any invoices for the first six months of the base year (R4, tab 3).

6. SERDI submitted the following invoices for the remainder of the base year:

<u>Invoice</u>	<u>Date</u>	<u>Hours</u>	<u>Amount</u>
001	05/02/11	56	5,834.08
002	05/14/11	160	14,395.20
003	06/02/11	354.50	29,656.29
004	06/15/11	351	29,519.02

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<sup>1</sup> The contract included \$5,000 for travel, conferences, and training for the base year, increasing the contract price to \$786,862 (R4, tab 1 at 002).

005	07/01/11	374	31,630.96
006	07/15/11	262	20,758.58
007	07/31/11	281	22,283.26
008	08/15/11	343	28,486.64
009	08/31/11	378	31,706.64
010	09/15/11	259	21,781.76

(R4, tabs 3-12)

7. In an attachment to its opposition to the motion, SERDI submitted the affidavit of Ms. Andrea Elliott-Dixon, a DIA contracted Senior Contract Specialist supporting DIA acquisitions. Her affidavit provides, in part, as follows:

5. Ms. Poole sent security packages for candidates...soon after contract award. I was copied on several communications regarding the packages to Mr. [Jose] Garcia [the contracting officer's representative (COR)]. I noticed that Mr. Garcia was not responding to the communications. I began calling and emailing Mr. Garcia to ensure he had the security packages but I received no response from him.

6. After a couple of weeks, I approached Mr. Garcia and asked him about the status of the security packages and onboarding of SERDI candidates.... Mr. Garcia said that he had forgotten all about the contract. He had not reviewed the security packages Ms. Poole sent or processed them through security. This conversation occurred sometime in November 2010.

7. Following our conversation in November, Mr. Garcia began sending the packages to the security department. He later complained to me that security was slow in processing the packages. I as well as Mr. Garcia contacted Ms. Poole and told her that the staffing problem and delay was definitely the fault of the Agency...and that SERDI was not at fault.

8. SERDI also submitted the affidavit of Ms. Sabrina Poole, President and CEO of SERDI. Her affidavit provides, in part, as follows:

5. Beginning in September 2010, SERDI submitted candidates to fill the contract labor categories and all required security information.... The candidates could not begin

performance until the Agency cleared them. Mr. Garcia and Ms. Dixon eventually told me that the security packages submitted had not been timely processed and that the security organization was the source of the delay. Mr. Garcia communicated that the delay was on the part of the Agency and not the fault [of] SERDI....

6. ...In March 2011, the Agency finally approved the first candidate for...Program Manager.... Ms. Covington began work on April 11, 2011. [See supp. R4, tabs 2, 4, 6, 7]

7. The Agency approved four additional candidates on April 25, 2011. Matthew Dunnagan...was a replacement for Ms. Covington as she could not continue to work...because of a medical emergency. Stephanie Harris and Lenora Cloud began as Senior Program Support Specialists on May 1, 2011. Hyle Poole began as a Senior Program Support Specialist on May 16, 2011. [See supp. R4, tabs 2, 8, 12-15]

9. According to Ms. Poole, DIA refused to allow SERDI to fill the fourth Senior Program Support Specialist position (Poole aff. ¶ 8; see SOF ¶ 2).

10. The parties entered into bilateral Modification No. (Mod. No.) P00001 on 21 September 2011. The modification corrected the start date of the base year from 1 October 2010 to 30 September 2010 and changed the contract type from FFP, LOE to time and materials. (R4, tab 13) Ms. Poole interpreted the change to apply to the option year (Poole aff. ¶¶ 15, 17). SERDI disputes retroactive conversion of the base year contract type to time and materials (app. opp'n at 3, ¶ 6).

11. On 28 September 2011, the parties entered into Mod. No. P00002, exercising the option year, increasing the contract price to \$1,597,169.00. Pursuant to FAR 52.232-22, LIMITATION OF FUNDS (APR 1984), the modification also provided incremental funding of \$358,500.00 for 30 September 2011 through 30 March 2012. The modification stated, in part, as follows:

As a result of this modification the obligated funds for this contract has [sic] increased by \$358,500.00...to \$1,145,362.00. Due to a system issue the displayed modification obligated amount noted in block 12 is displayed as \$1,168,307.00. The actual modification obligated amount should be \$358,500.00.

(R4, tab 14)

12. The parties entered into bilateral Mod. No. P00008<sup>2</sup> on 14 May 2012. The modification changed the performance period for the option year to 30 September 2011 through 14 October 2012. The modification also increased the contract price by \$220,001.49, from \$1,597,169.00 to \$1,817,170.40. The modification provided incremental funding of \$220,001.49 for 15 May 2012 through 14 October 2012, increasing the obligated amount from \$1,145,362.00 to \$1,365,363.49. (R4, tab 35)

13. On 25 September 2012, DIA notified SERDI that the contract would end on 14 October 2012 (R4, tab 46).

14. On 22 September 2012, SERDI submitted invoice 036 requesting payment of \$522,588.47 to close-out the base year (R4, tabs 47, 50).

15. DIA rejected the invoice, stating that “INVOICE NUMBER 036 IS SHOWING NO HOURS WORKED TOWARDS FFP/LOE” (R4, tab 48).

16. On 31 October 2012, SERDI submitted a certified claim to the contracting officer (CO) requesting payment of \$545,809.59 (R4, tab 52 at 3). The claim indicated that the difference between the amount of the final invoice (\$522,588.47) and the amount of the claim (\$545,809.59) was due to an error in the calculation of the final invoice (R4, tab 52 at 2 n.2). Implicit in the claim was that had its personnel been timely cleared by the government, it would have been able to perform during the first six months of the base year.

17. The CO did not issue a final decision and on 11 January 2013 SERDI appealed the deemed denial of its claim to this Board.

18. We docketed the appeal as ASBCA No. 58507 on 14 January 2013.

19. DIA moved for summary judgment and SERDI opposed the motion, attaching the affidavits of Ms. Poole and Ms. Elliott-Dixon.

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<sup>2</sup> The modification indicated that “after the last software update the modification numbers has [sic] jumped from P00003 to P00008 without there being any other modification created” (R4, tab 35 at 2).

## DECISION

### DIA'S MOTION TO STRIKE

Preliminarily, we address DIA's motion to strike the affidavit of Ms. Elliott-Dixon. DIA argues that the affidavit is speculative, irrelevant, and that it contains hearsay and opinion testimony on matters of contract interpretation/questions of law. We have reviewed Ms. Elliott-Dixon's affidavit in light of DIA's objections and strike paragraphs 10 through 14. DIA's objections as they relate to the rest of the affidavit are overruled.

### MOTION FOR SUMMARY JUDGMENT

Summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). The moving party bears the burden of proof and all significant doubt over factual issues must be resolved in favor of the non-moving party. *Id.* A material fact is one that may affect the outcome of the decision. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). Mere assertions of counsel are generally insufficient to defeat a motion for summary judgment. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626-27 (Fed. Cir. 1984). The non-moving party must set out, usually in an affidavit by one with knowledge, what specific evidence could be offered at a hearing. *See Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d 831, 836 (Fed. Cir. 1984).

DIA argues that SERDI indisputably failed to provide the level of effort required by the contract. SERDI's proposal, which was incorporated into the contract at award, required it to provide 9,600 hours of financial and project management support services (SOF ¶ 2). Since SERDI did not provide any services for the first six months of the contract (SOF ¶ 5), DIA concludes that it is entitled to summary judgment as a matter of law.

SERDI opposes summary judgment, alleging that government actions prevented it from achieving the required level of effort. In particular, SERDI alleges that (1) the COR "forgot" all about the contract and ignored SERDI's repeated communications regarding staffing; (2) DIA's security division failed to timely process its security packages; and (3) DIA refused to allow SERDI to fully staff the contract. In addition, SERDI argues that DIA improperly de-obligated funds from the contract and applied them to another contract, resulting in a shortage of funds to pay SERDI. In support of these arguments, SERDI submitted the affidavits of Ms. Sabrina Poole, President and CEO of SERDI, and Ms. Andrea Elliott-Dixon, a DIA contracted Senior Contract Specialist.

Ms. Poole states in her affidavit that SERDI personnel were required to have security clearances before they could begin work on the contract (SOF ¶ 8 at ¶ 5). Ms. Poole's affidavit states that SERDI began submitting its security packages in September 2010 (*id.*). The contract called for one Program Manager and four Senior Program Support Specialists (SOF ¶ 2). SERDI's first Program Manager, Ms. Covington, was not cleared until 11 April 2011 (SOF ¶ 8 at ¶ 6). Three Senior Program Support Specialists began work in May 2011 (*id.* at ¶ 7). Ms. Poole alleges that DIA refused to allow SERDI to fill the fourth Senior Program Support Specialist position (SOF ¶ 9).

Ms. Elliott-Dixon's affidavit states that she approached the COR in November 2010 and asked him about the status of SERDI's security packages (SOF ¶ 7 at ¶ 6). The COR allegedly told her that he had forgotten all about the contract and had not reviewed the security packages or processed them through security (*id.* at ¶ 6). Ms. Elliott-Dixon thereafter noticed that the COR began sending SERDI's packages to security (*id.* at ¶ 7). The COR later complained to her that security was slow in processing the packages (*id.*). According to Ms. Elliott-Dixon, she and the COR contacted Ms. Poole and told her that the staffing problem and delay were the fault of the Agency (*id.*).

Drawing all reasonable inferences in favor of SERDI, as we must, we find that there is a disputed issue of material fact as to whether and/or to what extent DIA failed to cooperate and/or delayed the commencement of work. As a result, we need not address SERDI's funding argument at this time.

DIA's motion for summary judgment is denied.

Dated: 29 October 2013



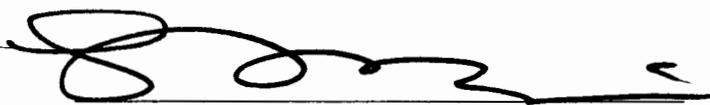
ELIZABETH A. TUNKS  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur



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

I concur



PETER D. TING  
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. 58507, Appeal of SERDI, LLC, rendered in conformance with the Board's Charter.

Dated:

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