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ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -)	
)	
Bullock Construction Inc.)	ASBCA No. 62683
)	
Under Contract No. FQ17095)	

APPEARANCES FOR THE APPELLANT: Stephen A. Oberg, Esq.
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OPINION BY ADMINISTRATIVE JUDGE ARNETT
ON THE AUTHORITY’S MOTION FOR SUMMARY JUDGMENT

Bullock Construction Inc. (Bullock or appellant) seeks compensation for two claim issues under its track rehabilitation contract with the Washington Metropolitan Area Transit Authority (WMATA or the Authority). First, Bullock asserts that it incurred additional costs for “lost time” when its crews repeatedly reported as scheduled but were denied access to the track. Bullock requests hourly compensation for personnel who were idle waiting for track access on specific days. Second, Bullock contends that its crews were scheduled and paid for lower-skilled hourly labor “assisting” with Grout Pad Renewal when, in fact, Bullock crews performed higher-skilled Grout Pad Renewal production work at the direction of WMATA personnel on site. Bullock contends it should have been paid for the Grout Pad Renewal work at the production rate (CLIN 10) rather than assist work paid at an hourly rate as Track Labor Support (CLINs 1-7). Bullock seeks the difference between the amount it was paid for hourly Track Labor Support and the amount it alleges that it earned for completion of the Grout Pad Renewal activity under CLIN 10.

WMATA has moved for summary judgment asserting that no genuine issues of fact remain for hearing arising from the two claim issues asserted by Bullock.

WMATA contends that Bullock's "lost time" claim is a delay claim barred by the express language of the contract. As to Bullock's second claim issue, WMATA asserts that it ordered and Bullock performed and invoiced for "assist" work, not the tasks required for Grout Pad Renewal production work. The motion is denied for the reasons detailed below.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

The Contract and Purchase Orders

1. Bullock is a corporation organized under the laws of Maryland (compl. ¶ 1).
2. WMATA is an interstate compact transportation agency and instrumentality of the District of Columbia, State of Maryland, and Commonwealth of Virginia with its principal office in Washington, DC (answer ¶ 2).
3. On June 30, 2017, WMATA awarded Contract No. FQ17095 (the Contract) to Bullock for System Wide Track Rehabilitation Services (R4, tab 1 at WMATA-BC000011). It was a firm fixed unit price, Indefinite Delivery/Indefinite Quantity (IDIQ) contract with one base year period of performance and four option years (R4, tab 1 at WMATA-BC000012).
4. The Contract price schedule consisted of sixteen contract line items (CLINs) including CLINs 1-7 for Track Labor Support based upon hourly labor rates, CLINs 8-10 for Direct Fixation Track Rehabilitation based upon production by activity or linear foot (LF) completed, CLINs 11-14 for Major Track Rehabilitation based upon production by activity or LF completed, and CLINs 15-16 for Third Rail Component Renewal based upon production by activity or LF completed (R4, tab 1 at WMATA-BC000014).
5. The Contract stated that the guaranteed minimum required under the contract would be \$100,000 per year and maximum which may be ordered would be \$20,000,000 per year (R4, tab 1 at WMATA-BC000020).
6. On July 19, 2017, Bullock acknowledged notice to proceed (R4, tab 1 at WMATA-BC000003).
7. The base year ran from July 19, 2017 to July 18, 2018. Option Year One was from July 19, 2018 to July 18, 2019. Option Year Two was from July 2019 to July 2020. (R4, tab 1 at WMATA-BC000003)
8. Between July 20, 2017 and July 11, 2019, WMATA issued eleven purchase orders (POs) to Bullock against the Contract (R4, tabs 2-12).

The Claim and Contract Closeout

9. On February 20, 2020, Bullock filed a certified claim asserting two issues: (1) “Lost Time” wages in the amount of \$1,974,789.50 and (2) “Bid Item Pay Discrepancy: Grout Pad Renewal vs. Labor Support” in the amount of \$3,072,864 (R4, tab 15).

10. On April 15, 2020, WMATA notified Bullock that it would not exercise Option Year Three and indicated that it would issue a modification and release of claims to close-out the Contract and associated POs (R4, tab 16).

11. On June 24, 2020, WMATA issued a letter closing out the POs and reflecting the remaining balance, if any, on each PO. According to WMATA’s records, the only PO with a significant remaining balance was FQ17905-9, which reflected a remaining balance of \$3,318,880. (R4, tab 19)

12. On September 1, 2020, WMATA issued a final decision denying Bullock’s February 20, 2020 claim (R4, tab 23). The contracting officer concluded that the basis of Bullock’s claim was unclear but that the claim was “improper under any claims provision of the contract” (R4, tab 23 at WMATA-BC000439).

13. As to the first claim issue, the contracting officer interpreted Bullock’s claim to assert that WMATA impeded or interrupted the work and determined that the contract precluded Bullock from claiming monetary damages for delay. The contracting officer also addressed an alternative argument that WMATA was unable to provide access to the designated work location. The contracting officer noted that the contract caps relief to two hours of show-up time and rejected Bullock’s claim as “inconsistent” for failing to address whether crews were relocated or dismissed and for seeking more than two hours in many instances. The contracting officer stated, “Even if Bullock’s claim were consistent with this provision for show-up time, Bullock is not entitled to any payment without required documentation that has not been submitted: ‘A daily work report and sign-in sheet, signed by the Contractor and WMATA.’” The contracting officer concluded that Bullock had already been fully compensated in accordance with the contract terms. (R4, tab 23 at WMATA-BC000439-41)

14. As to the second claim issue, the contracting officer summarily concluded that, during the period in question, WMATA did not issue orders for the Grout Pad Renewal CLIN and Bullock did not perform Grout Pad Renewal work as defined in the contract (R4, tab 23 at WMATA-BC000441).

15. On September 25, 2020, Bullock filed its notice with the Board appealing WMATA’s September 1, 2020 final decision. It was docketed as ASBCA No. 62683.

16. On September 15, 2022, WMATA filed a motion for summary judgment and memorandum in support of its motion.¹ On October 24, 2022, Bullock filed its opposition to WMATA’s motion and a memorandum in support of its opposition.² On November 7, 2022, WMATA filed its reply in support of its motion.

Claim Issue One: Lost Time

Contract provisions:

17. The Contract required Bullock to pay its crews prevailing wages consistent with the Fair Labor Standards Act and applicable Davis-Bacon Wage Determination (app. opp’n at 17; R4, tab 1 at WMATA-BC000021).

18. The Contract SOW provided for contractor staging of equipment and material “prior to track outages during regular non-revenue hours as well as the clean-up and punch list work after the outages” for numerous production activities (R4, tab 1 at WMATA-BC000253, 256, 259, 263, 266, 269, 274, 277).

19. The Contract SOW required WMATA to “[a]cquire track access and power outages” for all activities identified in the SOW (R4, tab 1 at WMATA-BC000256, 259, 262, 265, 269, 273, 276, 279-81).

20. SOW § 1.13, Schedule/Work Hours, subparagraph 1.13.1 states, “Activity schedule is to be coordinated between the contractor and respective Track Division, and conveyed to the Project Manager/Contract Officer’s Technical Representative (COTR) two weeks in advance, except for emergencies/urgent situations” (R4, tab 1 at WMATA-BC000282).

21. SOW § 1.13, Schedule/Work Hours, subparagraph 1.13.3.2 states, “Typically, night shift starts at 10:00 pm (2200 hrs) and ends at 6:00 am (0600 hrs), though crews may be required to report earlier for 10:00 pm early out single tracking” (R4, tab 1 at WMATA-BC000282).

22. SOW § 1.13, Schedule/Work Hours, subparagraph 1.13.3.4 for Night Tour and subparagraph 1.13.4.3 for Day Tour both state, “Crews typically report on-site, to the nearest rail yard, or any system-wide location, as directed by WMATA” (R4, tab 1 at WMATA-BC000282-83).

¹ WMATA’s Motion for Summary Judgment and Memorandum in Support are collectively referred to herein as “motion” and all page citations are to the memorandum.

² Appellant’s Opposition to Respondent’s Motion for Summary Judgment and Memorandum of Law in Support are collectively referred to herein as “opposition” and all page citations are to the memorandum.

23. SOW § 1.13, Schedule/Work Hours, subparagraph 1.13.5 states, “All Shifts: If after the work crews have reported and WMATA cannot provide access to the designated work location, WMATA also may elect to move the crews to a different location that night” (R4, tab 1 at WMATA-BC000283).

24. SOW § 1.13, Schedule/Work Hours, subparagraph 1.13.6 states,

If the contractor work crew arrives and WMATA cannot provide access to the designated work location, WMATA may elect to dismiss the work crew if moving the crews to another location is not possible, as decided by the WMATA field representative. In this situation, WMATA will only pay two (2) hours of show-up time for each contractor personnel in attendance. A daily work report and sign-in sheet, signed by the Contractor and WMATA will be required as documentation.

(R4, tab 1 at WMATA-BC000283)

25. SOW § 1.20, Delay Claims, subparagraph 1.20.1 states:

The possibility exists that Contractor work may be impeded, or that interruption of the work may occur, at WMATA’s discretion. This may include, but [sic] not limited to, WMATA operational functions and emergencies. It is the intent of this clause is [sic] to ease the administration of delays caused by WMATA operational functions or emergencies.

(R4, tab 1 at WMATA-BC000286)

26. SOW § 1.20, Delay Claims, subparagraph 1.20.2.1 indicates that there “shall be no allowable time extension or equitable adjustment for any delay from Authority operational functions or and [sic] emergencies causing work stoppage for less than two (2) hours” (R4, tab 1 at WMATA-BC000286).

27. SOW § 1.20, Delay Claims, subparagraph 1.20.2.3 states,

If the Contractor and COTR agree that the completion of the work, has been delayed due to unforeseen circumstances, resulting from outside of the control, of the parties, such as ‘superior force’ or ‘force majeure’, and no

alternative work location is available, it will count as a paid delay per contract documents.

(R4, tab 1 at WMATA-BC000287)

28. SOW § 1.20, Delay Claims, subparagraph 1.20.2.4 states, “The Contractor will submit to the COTR on a weekly basis a report of recognized delays occurring during the previous week, as a precondition to the Authority considering any claim for delays from Authority’s operations and emergencies” (R4, tab 1 at WMATA-BC000287).

29. SOW § 1.20, Delay Claims, subparagraph 1.20.2.5 states,

Upon the Contractor submitting a claim for delays from Authority’s operations and emergencies, the COTR shall grant a non-compensable time extension of one day for any working day in which the contractor accumulates sixty (60) or more minutes of timely submitted recognized delays, unless granting the time extension would result in providing the contractor with more than a one day time extension relating to any working day. Simultaneously, the COTR shall respond to the contractor’s claim, if any, for costs associated with any working day in which the contractor accumulates sixty (60) or more minutes of timely submitted recognized delays.

(R4, tab 1 at WMATA-BC000287)

30. SOW § 1.20, Delay Claims, subparagraph 1.20.2.9 states,

Contractor expressly agrees that if delayed from performing its work, its sole and exclusive remedy shall be a reasonable extension of time, as calculated by WMATA, provided that the Contractor makes written request for such time. The Contractor will not be entitled to claim

monetary damages from WMATA for such a delay, under any circumstances.

(R4, tab 1 at WMATA-BC000287)

31. SOW § 1.20, Delay Claims, subparagraph 1.20.2.10 states,

Excusable delays result from a force majeure, which is something outside of the control of the parties. The contractors will be granted an extension of time for excusable delays. Excusable delays are further divided into those that are compensable, and those that are not. Causes for delay must be adequately identified as either excusable or compensable, rather than be left open for later debate. WMATA and the Contractor will identify a detailed catalogue of anticipated delay events.

(R4, tab 1 at WMATA-BC000287) (emphasis in original)

Authority:

32. The contracting officer appointed Abbas Ebrahim and Troy Donahue to serve as COTRs for the contract (app. opp'n at 15-16; R4, tab 1 at WMATA-BC000006-8).

33. The COTR is the principal point of contact with the contractor, approves the contractor's progress schedules, inspects the work for contract compliance, and reviews and approves invoices and payment estimates. The COTR is expressly prohibited from specified activities including "[i]ssuing instructions to contractors to start or stop work, outside stated contractual obligations." (R4, tab 1 at WMATA-BC000006-8)

Bullock communication in 2017 regarding a "minimal track time" issue:

34. On October 16, 2017, Bullock Project Manager (PM) Marcotte issued a letter to the WMATA COTR expressing Bullock's concerns regarding the hours that Bullock had crews on site as compared to the "minimal track time" they were given to perform production work which is billed based upon work completed. It stated, "Bullock requests to have each delay causing minimal track time (by the hour), and cancellation caused by WMATA representative no show or delayed notice, paid at the contract hourly rate for each supervisor, foreman, and laborer." (App. supp. R4, tab 1 at 1)

35. On October 31, 2017, Bullock PM Marcotte emailed the WMATA COTRs seeking their input on how to handle lost production time and referenced a meeting when this issue was discussed (app. opp'n, ex. 3 at 3424). In early November 2017, Bullock and WMATA exchanged a series of communications in which Bullock provided additional information (app. opp'n, ex. 3). The record does not include any formal response from WMATA to Bullock's October 16, 2017 letter.

Unresolved factual issues regarding the "Lost Time" claim:

36. We find that questions of fact remain regarding scheduling, control, and coordination of Bullock's crews and communication regarding when track access would be provided and when crews should report. Questions of fact also remain regarding whether Bullock was idle for the entire period claimed prior to track access or whether its personnel were staging equipment and material during "regular non-revenue hours."

Claim Issue Two: Bid Item Pay Discrepancy: Grout Pad Renewal vs. Labor Support

Contract provisions:

37. Grout Pad Renewal is discussed in the SOW at section 1.4 and its subparts (R4, tab 1 at WMATA-BC000259-62). SOW § 1.4.23 sets forth the required Contractor tasks for Grout Pad Renewal (R4, tab 1 at WMATA-BC000261-62).

38. SOW § 1.11.3 provides that Track Labor Support work will be "in support of capital track rehabilitation activities that are not included in specific contract line items." The SOW identifies contractor responsibilities for Track Labor Support at paragraph 1.11.5 and its subparts. (R4, tab 1 at WMATA-BC000280-82)

39. Track Labor Support is paid at an hourly rate under CLINs 1-7 while Grout Pad Renewal is a Direct Fixation Track Rehabilitation activity under CLIN 10 and is paid at a production rate per LF completed (R4, tab 1 at WMATA-BC000014).

Bullock communication in 2018 regarding a grout pad renewal issue:

40. In June 2018, Bullock PM Lippa emailed WMATA COTR Donahue expressing Bullock's concern that its crews had been scheduled to perform "assist" work but were doing "much more than just assisting with" the grout work (app. opp'n, ex. 7).

Unresolved factual issues regarding the Grout Pad Renewal claim:

41. In opposition to the motion for summary judgment, Bullock submitted evidence indicating grout pad work performed by Bullock during the 2019 shutdown (app. opp'n, exs. 1-2). We find that a factual dispute exists as to whether Bullock performed all the tasks required under the SOW for Grout Pad Renewal or only performed "assist" work. A factual question also remains regarding whether WMATA directed Bullock to perform the work associated with Grout Pad Renewal rather than simply "assist" work.

42. Additionally, we find that a factual dispute exists as to whether Bullock notified WMATA of Bullock's concern that it was being scheduled to perform and required to invoice lower-skilled assist work but was performing higher-skilled grout work at the direction of WMATA (gov't mot. at 20; app. opp'n, ex. 7).

DECISION

I. The Parties' Contentions

WMATA asserts that no genuine issues of material fact remain in dispute as to the two claim issues asserted by Bullock. Regarding the "lost time" claim, WMATA contends that Bullock's "delay" claim for monetary damages is barred by SOW § 1.20.2.9. (Gov't mot. at 1) WMATA also contends that the contemporaneous daily reports do not report "delay" and that Bullock's invoices³ were paid in full without any reservation of rights. (Gov't mot. at 5-6)

Regarding its "lost time" claim, Bullock attempts to reconcile SOW § 1.13 Schedule/Work Hours with SOW § 1.20 Delay Claims and asserts an interpretation of those provisions that is contrary to WMATA's interpretation. Bullock contends that WMATA "forced" it to invoice only for the work Bullock's personnel performed when they had limited track time and WMATA refused to pay Bullock for the time its personnel did not have track time but were required to be on site. (App. opp'n at 9, 20-24) Moreover, Bullock asserts that its crews were under the direction and control of WMATA, that it was unable to redirect or dismiss its crews while waiting for track access, and that it had to pay its crews for the hours that they were idle waiting for track access (app. opp'n at 22). WMATA does not address these factual assertions and dismisses them as "[m]ere argument" (gov't reply, ex. C). Finally, Bullock alleges that disputes of material fact exist regarding the enforceability of the contract's exculpatory delay provision (app. opp'n at 39-40).

As to the Grout Pad Renewal claim, WMATA states that Bullock seeks payment for work neither ordered by WMATA nor billed by Bullock (gov't mot. at 13). WMATA asserts that Bullock accepted orders and received payment for Track

³ The invoices do not appear to be included in the current record.

Labor Support in 2019 (gov't mot. at 6-7). WMATA alleges that Bullock "was not asked to and did not perform the framing or finishing tasks required to fully complete Grout Pad Renewal work" (gov't mot. at 14). WMATA contends that Bullock contemporaneously characterized the work as "assistance" and "support" (gov't mot. at 6-7).

As to its Grout Pad Renewal claim, Bullock asserts that WMATA directed it to perform "all of the Grout Pad Renewal for which Bullock was responsible" under the Grout Pad Renewal production activity in the Contract and that Bullock performed all work as directed (app. opp'n at 2, 27-30). Finally, Bullock alleges that WMATA required Bullock to invoice for Track Labor Support at an hourly rate rather than for the Grout Pad Renewal activity at a production rate (app. opp'n at 30).

II. Standards of Review

The standards for summary judgment are well established. Summary judgment should be granted if it has been shown that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Any significant doubt over factual issues, and all reasonable inferences, must be resolved and drawn in favor of the party opposing summary judgment. *Mingus Constructors v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

III. Bullock's "Lost Time" claim may not be resolved on summary judgment.

In matters of contract interpretation, the preferred approach is to read the contract as a whole, and to give the language of the contract its plain meaning. In doing so, different parts of the contract are to be read in harmony, if possible, and preference is given to an interpretation that gives effect to all the terms of the contract and does not render one or more of them meaningless. *ECC Int'l, Inc.*, ASBCA No. 58993 *et al.*, 22-1 BCA ¶ 38,073 at 184,887 (citing *Jowett, Inc. v. United States*, 234 F.3d 1365, 1368 (Fed. Cir. 2000); *Christos v. United States*, 300 F.3d 1381, 1384 (Fed. Cir. 2002); *Air-Sea Forwarders, Inc. v. United States*, 166 F.3d 1170, 1172 (Fed. Cir. 1999)). Legal questions of contract interpretation are generally amenable to summary judgment, unless there is an ambiguity that requires weighing extrinsic evidence, but extrinsic evidence will not be received unless there is such an ambiguity. *Dixie Constr. Co.*, ASBCA No. 56880, 10-1 BCA ¶ 34,422 at 169,918 (citing *Coast Fed. Bank, FSB v. United States*, 323 F.3d 1035, 1040 (Fed. Cir. 2003) (en banc)). If a government contract provision is susceptible of more than one different, reasonable interpretation, it is ambiguous. *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 751 (Fed. Cir. 1999); *Edward R. Marden Corp. v. United States*, 803 F.2d 701, 705 (Fed. Cir. 1986).

As to Bullock’s “lost time” claim, WMATA contends that the contract terms yield only one reasonable interpretation (gov’t mot. at 9). Conversely, Bullock asserts a different interpretation as reasonable (app. opp’n at 34-37). Mixed questions of fact and law remain regarding the reasonableness of each party’s interpretation and reconciliation of seemingly inconsistent contract provisions. Additional factual questions remain regarding WMATA’s fulfillment of its duty to acquire track access, the extent to which WMATA directed and exercised control over Bullock’s crews, and contemporaneous coordination and communication between the parties regarding work schedules and track access (SOF ¶ 36). Mixed questions of fact and law are present that pose triable issues precluding summary judgment. *AshBritt, Inc.*, ASBCA Nos. 56145, 56250, 09-2 BCA ¶ 34,300 at 169,434. Accordingly, summary judgment is not appropriate.

IV. Bullock’s Grout Pad Renewal claim may not be resolved on summary judgment.

Bullock alleges that its crews were directed by WMATA to perform all tasks associated with the Grout Pad Renewal work for which Bullock was responsible under the SOW (app. opp’n at 2, 27-30). WMATA disputes that Bullock performed the required tasks for the Grout Pad Renewal activity (gov’t mot. at 6-7, 14). Bullock set forth sufficient evidence to demonstrate a factual dispute as to whether it performed the tasks required for the Grout Pad Renewal activity (SOF ¶ 41).

Thus, a factual dispute exists regarding whether Bullock, at the direction of WMATA, performed the tasks required under the contract for the Grout Pad Renewal activity or only “assisted” (SOF ¶ 41). Finally, WMATA raises a factual dispute regarding whether Bullock notified WMATA of Bullock’s concern that it was being scheduled and paid to perform lower-skilled assist work but, in fact, was performing higher-skilled grout work at the direction of WMATA (SOF ¶ 42).

CONCLUSION

The motion for summary judgment is denied.

Dated: March 6, 2023



LAURA J. ARNETT
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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 No. 62683, Appeal of Bullock Construction Inc., rendered in conformance with the Board's Charter.

Dated: March 7, 2023



PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals