ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Dynamics Research Corporation	)	ASBCA No. 53788
	)	
Under Contract No. F33657-98-D-2012	)	

APPEARANCES FOR THE APPELLANT: Brian A. Bannon, Esq.
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Washington, DC

APPEARANCES FOR THE GOVERNMENT: COL Anthony P. Dattilo, USAF
Chief Trial Attorney
John M. Taffany, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE THOMAS

Appellant claims an equitable adjustment of $168,439.72 for suspension costs comprised of payments to data entry employees during periods when Air Force computers were down and the employees were unable to work. Appellant relies upon the contract Base Support and Stop-Work Order clauses. The parties have submitted the appeal on the record pursuant to Board Rule 11. Only entitlement is before us. We sustain the appeal upon the basis of the Stop-Work Order clause.

FINDINGS OF FACT

1. On 13 March 1998, the Air Force awarded Dynamics Research Corporation Contract No. F33657-98-D-2012 for omnibus services to the Aeronautical Systems Center (Center), Wright-Patterson AFB, Ohio. The contract was an indefinite-quantity contract. Delivery orders were to be performed on a time-and-material basis except for travel and computer access time services, which are not in issue here. The contract included hourly labor rates for categories of employees. According to the contract, the hourly labor rates were "composite billing rates consisting of all direct and indirect expenses and profit." (R4, tab 1 at 1, 3-5 of 29, tab 1, § J, attach. 3 at 1 of 2) Appellant did not include standby or idle labor costs in the labor rates set forth in the contract (R4, tab 30 at ¶ 5).

2. The contract included the Federal Acquisition Regulation (FAR) 52.232-7, PAYMENTS UNDER TIME-AND-MATERIALS AND LABOR-HOUR CONTRACTS (FEB 1997)

and FAR 52.242-15, STOP-WORK ORDER (AUG 1989) clauses (R4, tab 1 at 7, 16 of 29). The Payments clause provides:

> (a) *Hourly rate.* (1) The amounts shall be computed by multiplying the appropriate hourly rates prescribed in the Schedule by the number of direct labor hours performed. The rates shall include wages, indirect costs, general and administrative expense, and profit.

The Stop-Work Order clause provides:

> (a) The Contracting Officer may, at any time, by written order to the Contractor, require the Contractor to stop all, or any part, of the work called for by this contract for a period of 90 days after the order is delivered to the Contractor . . . . Upon receipt of the order, the Contractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. . . .
>
> . . . .
>
> (b) . . . . The Contracting Officer shall make an equitable adjustment in the delivery schedule or contract price. . . , if-
>
> (1) The stop-work order results in an increase in the time required for, or in the Contractor's cost properly allocable to, the performance of any part of this contract . . . .

3. Contract clause 5352.245-9004, BASE SUPPORT (AFMC) (JUL 1997), ALTERNATE I (JUL 1997), stated:

> Base support shall be provided by the Government to the Contractor in accordance with this clause. Failure by the Contractor to comply with the requirements of this clause shall release the Government, without prejudice, from its obligation to provide base support by the date(s) required. If warranted, and if the Contractor has complied with the requirements of this clause, an equitable adjustment shall be made if the Government fails to provide base support by the date(s) required.

(R4, tab 1 at 11 of 29)

4. On 24 March 2000, the Air Force issued delivery order 40 (DO 40) under the contract. DO 40 required litigation support including data entry at a ceiling price of $3,290,557. The period of performance was 24 March 2000 through 31 August 2000, subsequently extended to 8 September 2000. (R4, tabs 1(G), 1(H)) DO 40 described the base support to be provided by the Air Force as computers, FAX machines, copiers, telephone access and general office supplies. (R4, tab 1(G) at 2 of 6)

5. The DO 40 statement of work required that work be performed at the Air Force program office or designated TDY locations. It said that the program office "will be open to personnel from 06:30 AM to 12:30 AM daily" and there will be two shifts, a day shift and an afternoon shift. The statement of work also included paragraph 14.0, "Recruiting Commitment." The contractor was required to provide a minimum of 20 SF 86s (security clearance forms) each month "until the manpower equivalent of 194 are cleared, in-briefed, and working" in the program office. All personnel were required to "have a Secret/SAR [Special Access Required] Clearance with an investigation performed within the last five years, and a Program Access Request approved by the . . . Government Program Manager before they can begin work." The "SF86 metrics" were to "be evaluated by the Government on a month-to-month basis." If, at any point, the manpower level fell below the "equivalence line," the original recruiting requirement of 20 SF86 submissions per month was to be reinstated. (R4, tab 1(G), attach. 1 at 3, 5, 6 of 6)

6. During performance of DO 40 the computer system at the Air Force program office "crashed" on three occasions and data entry could not be performed. On each occasion, the Air Force program manager directed that the data entry employees be sent home until the computers were available. The contractor promptly reported each malfunction and the ensuing downtime to the contracting officer. The specific periods of downtime were parts or all of 23 to 24 May 2000, 21 to 27 or 28 July 2000, and 2 to 3 August 2000. (R4, tabs 2, 3, 6, 8, 15)

7. Appellant and its subcontractors paid the employees for their scheduled hours during these periods even though they performed no work. Appellant explains in a declaration that:

> The decision to pay the employees was a business decision that such payments were a necessary cost of continuing to perform the contract. Neither DRC nor its subcontractors would have been able to attract and retain qualified personnel willing to work multiple shifts if their policy were to furlough employees without pay whenever the employees were

> prevented from working due to actions completely out of their control.
>
> . . . .
>
> Since the government shut downs of the contract facility were unplanned and sudden with a moving date/time for resuming operations, DRC was unable to plan for alternate employment for the individuals. Additionally, there were no other contemporaneous projects on which employees could have been used.

(R4, tab 30 at ¶¶ 1, 6) The government did not offer any evidence indicating that appellant's assessment of the facts was incorrect. We find appellant's explanation reasonable.

8. On 21 May 2001, appellant submitted a certified claim in the amount of $168,439.72 for payments for downtime including indirect costs and profit (R4, tabs 15, 16).

9. On 3 May 2002, appellant appealed from a deemed denial of the claim and the appeal was docketed as ASBCA No. 53788. On 10 June 2002, the contracting officer issued a final decision denying the claim (R4, tab 28).

DECISION

Appellant had a time-and-materials contract to perform data entry services at the Air Force's program office. It seeks an equitable adjustment for suspension costs consisting of payments to data entry personnel during three periods when the Air Force's computers had crashed and the Air Force program manager sent the employees home. The personnel did not perform any work under the contract during these time periods. Appellant argues that it is entitled to an equitable adjustment pursuant to the Base Support or Stop Work Order clauses.

Under a time-and-materials contract, the government acquires services on the basis of "direct labor hours at specified fixed hourly rates that include wages, overhead, general and administrative expenses, and profit." FAR 16.601(a). A contractor may not recover separately for stand-by or idle hours, absent some change or other compensable event, since stand-by or idle time is not time worked. *Resource Consultants, Inc.*, ASBCA No. 29710, 86-2 BCA ¶ 18,916 at 95,403.

The Stop-Work Order clause, FAR 52.242-15, provides that the contracting officer may by written order require the contractor to stop all or any part of the work for a period

of 90 days (finding 2). Here, the Air Force program manager in charge at the site directed that the employees be sent home because the computers had crashed. Appellant promptly notified the contracting officer of each shut down. (Finding 6) We conclude that there was a constructive stop-work order on each occasion. *See Merritt-Chapman & Scott Corp. v. United States*, 429 F.2d 431, 443 (Ct. Cl. 1970) (constructive suspension of work).

The Stop-Work Order clause further provides for an equitable adjustment when the stop-work order results in an increase in the cost properly allocable to performance of the contract. The government argues that appellant has not proved causation in that the payment of the employees' wages was "by no means unavoidable and thus did not result *per se* from the failure of the computer system" (gov't br. at 9). Appellant argues that the costs were reasonable and prudent (app. reply br. at 3).

The DO 40 statement of work required appellant to provide employees who had secret security clearances with special access. (Finding 7) As a result of the Air Force's computer malfunctions, appellant was confronted with the problem of whether or not to pay its employees for the time until the computers were up again. Appellant was of the opinion that paying the employees was a necessary cost of continuing to perform the contract and that neither it nor its subcontractors would be able to attract and retain qualified personnel if they furloughed the employees without pay in these circumstances.

The government argues that appellant's assertion that it had to pay employees for the down time in order to attract and retain qualified personnel "is problematic on two counts." (Gov't reply br. at 5) First, the government contends there is no evidence supporting a company policy to make such payments, no evidence of experience on other contracts, and no analysis or other support regarding potential retention problems beyond appellant's bare allegation in a declaration. Further, the government argues that appellant should have known from the outset that in a time and materials contract intermittent work is to be anticipated and it would only be paid for "time spent in productive activity." (*Id.*)

As to the first point, we agree that the lack of corroborative evidence supporting the assertions in the declaration is "problematic" and under other circumstances might be fatal to appellant's case. However, we believe appellant's actions find support in the Recruiting Commitment clause. In that non-standard clause the government imposes a requirement for 194 Secret/SAR cleared, in-briefed and working document processors, month-to-month government monitoring of those manpower levels, and reinstatement of recruiting requirements if that level is not maintained (finding 5). The work stoppages placed appellant on the horns of a dilemma. It had to balance the disruption to its staff, and ultimately to contract performance, caused by the outages against the contractual emphasis placed on employee retention and staffing levels. The government's computers crashed and the government sent appellant's employees home. The government had also imposed a stringent condition on employee clearances and staffing. The government

cannot now be heard to complain that appellant's actions in attempting to balance its contractual responsibilities were unreasonable.

As to the second point, evidence of record establishes that appellant's pricing did not include the cost of idle or standby labor in its labor rates (finding 1). The government seems to argue that it should have. We disagree. The work stoppages were unplanned, sudden and without resumption dates (finding 7). Further, such stoppages are not "intermittent." Moreover, we have found that the computer outages at issue resulted in constructive stop-work orders. We hold that appellant incurred the costs in question as a result of the constructive stop-work orders within the meaning of the Stop Work Order clause, and that it would not have been reasonable to furlough these employees in the circumstances.

In supplemental briefing, the government has made a number of further arguments. One is that the contract SOW did not require appellant to pay the employees for their idle time. The government is correct, but the issue is the reasonableness of appellant's doing so under the circumstances created by the stop work order, not whether it was required to. Another is that the government did not agree to pay directly and individually for the elements set out in the contract SOW. Again, the government is correct, but it did agree to pay for increased costs caused by stop work orders. We have considered the government's other arguments in its supplemental brief, including that the Base Support clause limits appellant's recovery under the standard Stop-Work Order clause, but do not find them persuasive.

The appeal is sustained and remanded to the parties for negotiation of quantum.

Dated: 23 August 2004

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

(Signatures continued)

I concur

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

I concur

CARROLL C. DICUS, JR.
Administrative Judge
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. 53788, Appeal of Dynamics Research Corporation, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals