ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
JJM Systems, Inc.	)	ASBCA Nos. 51152 and 52159
	)	
Under Contract No. N62269-93-C-0534	)	

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OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD

Appellant, JJM Systems, Inc. (appellant or JJM), has appealed the Navy's refusal to pay for work appellant alleges it performed under the subject contract. Appellant has moved for summary judgment. The Navy has filed a reply in opposition to the motion. We deny the motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

On 21 September 1993 the Navy awarded the above-referenced "level-of-effort" contract to JJM to perform research and development engineering services on what was labeled "Non-Cooperative Target Identification and Multi-Sensor Integration." As awarded, the contract was for a base year and four option years. (R4, tab 1)[1] The total estimated cost, plus fixed fee, for all options was $2,117,286; the initial funding was $225,000 (R4, tabs 1, 2).

The contract incorporated, by reference, Federal Acquisition Regulation (FAR) 52.232-22 LIMITATION OF FUNDS (APR 1984), which in relevant part states:

> (a) The parties estimate that performance of this contract will not cost the Government more than (1) the estimated cost specified in the Schedule . . . .

. . . .

(c) The Contractor shall notify the Contracting Officer in writing whenever it has reason to believe that the costs it expects to incur under this contract in the next 60 days, when added to all costs previously incurred, will exceed 75 percent of (1) the total amount so far allotted to the contract by the Government . . . . The notice shall state the estimated amount of additional funds required to continue performance for the period specified in the Schedule.

. . . .

(f) Except as required by other provisions of this contract, specifically citing and stated to be an exception to this clause –

(1) The Government is not obligated to reimburse the Contractor for costs incurred in excess of the total amount allotted by the Government to this contract; and

(2) The Contractor is not obligated to continue performance under this contract (including actions under the Termination clause of this contract) or otherwise incur costs in excess of (i) the amount then allotted to the contract by the Government . . . until the Contracting Officer notifies the Contractor in writing that the amount allotted by the Government has been increased and specifies an increased amount, which shall then constitute the total amount allotted by the Government to this contract.

. . . .

(h) No notice, communication, or representation in any form other than that specified in subparagraph (f)(2) above, or from any person other than the Contracting Officer, shall affect the amount allotted by the Government to this contract. In the absence of the specified notice, the Government is not obligated to reimburse the Contractor for any costs in excess of the total amount allotted by the Government to this contract, whether incurred during the course of the contract or as a result of termination.

> (i) When and to the extent that the amount allotted by the Government to the contract is increased, any costs the Contractor incurs before the increase that are in excess of (1) the amount previously allotted by the Government . . . shall be allowable to the same extent as if incurred afterward . . . .
>
> (j) Change orders shall not be considered an authorization to exceed the amount allotted by the Government specified in the Schedule, unless they contain a statement increasing the amount allotted.

The contract also included H32-9400 LIMITATION OF LIABILITY – INCREMENTAL FUNDING (JAN 1992) (NAVSUP 5252.232-9400), which in relevant part states:

> This contract is incrementally funded and the amount currently available for payment hereunder is limited to *$225,000.00* inclusive of fee. It is estimated that these funds will cover the cost of performance through *30 November 1993*. Subject to the provisions of the clause entitled "Limitation of Funds" (FAR 52.232-22) of the General Provisions of this contract, no legal liability on the part of the government for payment in excess of *$225,000.00* shall arise unless additional funds are made available and are incorporated as a modification to this contract.

(R4, tab 1 at 5)

Per contract provision H43-9400 AUTHORIZED CHANGES ONLY BY THE CONTRACTING OFFICER (JAN 1992) (NAVSUP 5252.243-9400), the contract advised the contractor that the "Contracting Officer is the only person authorized to make changes in any of the requirements of this contract and[,] notwithstanding provisions contained elsewhere in this contract, the said authority remains solely the Contracting Officer's," and that the contractor was not to "comply with any order, direction or request of Government personnel unless it is issued in writing and signed by the Contracting Officer, or is pursuant to specific authority otherwise included as a part of this contract." Further, if "the contractor effects any change at the direction of any person other than the Contracting Officer, the change will be considered to have been made without authority and no adjustment will be made in the contract price . . . ." (R4, tab 1 at 14)

The contract anticipated the appointment of a contracting officer's technical representative (COTR) to provide technical direction "with respect to the specification

or statement of work[;]" however, the contract warned that the COTR "does not have authority to take any action, either directly or indirectly, that would change the pricing, quantity, quality . . . or any other terms and conditions of the contract, . . . or to direct the accomplishment of effort which goes beyond the scope of the statement of work in the contract . . . ." If the contractor believed that the COTR made a request which required effort outside the scope of work, the contractor was required to "promptly notify" the contracting officer in writing, and to take no action to comply with the request until the matter was resolved by the contracting officer. (R4, tab 1 at 15)

At various times in the course of the contract, the Navy exercised options and added funds to it, increasing the amount of funds allotted to the contract from the original $225,000 to $6,750,629 (R4, tabs 2, 3, 5-11, 13-32, 34, 36-42, 45-49). Except for P00001, each contract modification increasing the allotted funds stated that it was pursuant to the above-quoted FAR 52.232-22 LIMITATION OF FUNDS. Each modification increasing the allotted funds advised that the new total amount included a fixed fee, and was the "maximum amount reimbursable" and was not to be exceeded without further modification. (*Id.*)

The Statement of Work required JJM to submit "monthly progress reports in accordance with CDRL [Contract Data Requirements List] Form 1423, Sequence A005[,] and funding status reports in accordance with CDRL Form 1423, Sequence A006" (R4, tab 1). The CDRL listed the addressee for those reports as "NAWC/AD 5024"[2] (*id).*

Beginning 30 November 1993, JJM began filing what it entitled "Progress and Cost Reports." From that time until 29 December 1995, JJM filed 24 reports more or less on a monthly basis.[3] The reports are addressed to the "Commander, Naval Air Warfare Center," and marked for the attention of "Receiving Officer." The distribution included the COTR: "Dave Davis, NAWC Warminster, Code 5024." The cover letters specifically referenced the CDRL requirements for progress and cost reports. (App. appen., tab 2) The 5024 code is the same one listed as the recipient for distribution of the reports on the CDRL (R4, tab 1).

As part of the reports, JJM included a table in the section entitled "Cost Summary," which showed the expenses for the current reporting period ("This Period"), cumulative costs ("Since Start"), funds budgeted ("Budget"), and the overage or underage of funds ("Balance"). As early as the second report dated 28 December 1993, for the period 23 October 1993 to 3 December 1993, the costs were shown to have exceeded the budget, and the balance was shown as a negative, *e.g.*, "(134,897)." Except for the first report which showed that costs had not yet exceeded allotted funds, every report shows a negative balance, with the greatest deficiency documented as "($1,159,519)" for the 31 December 1994 to 27 January 1995 period. (App. appen., tab 2)

The Navy assigned seven different people to serve as the contracting officer (R4, tabs 1-3, 5-11, 13-32, 34, 36-42, 45-49; Gov't reply app., exs. 2-8). Those contracting officers executed 41 modifications to the contract which increased the allotted funds (R4, tabs 2, 3, 5-11, 13-32, 34, 36-42, 45-49). In many cases, funds were increased just a few days after the last increase (*see*, *e.g.*, R4, tabs 9 and 10 (7 days), 18 and 19 (8 days), 31and 32 (9 days), and 36 and 37 (6 days)).

Appellant concedes that other than filing the Progress and Cost Reports, at no time did JJM notify the cognizant contracting officer as required by the Limitation of Funds clause that the contract was in an overrun situation (app. mot. at 8, ¶ 32). In a sworn affidavit, appellant's vice-president maintains that the "Navy could readily determine from a review of [the monthly Progress and Costs Reports] whether this cost contract was within funding limitations" (app. appen., tab 1 at ¶ 12). The Navy exercised some of the options while the project was in an overrun condition (*id*. at 8, ¶ 33; R4, tabs 9, 18, 41).

On 25 April 1997, appellant filed a request for an equitable adjustment in the amount of $1,271,956 (R4, tab 50). That request was denied on 16 October 1997 (R4, tab 52). On 20 October, appellant filed a "formal claim," properly certified, requesting an equitable adjustment in the same amount. The claim was for "extra work performed within the scope of the contract" during the period between August 1994 and December 1995. (R4, tab 53) The Navy's acknowledgment of receipt of the claim stated that a final decision would be made not later than "06 May 1997 [sic – 1998]" (R4, tab 54).

At least once during the contract performance period, appellant and respondent recognized and agreed that the contract was in an overrun position. In a letter dated 22 October 1996 to the contracting officer, appellant represented that it had done work on the F-14 ALR-45 Upgrade project, and that a Navy office identified as PMA-241 wanted to reimburse appellant for expenses incurred which were "beyond the initial funding." (Gov't reply br., ex. 10) Eventually, the parties agreed on a settlement of $475,000. That amount was added to the contract funding by Modification P00044 on 18 December 1996. (Gov't reply br., ex. 5; R4, tab 45) Of the 42 modifications to the contract which added additional funds, four were done after Modification No. P00044 (R4, tabs 46-49).

On 12 November 1997, appellant filed its initial appeal on the basis of a deemed denial of its 20 October 1997 claim which was docketed as ASBCA No. 51152 (R4, tab 60).

On 13 November 1997, the Navy requested an audit of the claim by the Defense Contract Audit Agency (DCAA) (R4, tab 58). The DCAA audit report, dated 1 June 1998, among other things, concluded that "the contractor has already received payment

for the majority of the costs included in the equitable adjustment claim" (Gov't reply br., ex. 1 at 2).

On 14 July 1998, appellant filed another certified claim which requested another equitable adjustment, and stated that a 4 May 1998 audit report "indicated that there was a significant variance in the reimbursed cost versus the incurred costs through the end of the contract" (R4, tab 62).[4] The claim was to "cover the period after voucher 44" to the completion of the contract (*id*. at 2). The total amount of the request was $1,496,865 (*id*. at 5). That claim was denied by a contracting officer's final decision dated 21 April 1999 (R4, tab 66). Appellant timely filed an appeal which was docketed as ASBCA No. 52159.

The essence of JJM's claims is that, over the course of its performance, it performed several tasks which were within the scope of the contract, but for which it was never reimbursed (app. mot. at ¶¶ 13-27). In his sworn affidavit, appellant's vice-president avers that the "Navy made repeated promises to pay for various tasks and briefings conducted by JJM, but after performance the funding was not provided" (app. appen., tab 1 at ¶15). Additionally, JJM alleges that it was not paid for providing a senior engineer to the COTR to aid in the project (app. mot. at ¶ 28). According to appellant, this staffing was "specifically requested" by the Navy; however, it has never "paid for this requested effort, [a]lthough it fully authorized and utilized this assistance" (app. appen., tab 1 at ¶11).

By order dated 22 June 1999 and on appellant's motion, we consolidated the two appeals. Appellant filed its present motion before the parties had exchanged written discovery or taken any depositions (Gov't reply at 4-5).

DECISION

Summary judgment is appropriate where no material facts are 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). The burden is on the movant to establish the absence of any genuine issues of material fact. *Id*. at 1390-91. In deciding a motion for summary judgment, we do not resolve factual disputes, but ascertain whether genuine disputes of material fact are present. *General Dynamics Corp.*, ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851. A material fact is one which will affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Generally, the unambiguous language of the Limitation of Funds clause serves as a bar to any liability on the part of the Government to pay any amount beyond that provided in the contract, especially where the contractor fails to give the required notification. *See Advanced Materials, Inc. v. Perry*, 108 F.3d 307, 310 (Fed. Cir. 1997). Although

appellant admits that the required notice set out in the Limitation of Funds clause was not given to the Government, it maintains that the Government should be estopped from asserting that the lack of such notice is a bar to payment of its claim. (App. mot. at 9-10)

In order for a party to successfully estop the Government under these circumstances, it must show four elements:

> (1) [T]he party to be estopped must know the facts, *i.e.*, the government must know of the overrun; (2) the government must intend that the conduct alleged to have induced continued performance will be acted on, or the contractor must have a right to believe the conduct in question was intended to induce continued performance; (3) the contractor must not be aware of the true facts, *i.e.*, that no implied funding of the overrun was intended; and (4) the contractor must rely on the government's conduct to its detriment.

Advanced Materials, 108 F.3d at 311-12 quoting *American Elec. Lab., Inc. v. United States*, 774 F.2d 1110, 1113 (Fed. Cir. 1985). Thus, for appellant's motion for summary judgment to succeed, it must show that there are no genuine disputes as to the material facts surrounding each of these elements. Conversely, failure to meet any one of the elements requires that we deny the motion.

While the Government urges that there are genuine disputes as to material facts for each element (Gov't reply br. at 8-17), for purposes of this motion, we need address only the first element, *i.e.*, whether the Government knew of the overrun. In its effort to demonstrate that it has met this requirement, appellant alleges:

> The [Government] was fully aware of the cost overruns based upon the monthly progress and status reports it was receiving from JJM. It was clear that the contract was in a cost overrun situation. Thus, the first element of estoppel is satisfied.

(App. mot. at 10)

In support of its opposition, the Government has submitted affidavits from the seven contracting officers who were assigned responsibility for the captioned contract (Gov't reply br., exs. 2-8). In their affidavits, each of the seven contracting officers swears that he or she "did not see any progress and cost status reports" JJM submitted to NAWC (*id.*). Additionally, the COTR swears that, while he "received progress and cost status reports," he never discussed "the contents of any such report with any contracting officer" (*id.* at ex. 9). The affidavits do not provide a complete picture as to what the

contracting officers knew, or when and how they knew it; nevertheless, for purposes of the motion, we draw all inferences in favor of the non-movant. Thus, as to the first element needed to estop the Government, it is clear that the Government has raised a genuine issue as to a fact that is material.

Even if there was not such a genuine issue of material fact, we would not be inclined to grant summary judgment where, as here, respondent as non-movant has not had an opportunity for full discovery on issues such as the contractor's awareness of the true facts. Although we have no specific rule for motions for summary judgment, we use the Federal Rules of Civil Procedure as a guide in procedural matters. The applicable federal rule is Rule 56. The Supreme Court has opined that "summary judgment [should] be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986); *Burnside-Ott Aviation Training Center, Inc. v. United States*, 985 F.2d 1574, 1582 (Fed. Cir. 1993). Such is the case here as no written discovery has been completed or depositions taken (Gov't reply br. at 4-5).

CONCLUSION

As relates to at least one element which appellant must prove in order to estop the Government, respondent has shown that there is a genuine issue of material fact, and the record needs to be developed before that issue may be resolved as a matter of law. The motion for summary judgment is denied.

Dated: 11 September 2000

RICHARD SHACKLEFORD
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

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

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

NOTES

[1] A separate Rule 4 file was submitted for each appeal; however, the exhibits are numbered consecutively with the second file beginning with tab 62.

[2] It appears that "NAWC/AD" stands for Naval Air Warfare Center, Aircraft Division. *See, e.g.*, R4, tab 1 at 4. The "5024" correlates to the "code" listed for the COTR, Dave Davis. *Id*.

[3] The record does not include reports for April 1994, or for March or June 1995.

[4] We do not have a 4 May 1998 audit report in this record.

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. 51152 and 52159, Appeals of JJM Systems, Inc., rendered in conformance with the Board's Charter.

Dated:

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