ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Scientific Management Associates, Inc.	)	ASBCA No. 50956
	)	
Under Contract No. N00167-94-D-0016	)	

APPEARANCE FOR THE APPELLANT: Joseph A. Artabane, Esq.
Artabane & Beldone, PC
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Arthur H. Hildebrandt, Esq.
Navy Chief Trial Attorney
Robert C. Ashpole, Esq.
Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DICUS
ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

This appeal is taken from a contracting officer's decision denying appellant's claim seeking recovery of additional fee and indirect costs. The underlying contract is an indefinite quantity, cost-plus-fixed-fee contract for program engineering, management and technical support. Respondent, United States Navy, has moved for summary judgment. We grant the motion.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Contract No. N00167-94-D-0016 was awarded to appellant, Scientific Management Associates, Inc. (SMA), on 26 November 1993. The contract included the following provisions:

SECTION B - SUPPLIES/SERVICES AND PRICES/COSTS

Item	Supplies/Services	Qty	Unit	Unit Price	Amount
0001	Program Engineering/Management, Marine Engineering and Technical Support for the Condition Based Maintenance (CBM) Program in accordance with Section C.	1	LT	Est Cost	$16,444,703
				Fixed Fee	$453,947
				Total CPFF	$16,898,650

0002	Technical Data IAW DD Form 1423, Exhibit A as specified on individual delivery orders.	1	LT	NSP	NSP
0003	Estimated Material for Item 0001	1	LT	NTE	$2,150,500
0004	Estimated Special Test Systems/ Equipment for Item 0001	1	LT	NTE	$5,000,000
0005	Estimated Travel for Item 0001	1	LT	NTE	$1,250,000
				Total 5 Year Est CPFF	$25,299,150

Units: LT = Lot; NSP = Not Separately Priced; NTE = Not To Exceed. CLINs 0003, 0004, and 0005 will be reimbursed at actual cost plus applicable indirect expenses and are NON-FEE bearing.

Contract Type: This is an indefinite delivery/indefinite quantity, cost plus fixed fee, type contract. The estimates provided in this schedule represent the dollar value limitations imposed under the contact. The expenditure of Government funds in consideration for support services will be performed by the issuance of individual delivery orders. Delivery orders issued under this contract are on a completion basis. The cumulative estimated value for all delivery orders issued shall not exceed the estimated cost, fixed fee, and the NTE amounts established in the schedule. As referred to in paragraph (b) of clause 52.216-22 entitled “Indefinite Quantity”, the contract minimum quantity is $400,000.00 worth of delivery orders. This amount represents the Government’s monetary obligation under the contract. The maximum order quantity is $5,000,000.00 on individual delivery orders.

The minimum order quantity amount of $400,000 worth of orders, which is the Government’s monetary obligation for consideration under this contract, is provided for under issuance of delivery order numbers 0001 and 0002.

Delivery orders shall be issued pursuant to Section I clauses 52.216-22 and 52.216-18. Oral orders are authorized and may only be placed by Carderock Division, Naval Surface Warfare Center warranted Contracting Officers within the authority of their certificate of appointment. Refer to Section I clause 52.216-19 for delivery order limitations.

SECTION B - CONTINUED

PAYMENT OF FIXED FEE: The total fixed fee amount possible under this contract is $453,947. Fixed fee will be distributed among individual delivery orders at a pro-rata portion of the total estimated (burdened) direct (prime contractor) labor costs under the respective delivery order. For administrative management purposes, the pro-rata fixed fee amount will be distributed according to the following schedule: Months 1 thru 12 = 8%; Months 13 thru 24 = 7%; Months 25 thru 36 = 6%; Months 37 thru 48 = 5%; Months 49 thru 60 = 3.95%

INDIRECT RATE CAPS: Rate caps for indirect rates are hereby incorporated into this contract. The percentages indicated below represent a "rate cap" and are the maximum allowable percentage rates for calculating indirect costs which can be proposed and billed under this contract according to the following schedule:

On-Site Overhead: Months 1 thru 12 = 45%; Months 13 thru 24 = 40%; Months 25 thru 36 = 38%; Months 37 thru 48 = 33%; Months 49 thru 60= 30%

Off-Site Overhead: Months 1 thru 60 = 23%

General and Administrative Expense (G&A): Months 1 thru 12 = 11%; Months 13 thru 24 = 10%; Months 25 thru 36 = 8%; Months 37 thru 48 = 6%; Months 49 thru 60 = 5.6%

The Contractor's technical and cost proposals dated 5 May 1993, 29 July 1993, 14 October 1993, 25 October 1993, and BAFO dated 1 November 1993, completed Section K - "Representations, Certifications, and Other Statements of Offerors" and subcontracting plan, submitted by SMA in response to Navy RFP N00140-91-R-2465 and any technical and cost discussions conducted thereafter, are hereby incorporated into this contract award by reference.

(R4, tab 1)

2. SMA's cost proposal shows officers' salaries, legal services, consultants and conferences as included in the indirect cost base (R4, tab 2).

3. Respondent placed delivery orders in the approximate amount of $1.8 million under the contract (R4, tabs 10, 14).

4. On 31 March 1997 appellant filed a claim. The claim contains a lengthy narrative leading to the following conclusory section:

> The Navy's actions caused SMA additional costs in three respects. First, the Navy's refusal to shift the promised work to SMA caused a massive downturn in SMA's business. That, in turn, drove up SMA's actual rates (because the direct cost base shrank so dramatically); when the Navy refused to adjust those rates, SMA's managers were preoccupied by the effort to resolve the rate problem. Finally, the rate impasse caused additional costs of administration, as SMA negotiated - seemingly endlessly - with the Navy attempting to gain a rate adjustment. Taken together, these three sources boosted SMA's costs as follows:

Period: November 1993 -February 1997

LABOR COST:

Position	Estimated Hours	Estimated Cost
President/CEO	1,137	$89,222
Vice President - Operations	240	9,540
Vice President - NJ Operations	1,220	30,036
Vice President - Finance/Contract & Admin.	520	14,328
Total Labor Cost	3,117	143,126

OTHER COSTS:

Business Meetings/Conferences	8,319
Outside Professional Services:	
Contract Analyst - 102.4 Hrs.	3,000
Legal Support - Time + Expenses	4,000
TOTAL COSTS THROUGH 02/28/97	$158,445

> The above labor and other costs are currently in the indirect cost pools and will be adjusted to the direct cost pools at the time of final indirect rate closings.

> In addition to entitling SMA to its costs, the Navy's actions in repeatedly representing the validity of a baseless $25 million estimate, misleading SMA into believing delivery orders would increase, and shifting

> orders to another contract entitle SMA to breach of contract damages. In particular, SMA is entitled to anticipated profits on all orders that should have been placed under the contract. *See, e.g., Tamp Corporation*, ASBCA No. 25692, 84-2 BCA ¶ 17,460 (appropriate principle in determining breach damages is that "appellant should be put in as good a position as if it had been permitted to fully perform the contract"). Thus, in additional [sic] to the costs listed above, SMA should receive in damages the entire amount of the $453,947 fixed fee rather than the minuscule pro rata share it has been paid.

(R4, tab 14)

5. The claim was denied in a contracting officer's decision dated 25 June 1997 (R4, tab 15). A Notice of Appeal was received by the Board on 18 August 1997.

6. Appellant's complaint asserts the following four causes of action:

a. The Navy did not exercise due care in estimating its needs under the contract.

b. The Navy erroneously relied on the contract's indirect cost ceilings as a basis for denying SMA's claim for an equitable adjustment.

c. The Navy breached its duty of good faith and fair dealing by placing orders against a competing contract.

d. The Navy breached its duty of good faith and fair dealing by misleading SMA regarding the amounts to be ordered under the contract.

7. Respondent filed a Motion to Dismiss for Lack of Jurisdiction dated 13 January 1998. The Board denied the motion except insofar as appellant's claim could be interpreted to seek recovery of all appellant's indirect costs in spite of the contract's rate ceilings. The Board reasoned that it did not have jurisdiction because that part of SMA's claim did not meet the "sum certain" requirement for a CDA claim as it did not quantify the amount at issue. *Scientific Management Associates, Inc.*, ASBCA No, 50956, 98-1 BCA ¶ 29,656.

8. SMA has submitted 2 attorney affidavits regarding discovery and selected pages from the deposition of the contracting officer's technical representative, Mr. DiGiovanni, who did not make requirements estimates for the contract and knows of no such estimates (affidavits of Joseph A. Artabane, Esq., and W. Neil Belden, Esq., attachment to Appellant's Supplement).

DECISION

Respondent asserts there is no dispute of material fact and that it is entitled to judgment as a matter of law because, *inter alia*, it discharged its obligation under the contract by placing orders in excess of the contract minimum, and because there is no evidence that respondent acted in bad faith in establishing contract limits. Appellant asserts that respondent fraudulently induced it into the contract by use of inflated, negligently prepared estimates, that respondent wrongfully refused to adjust indirect rates, and that it is entitled to relief because of changed conditions[1].

Summary judgment is appropriate where no material facts are genuinely in dispute and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). More than mere assertions of counsel are necessary to counter a motion for summary judgment. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624 (Fed. Cir. 1984). The nonmovant may not rest on its conclusory pleadings, but must set out, in affidavit or otherwise, what specific evidence could be offered at trial. Failing to do so may result in the motion being granted. Mere conclusory assertions do not raise a genuine issue of fact. *Id.* The party with the burden of proof must support its position with "more than a scintilla of evidence." *Walker v. American Motorists Insurance Co.*, 529 F.2d 1163, 1165 (5th Cir. 1976).

SMA does not dispute the facts alleged by respondent, but argues that it was fraudulently induced into the contract. It also argues there were "changed conditions" that entitle it to recovery. Thus, appellant's arguments purport to raise issues of fact as to whether respondent engaged in fraud and whether there were changed conditions that warrant recovery. Appellant asserts that respondent has not been forthcoming in discovery because of redactions in other contracts and orders thereunder produced by respondent. It seeks to depose a Mr. Cieri based on the deposition testimony of the contracting officer's technical representative, Mr. DiGiovanni. The only substantive evidentiary submission received from SMA in opposing summary judgment consists of selected pages from Mr. DiGiovanni's deposition. SMA asserts that "Mr. DiGiovanni could tell this Board nothing regarding contract formation, what the Navy intended or promised SMA or anything else directly useful to this Board's present inquiry." Appellant's Supplement to its Opposition at 8. In short, SMA represents that its only substantive evidentiary submission is meaningless except to identify another Government employee who might know something about the contract. We have, therefore, nothing but counsel's assertions from appellant to support its contention that a genuine issue exists as to fraud and the "changed conditions" issue. Indeed, we do not even have counsel's assertion of the specific facts constituting the alleged "changed conditions." Other than broad, unsupported allegations, all SMA has offered in support of the

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[1] Appellant initially argued that it had not had an adequate opportunity for discovery. The Board suspended action on the motion and ordered discovery.

"changed conditions" issue is a cryptic "See contract, including FAR 52.249-6[2] by reference." Appellant's Opposition at 7.

In raising fraud in the inducement as a basis for recovery, SMA raises an issue which imposes on its proponent a heavy burden of proof. Any inquiry into fraud by a Government official "must begin with the presumption that public officials act 'conscientiously in the discharge of their duties.'" *Kalvar Corp. v. United States,* 543 F.2d 1298, 1301 (Ct. Cl. 1976). In analyzing a summary judgment motion to determine whether a genuine issue exists, the Board must consider the extent and quality of the evidence either provided or identified by the nonmoving party with the burden of proof, and it must "view the evidence presented through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, supra* at 254. SMA has failed utterly to provide probative evidence, let alone meet its heavy burden to establish a genuine issue as to its contention of fraud in the inducement. Thus, the presumption that the Government officials involved here acted properly is not placed in issue.

SMA argues that it needs further discovery to develop facts. To support a contention of fraud, a party must establish that false representations were made which the declarant knew or is presumed to know were untrue; that the purpose of the false representations was to influence action by the other contracting party; that the false representations were relied on; and that the party relying on the false representations was injured as a result. *Lehigh Zinc & Iron Company, Limited v. Bamford*, 150 U.S. 665 (1893). In this regard, it is implausible that a party complaining of fraud in the inducement has not, from its own sources, by now identified the Government personnel who perpetrated or were party to that fraud. If SMA was misled, surely there are SMA personnel who can provide specific facts as to respondent's misrepresentation and who it was that uttered the misleading statements. Similarly, if conditions changed so as to provide a basis for a claim, there should be SMA personnel familiar with events which gave rise to the "changed conditions" issue. While there may be facts attending the contentions of fraud in the inducement and "changed conditions" that rest only in the opponent's hands, SMA has failed to come forward with an affidavit or other evidence within its control to establish a genuine issue. From this record, we cannot ascertain what evidence SMA intends to present regarding what respondent did to induce SMA to enter into the contract, what constitutes the fraud alleged by SMA or what the facts are with respect to the "changed conditions" issue. As the nonmoving party with the burden of proof, SMA cannot rely on pleadings or the assertions of counsel. "A non-movant runs the risk of a grant of summary judgment by failing to disclose the evidentiary basis for its claim." *Pure Gold, Inc, v. Syntex (U.S.A.), Inc.*, 739 F.2d at 627. Moreover, a plea for further discovery will not result in the denial of summary judgment if the discovery is

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[2] FAR 52.249-6 is the clause, TERMINATION (COST REIMBURSEMENT) (MAY 1986).

"merely to satisfy a litigant's speculative hope of finding some evidence that may tend to support a complaint." *Id.* We hold that appellant has had an adequate opportunity for discovery and that it has failed to establish the existence of a genuine issue of material fact with respect to fraud in the inducement and "changed conditions."

Appellant's claim seeks costs of $158,445, composed of officer's salaries, outside professional services, and business conferences, all cost categories which it had included in the indirect pools in its cost proposal (findings 2, 4). SMA asserts these costs were incurred, *inter alia*, as a result of unsuccessful negotiations for relief from indirect cost ceilings (finding 4). As we interpret the claim, these costs are related to the alleged misrepresentation of the Government that induced SMA into the contract. The method SMA's claim proposes to obtain an equitable adjustment in a sum certain is not to increase indirect costs or adjust the indirect ceilings, but to convert these previously indirect costs to direct costs. We held that we have jurisdiction over this quantified portion of the claim. *Scientific Management Associates, Inc., supra* at 146,940. As the cost proposal was incorporated into the contract (finding 1), appellant is contractually bound by its terms, which include the composition of its overhead pools. Thus, unless SMA can prove that it is entitled to relief from the contract's provisions, respondent's motion must be granted on this issue. We have held *supra* that SMA has failed to establish a genuine issue with respect to fraud in the inducement and "changed conditions." Insofar as this element of the claim may be viewed as the result of respondent otherwise breaching the contract, including its duty of good faith (finding 6), we address it separately. In its responses to the summary judgment motion, SMA does not address these costs directly in argument and it has not submitted an affidavit or other evidence to support that portion of the claim. Neither has it submitted an affidavit asserting what evidence it could produce at trial to support recovery of the costs or that additional costs were incurred at all. As SMA has failed to submit anything other than the complaint and counsel's assertions to support this part of its claim, we grant respondent's motion. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc., supra.*

Finally, SMA asserts that Mr. DiGiovanni's testimony establishes that respondent did not make requirements estimates for the contract and was, therefore, negligent. Assuming, *arguendo*, that facts are in dispute as to whether the estimates were negligently prepared, SMA has still failed to assert grounds for denial of the summary judgment motion. Disputed facts must affect the outcome of a case to be material. *Anderson v. Liberty Lobby, Inc., supra* at 248. Facts affecting whether the estimates were negligently prepared are not material because the contract at issue here is an indefinite quantity contract (finding 1) where the guaranteed minimum has been ordered (findings 1, 3). "[W]hether the estimates were negligently prepared or not is simply not material in light of the Government's obligation to order only the guaranteed minimum." *C.F.S Air Cargo, Inc.*, ASBCA No, 40694, 91-2 BCA ¶ 23,985 at 120,040, *aff'd* 972 F.2d 1353 (Fed. Cir. 1992). Respondent's motion is granted. The appeal is denied.

Dated: 8 March 2000

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

RONALD JAY LIPMAN
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. 50956, Appeal of Scientific Management Associates, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals