

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
NSI Technology Services Corp.) ASBCA No. 53519
)
Under Contract Nos. NAS2-12867)
NAS2-13267)
NAS2-13708)

APPEARANCES FOR THE APPELLANT: Devon E. Hewitt, Esq.
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McLean, VA

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Ames Research Center
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OPINION BY ADMINISTRATIVE JUDGE JAMES
ON APPELLANT'S MOTION FOR SUMMARY JUDGMENT

After pleadings were filed in the captioned appeal, appellant moved for summary judgment, submitting "Proposed Findings of Uncontroverted Fact" and legal arguments. The Government opposed the motion, submitting a "Statement of Disputed Facts" and legal arguments. Appellant replied to the Government's opposition, and the Government responded to appellant's reply.

STATEMENT OF FACTS (SOF) FOR THE PURPOSES OF THE MOTION

1. NSI Technology Services Corp. (NSI) is a wholly-owned subsidiary of ManTech International Corporation (R4, tab 15 at 1).
2. On 25 November 1992, the Ames Research Center (Ames) of the National Aeronautics and Space Administration (NASA) issued a solicitation for aircraft and flight simulator maintenance and technical support (MTS) services for Ames (R4, tab 8 at 1-2).
3. NSI was the incumbent contractor for Ames MTS services prior to the issuance of said solicitation (R4, tab 8 at 1).

4. On 17 June, 15 July, 9 August, and 1 September 1993 NSI filed bid protests to the Comptroller General (GAO), challenging NASA's selection of Serv-Air, rather than NSI, for award of the Ames MTS services contract. The 15 July 1993 protest alleged that NASA had improperly released NSI's proprietary information to Serv-Air. The law firm of Saltman & Stevens, P.C., Washington, DC, represented NSI in these protests. (R4, tabs 4-7)

5. On 29 December 1993 GAO denied all NSI's foregoing protests in decision No. B-253797.4, 93-2 CPD ¶ 344 (R4, tab 8).

6. On or about 3 January 1994 NASA Ames awarded the Ames MTS to Serv-Air (R4, tab 15 at 2).

7. On 31 January 1994 NSI filed a suit that was transferred to the United States District Court, Northern District of California, Case No. C95-20559 SW-EAI, against defendants Serv-Air and NASA, alleging that NASA had allowed Serv-Air improperly to appropriate and use NSI's trade secrets and proprietary information in obtaining NASA's Ames MTS contract. Of the 63 pages in NSI's Third Amended Complaint in No. C95-20559 SW-EAI, the Rule 4 record in this appeal contains seven pages, which state that NSI's complaint (a) alleged ten counts (only the allegations in counts IX and X are in our record) and (b) included ten Prayers for Relief, of which prayer (I) stated: "(I) On all COUNTS I-VIII, (1) Costs and attorneys' fees incurred and accruing herein as provided by law" (R4, tab 13 at 5, tab 26) From the present ASBCA record, one cannot determine what law firm or firms represented NSI in 1994 in the District Court suit, or whether any of NSI's Counts I through VIII included any allegations about its 1993 GAO bid protests regarding NASA's Ames MTS contract or costs and attorneys' fees NSI incurred therefor.

8. On 10 February 1995 NASA's contracting officer (CO) requested the Defense Contract Audit Agency (DCAA) to audit the legal costs NSI incurred for the foregoing GAO protests and U. S. District Court lawsuit in 1993 and 1994, and to determine whether those costs were charged as direct or indirect costs and how much of those costs NSI apportioned to contracts NAS2-12867, NAS2-13267, NAS2-13708 and NAS2-13942 (R4, tab 10).

9. DCAA's 18 January 1996 draft audit report No. 6121-95Z17860002 stated to the CO that: NSI claimed legal expenses as general and administrative (G&A) costs amounting to \$351,745.93 for 1993 and \$340,979.32 for 1994; the 1993 legal costs were for the GAO protest; the 1994 legal costs were for the District Court suit; the 1993 costs were not allowable by their similarity, pursuant to FAR 31.204(c), to costs of claims or appeals against the Government made unallowable by FAR 31.205-47(f); and the 1994 costs were expressly unallowable pursuant to FAR 31.205-47(f) (R4, tab 11 at 3-4).

10. ManTech's 6 February 1996 letter to DCAA stated that it disagreed with the DCAA draft audit conclusions about the non-allowability of NSI's legal costs of the GAO

bid protest and the District Court suit, and enclosed a legal opinion of retained counsel who argued such position based chiefly on the distinction between a pre-award protest and a contract claim defined in FAR 31.205-47(f)(1) and 33.201 (R4, tab 13 at 2-3).

11. DCAA’s final audit report, No. 6321-96Z17900003, dated 26 March 1997, stated that NSI had apportioned the 1993-1994 legal expenses to five NASA contracts, one Navy contract, one Air Force contract, and a “Sales Accruals” account, as follows:

<u>Contract</u>	<u>1993</u>	<u>1994</u>
NAS2-12692	\$ 955	\$ (42)
NAS2-12867	237,686	53,394
NAS2-13267	51,971	70,072
NAS2-13708	69,506	138,530
NAS2-13924	0	36,894
N60530-87-C-0074	224	0
F04611-90-C-0056	28,203	38,988
Sales Accruals	<u>(3,676)</u>	<u>(15,120)</u>
Total	<u>384,869</u>	<u>322,716</u>

NSI’s 1993-94 total legal expenses of \$707,585 (\$384,869 + 322,716) were incurred for the following legal services:

<u>Firm</u>	<u>Hours</u>	<u>Amount</u>
Saltman & Stevens	1,977.0	\$360,836
Robinson & Wood	163.8	41,584
Fried, Frank & Harris	<u>1,153.1</u>	<u>305,165</u>
Totals:	<u>3,293.9</u>	<u>\$707,585</u>

The audit report stated that: (a) NSI had documented its payments for the foregoing legal services by canceled check, check log indicating invoice numbers and dates, the accounts payable voucher and vendor invoices, and DCAA had reviewed and attached to its audit report the itemized billings of each of the three law firms (those billings are not in the Rule 4 file *) (b) costs NSI incurred after 31 January 1994 appeared to be costs of a claim against the Government and thus expressly unallowable pursuant to FAR 31.205-47(f)(1); and (c) DCAA qualified the report on the basis that it did not have the technical expertise to

* On 2 February 2000 ManTech sent the CO a 17 April 1997 list of nine Saltman & Stevens vouchers dating from July 1993 to March 1994 and totaling \$356,082.38, which does not correspond to DCAA’s audit figures of \$384,869 in NSI legal fees for 1993, or \$360,836 for Saltman & Stevens expenses, or \$359,163 for 1993 legal expenses allocated to contracts NAS2-12867, -13267, and -13708.

ascertain whether the fees for the District Court suit constituted “a claim against the Federal Government.” (R4, tab 24)

12. On 20 May 1997: (a) District Court suit No. C95-20559 SW-EAI was dismissed with prejudice by agreement of the parties, Serv-Air, NSI, and NASA (R4, tab 27 at 2-4); and (b) the CO received a 9 May 1997 letter from NSI’s attorneys which stated that NSI would not pursue the recovery of its legal fees and costs incurred in that District Court suit under its NASA cost-reimbursement type contracts (R4, tab 28).

13. DCAA’s 19 November 1997 audit report No. 6321-97Z17900001 advised the CO that in calendar year 1994 NSI included \$545,107 in legal expenses for the District Court case in its G&A cost pool, and that “ManTech voluntarily deleted the 1994 payments and accruals from [the] claim for reimbursable [G&A] expense upon settlement of the District Court case” (NSI’s reply to Gov’t opposition to motion, tab B at 4).

14. The CO’s 23 October 2000 letter to ManTech stated that: (a) the 1993 legal costs of pursuing six unsuccessful GAO bid protests against NASA were “not allowable, not allocable to any NASA contract, . . . not fair or reasonable, and were not incurred for the benefit of NASA”; (b) this “decision” affected contracts NAS2-12867, NAS2-13267 and NAS2-13708, but not NAS2-12692, which had already been “closed”; and (c) though NSI indicated that this decision would affect \$356,000 in legal costs, a final DCAA audit would “determine the exact dollar value.” The letter did not state that its was a “final decision” or advise ManTech or NSI of its appeal rights. (R4, tab 41)

15. NSI’s 8 November 2000 letter to the CO: disagreed with the CO’s 23 October 2000 “decision” letter; requested “immediate monetary relief” of \$384,869; submitted three certifications for contracts NAS2-12867, NAS2-13267 and NAS2-13708, whose individual amounts totaled \$359,163.21; and requested a final CO’s decision (R4, tab 43).

16. The CO’s 4 January 2001 letter to ManTech identified the monetary discrepancy in NSI’s 8 November 2000 letter and requested clarification (R4, tab 44).

17. NSI’s 22 January 2001 letter clarified to the CO that \$359,163.21 was the intended amount (R4, tab 45).

18. The CO’s 21 June 2001 final decision denied NSI’s \$359,163.21 claim for 1993 legal costs applied to contracts NAS2-12867, NAS2-13267 and NAS2-13708 (R4, tab 49). NSI received that final decision on 2 July 2001 (R4, tab 50) and timely appealed therefrom to the ASBCA on 18 September 2001 (R4, tab 51), which docketed the appeal as ASBCA No. 53519.

19. Respondent’s 20 November 2001 pleading in ASBCA No. 53519 asserted the “affirmative defense” of accord and satisfaction, stating:

Appellant filed a lawsuit in Federal District Court against both Serv-Air and NASA. In its suit NSI requested that contract NAS2-13825 (the MTS contract) awarded to Serv-Air be declared null and void. NSI also requested that it recover its attorneys fees related to that contract. NSI subsequently dismissed the lawsuit against NASA with prejudice, after receiving a substantial settlement from Serv-Air. This settlement included payment to NSI to cover NSI's legal fees incurred in both the District Court lawsuit and the GAO protests. Thus, NSI has already been compensated for its GAO protest legal fees.

(Answer at 6)

20. Respondent's 22 July 2002 opposition to NSI's motion for summary judgment re-asserts its belief that Serv-Air's settlement payment to NSI included all attorneys' fees incurred in both the GAO bid protests and the District Court action, and hence is barred by the doctrine of accord and satisfaction (Gov' t opp' n at 3-4, 15-16).

21. NSI's 30 August 2002 Reply to NASA's Opposition to Summary Judgment submitted to the Board in camera (but not to NASA) "a confidential Settlement Agreement between NSI and a third party." Even if the information NSI expunged from its reply to NASA were revealed, such information would not resolve the factual issue of whether any of NSI's Counts I through VIII included any allegations about its 1993 GAO bid protests regarding NASA's Ames MTS contract or costs and attorneys' fees NSI incurred therefor.

22. Respondent's 22 July 2002 Statement of Disputed Facts (SDF) contends that NSI has submitted no evidence that its hourly rates and times spent in charging legal fees were reasonable and necessary and in fact were incurred solely with respect to the GAO bid protests (SDF ¶¶ 4, 7, 9-10).

DECISION

Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c); *U.S. Ecology, Inc. v. United States*, 245 F.3d 1352, 1355 (Fed. Cir. 2001).

NSI's District Court suit, No. C95-20559 SW-EAI alleged ten counts, of which the allegations in counts IX and X are in the ASBCA record, but the allegations in counts I-VIII are not in the record, and NSI's prayer for relief (I) stated: "On all COUNTS I-VIII (1) Costs and attorneys' fees incurred and accruing herein as provided by law" From the present ASBCA record, one cannot determine whether any of NSI's counts I through VIII

included any allegations about its 1993 GAO bid protests regarding NASA's Ames MTS contract or costs and attorneys' fees NSI incurred therefor. (SOF ¶ 7) Respondent asserted the affirmative defense of accord and satisfaction, based on its belief that Serv-Air's 1997 settlement payment to NSI included all attorneys' fees incurred in both the GAO bid protests and the District Court action and other disputed material facts (SOF ¶¶ 19-20, 22). Thus, on the present record in this appeal, one cannot determine that there is no genuine issue of material fact. Accordingly, summary judgment is not appropriate.

NSI's motion for summary judgment is denied.

Dated: 8 May 2003

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

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

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. 53519, Appeal of NSI Technology Services Corp., rendered in conformance with the Board's Charter.

Dated:

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