

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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TranLogistics LLC) ASBCA Nos. 61366, 61450
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Under Contract No. W912CL-17-P-0700)

APPEARANCE FOR THE APPELLANT: George R. Calhoun, Esq.
Ifrah PLLC
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
MAJ Allen D. Stewart, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE MCILMAIL

FINDINGS OF FACT

In February 2017, the parties entered into a contract in the amount of \$98,898.90 for appellant to transport military cargo by truck between Soto Cano Air Base and Port of Cortés, both in Honduras (61366 R4, tab 7 at 185, 193). On July 10, 2017, the government paid appellant \$51,639.45, and on October 11, 2017, \$47,259.45, for a total of \$98,898.90 (61366 R4, tab 20 at 681; 61450 R4, tab 18 at 486).

During contract performance, and regarding one of the two phases of the work, the government stated the following:

The Government agrees a modification will be issued to reduce truck trips from 63 trucks to 53. A modification is currently being prepared to reduce the quantity of truck trips from 63 to 53, and to increase the trip cost for 13 trucks/trips from \$550.00 per trip up to \$1550.00 per trip for CLIN 0001, Line Haul from SCAB to Port of Cortes. *The modification is pending submission of supporting pricing documentation.*

(61366 R4, tab 13 at 379 (emphasis added))

On May 10, 2017, appellant presented to the contracting officer a claim for \$170,932.05 for “additional work and delay costs” (61366 R4, tab 19 at 656). The

government responded by asking for documentary support for the claim (61366 R4, tab 23 at 711-12). Appellant replied on September 6, 2017, with three invoices from Aaron Casariego to appellant, totaling \$183,592.55, and identifying Mr. Casariego as “Subcontractor-Project Manager” (61366 R4, tab 24 at 714-20). The invoices, all dated March 14, 2017, were accompanied by what appear to be several Spanish-language invoices, each with identifying information redacted, as well as airline trip receipts for Mr. Casariego for travel between the United States and Honduras in March and July 2017 (61366 R4, tab 24 at 721-30). On September 15, 2017, the contracting officer issued a final decision denying the claim (61366 R4, tab 27 at 844). Appellant appealed on October 10, 2017, in ASBCA No. 61366.

On September 14, 2017, appellant presented to the contracting officer a claim for \$434,095.61, for “government caused delay and changed circumstances” (61450 R4, tab 16 at 357, 363). On November 1, 2017, appellant provided, in support of the claim, an invoice from Mr. Casariego to appellant for \$424,502, dated September 6, 2017 (61450 R4, tab 20 at 502-16). Like the March invoices, the September invoice identifies Mr. Casariego as “Subcontractor-Project Manager,” and is accompanied by what appear to be several Spanish-language invoices, with identifying information redacted (61450 R4, tab 20 at 508-16). On November 20, 2017, the contracting officer issued a final decision awarding appellant \$127,050 (plus Contract Disputes Act (CDA) interest), for 231 truck trips at \$550 each, otherwise denying the remainder of the claim (61450 R4, tab 22 at 526, 532). Appellant appealed on December 6, 2017, in ASBCA No. 61450. The government requests that the Board in ASBCA No. 61450 “deny appellant’s appeal to the extent it seeks a total amount greater than that previously allowed by the contracting officer” (answer at 25).

A Honduran invoice typically includes the name of the vendor (tr. 2/67-69). Appellant, which has almost 15 years of commercial experience in Honduras, does not normally receive, nor does it normally pay, redacted invoices (tr. 1/33, 112).

At the hearing of the appeals, appellant put forward Mr. Casariego to substantiate his and the vendor invoices (tr. 1/136). Mr. Casariego has a personal relationship with appellant’s Chief Executive Officer, Lily Tran (tr. 1/17, 78). Ms. Tran and Mr. Casariego have lived together for the last ten years (including at appellant’s business address), have been engaged to be married for eight years, and have two children together (tr. 1/78-80). Mr. Casariego was, at least during contract performance if not also at other times, one of appellant’s corporate officers, at least its Chief Financial Officer (61366 R4, tab 37 at 875, tab 38 at 879, tab 39 at 881-82, tab 49 at 1085-86, tab 54 at 1098; tr. 1/17, 76, 80; Kreakie decl. ¶ 14 & ex. A). He is also responsible for the invoice redactions: his testimony is that he suggested that vendors redact their invoices so they could maintain their “confidentiality” (see tr. 1/152-53). And although Mr. Casariego says that he knows the identities of the vendors, he refused during the hearing to identify them, even after having been duly sworn to testify truthfully (tr. 1/139-40, 143-44).

DECISION

Appellant must prove the fact of loss with certainty, as well as the amount of loss with sufficient certainty so that the determination of the amount of recovery will be more than mere speculation. See *Austin Logistic Services Co.*, ASBCA Nos. 60916, 61052, 18-1 BCA ¶ 36,948 at 180,049 (quoting *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 767 (Fed. Cir. 1987)). In support of its quantum argument, appellant seems to say that it can prove the amount it is due without having to rely upon invoices, merely by showing that the amount it requests is reasonable according to market prices in Honduras (app. br. at 21). However, we require evidence of actual incurred costs, if possible, not market prices. See *Missouri Department of Social Services*, ASBCA No. 61121, 19-1 BCA ¶ 37,240 at 181,278-79; *Kellogg Brown & Root Services, Inc.*, ASBCA Nos. 57530, 58161, 19-1 BCA 37,205 at 181,130.

Appellant relies upon two sets of invoices to support its quantum position (app. br. at 19 (referencing tabs 20 and 24)); therefore, it was possible for appellant to provide evidence of its actual incurred costs. However, appellant fails to prove its actual incurred costs, because we do not credit its invoices. First, as the government urges (gov't br. at 16), we credit none of the redacted invoices from what appellant says are Honduran vendors. Appellant says that Honduran vendors have an understandable desire for confidentiality, and that there is no need for them to identify themselves to the United States Government (app. br. at 22). However, (1) a Honduran invoice typically includes the name of the service provider; (2) even appellant, with almost 15 years of commercial experience in Honduras, does not normally receive nor pay redacted invoices; and (3) the redactions here make the invoices not subject to authentication. In addition, Mr. Casariego, whom appellant put forward to substantiate those invoices, not only elicited the redactions in the first place, but refused under oath to identify the vendors, from which we reasonably infer that without the redactions the invoices would be unfavorable to appellant. Cf. *Graves v. United States*, 150 U.S. 118, 121 (1893) (“if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable”). For all these reasons, we do not credit the redacted invoices.

Second, we reject Mr. Casariego's own invoices to appellant. Those invoices identify Mr. Casariego as appellant's subcontractor; however, Mr. Casariego was appellant's corporate officer. We do not credit those facially misleading invoices, including because they come from Mr. Casariego, who, we repeat, refused under oath to provide relevant information that he had a hand in covering up in the first place. Rather, we find that Mr. Casariego's invoices are a clumsy attempt by appellant to paper over a lack of credible, contemporaneous, documentary evidence of its actual costs, and that the so-called “Honduran invoices” are fabrications whose redactions are an effort to prevent anyone from testing their authenticity.

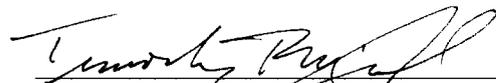
Otherwise, we reject appellant's argument that the government owes \$1,550 per truck for some truck trips pursuant to a contract modification (app. br. at 15). That agreement was conditioned on appellant providing supporting pricing documentation, and (for the reasons set forth above) appellant points to no such credible documentation. On the other hand, in ASBCA No. 61450, the government requests that the Board "deny appellant's appeal to the extent it seeks a total amount greater than that previously allowed by the contracting officer." We take that as a concession – and so decide – that appellant is entitled in ASBCA No. 61450 to the principal amount awarded in the contracting officer's final decision, \$127,050, plus CDA interest from September 14, 2017, the date that appellant presented its claim to the contracting officer, for 231 truck trips at \$550 each.

For the foregoing reasons, ASBCA No. 61366 is denied, and ASBCA No. 61450 is sustained in part. In view of our reasoning and conclusions, we find it unnecessary to address any of the parties' other arguments.

CONCLUSION

ASBCA No. 61366 is denied. ASBCA No. 61450 is sustained in the amount of \$127,050, plus CDA interest pursuant to 41 U.S.C. § 7109, from September 14, 2017, to date of payment.

Dated: May 1, 2019


TIMOTHY P. MCILMAIL
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



OWEN C. WILSON
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. 61366, 61450, Appeals of TranLogistics LLC, rendered in conformance with the Board's Charter.

Dated:

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