

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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Griffin Services, Inc.) ASBCA Nos. 54246, 54247
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Under Contract No. SP4700-97-D-0007)

APPEARANCE FOR THE APPELLANT: Karl Dix, Jr., Esq.
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Atlanta, GA

APPEARANCE FOR THE GOVERNMENT: Jo DuBose Spence, Esq.
Assistant General Counsel
Defense Logistics Agency
Fort Belvoir, VA

OPINION BY ADMINISTRATIVE JUDGE KIENLEN
ON
APPELLANT’S MOTION FOR SUMMARY JUDGMENT

NATURE OF THE CASE

This case involves a contract for electrical operations and maintenance services at the Defense Logistics Agency headquarters complex at Fort Belvoir, Virginia. After an ineffective attempt to exercise the first option year, the government exercised successive options for continued performance of services, for a total of six months.

During the base period the contractor incurred costs for extra work required by the government. The contractor filed a claim for those costs. It was the subject of ASBCA No. 51544. That dispute was settled. During the six-month option period, the contractor continued to incur costs for identical extra work. Instead of filing a claim for those extra costs, the contractor filed a constructive change claim for all costs incurred during the option period. That constructive period of performance claim was docketed as ASBCA No. 52280.

The contractor also filed specific claims for extra work performed during all periods of performance. These claims included \$4,048 for the “maintenance and repair of the motorized blinds” and \$12,500 for the “inaccurate and misleading nature of the equipment inventory.” Those claims were docketed as ASBCA No. 52281. Some of those costs would be subsumed by the constructive period of performance claim in ASBCA No. 52280.

On 21 December 2001 the appellant filed a motion for summary judgment on its constructive change claim. That motion applied to the claim in ASBCA No. 52280, as well as to most of the claimed costs in ASBCA No. 52281. In our decision of 2 August 2002 we granted appellant's motion with respect to the period between 1 January and 31 March 1998. We denied the motion with respect to the earlier periods for which options for continued performance were exercised. That decision was on entitlement only. *Griffin Services, Inc.*, ASBCA Nos. 52280, 52281, 02-2 BCA ¶ 31,943. Familiarity with our earlier decision is presumed.

The parties have been unable to agree on the quantum issues. The quantum for services rendered during the period 1 January through 31 March 1998 is the subject of ASBCA No. 54246; the quantum in ASBCA No. 54247, under the theory of extra work, would duplicate the costs covered in ASBCA No. 54246 under the theory of a constructive period of performance. Under that latter theory, all actual costs of work performed are recoverable.

The appellant seeks to recover \$111,888.40 plus Contract Disputes Act interest. Because the parties failed to agree on quantum, the appellant has filed a motion for summary judgment on those quantum issues. The appellant has submitted a statement of undisputed facts and has filed an affidavit by its controller, along with extracts of its financial records. The appellant has also submitted a Defense Contract Audit Agency audit report. The government has responded to the appellant's motion, but, has not filed affidavits or other additional documents which contradict or raise a genuine dispute of fact. We grant the motion by the appellant.

STATEMENT OF UNDISPUTED FACTS

Under the contract, Griffin Services received a monthly fixed-price for the base period services of \$26,071. Following the contract expiration, Griffin continued to provide electrical operations and maintenance services to the government from 1 January 1998 until 31 March 1998. The government paid for those services at the fixed rate of \$26,071 per month.

During this period the contract was re-solicited under a similar scope of work. The government awarded that contract to Varco/Marc Electrical Construction Company, at a monthly price of \$106,034 for the base period. The government accepted this price as reasonable. In its reply to the appellant's statement of undisputed facts, the government merely denied the truth of these facts without any supporting affidavit or citation to evidence. A mere denial is insufficient to establish a genuine dispute of fact. Moreover, in its answer to the complaint the government admitted that it had made the award. (Compl. and Answer, ¶ 14) It was required to make the award at a reasonable price. (*See, e.g.*, FAR 14.408-2(a), 15.405(b), (d)) For the purposes of this motion, therefore, we find that these facts are undisputed.

As noted in the Board's decision of 2 August 2002, the original government Rule 4 File in ASBCA No. 52280 shows that on 28 January 1999 Griffin submitted its claim to the government for the actual costs incurred during the extended period of performance. That document was received on 1 February 1999. (R4, tab A17)

The appellant has submitted the affidavit of Mr. Kenneth A. Klueter, the financial controller for Griffin Services, Inc. Included in the record is an extract from Griffin's general register detail report for the month of January 1998. The general ledger detail is extracted from Griffin's financial records and reports of costs incurred for the contract. These records show that the total costs incurred for the fixed portion of the contract work total \$34,982.99 for the month of January 1998. Griffin had an audited overhead rate of 13.11 percent. Griffin used a profit rate of 5 percent. After applying these rates to the above costs, the total costs and profit for January 1998 were \$41,547.73. Griffin subtracted the \$26,071 contract rate paid by the government, leaving a balance of \$15,476.73 for January 1998.

Also included in the record is an extract from the general ledger for the months of February and March 1998. The total direct costs under this contract during those months were \$120,040.00. These months began a new fiscal year for the contractor. The audited overhead rate for the new fiscal year was 17.86 percent. Griffin used a profit rate of 5 percent. After applying these rates to the above costs, the total costs and profit for February and March 1998 were \$148,553.60. Griffin subtracted the \$26,071 monthly contract rate paid by the government in the amount of \$52,142, leaving a balance of \$96,411.60 for the months of February and March 1998. The total unreimbursed amount for January through March 1998 is thus \$111,888.33 (rather than the \$111,888.40 claimed).

The government avers that it lacked information to admit or deny the accuracy of Griffin's costs. After sufficient opportunity for discovery, the government cannot raise a genuine dispute over a material fact by claiming that it simply doesn't know what the facts are. In its reply the government merely denied the truth of this fact without any supporting affidavit or citation to evidence. This type of mere denial is insufficient to establish a genuine dispute. For the purposes of this motion, therefore, we find that the facts concerning Griffin's costs are undisputed.

Also in the record is an audit report by the Defense Contract Audit Agency. Although that report raised issues concerning Griffin's entitlement to its costs, which we resolved in our decision of 2 August 2002, the report found that Griffin maintained an accounting system on the accrual basis in accordance with generally accepted accounting principles. Further, the report concluded that the accounting system was adequate for cost type contracts.

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. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 327 (1986); *Armco, Inc. v. Cyclops Corp.*, 791 F.2d 147, 149 (Fed. Cir. 1986); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987).

Although the government had the burden of proof on the issue of whether the option was properly exercised, the appellant has the burden of proof to establish its costs in performing the contract work during the extended three-month period of January through March 1998. As we discussed above, we have found that there is no genuine dispute as to Griffin's actual costs for performance of the contract work during the period of 1 January through 31 March 1998.

As the Federal Circuit said in *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987), "the party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient." *Paragon Podiatry Laboratory, Inc. v. KLM Laboratories, Inc.*, 984 F.2d 1182, 1190 (Fed. Cir. 1993); *Eurovan Movers, S.A.*, ASBCA No. 53302, 02-1 BCA ¶ 31,843 at 157,343 (statements based on "information and belief" are not sufficient to raise a factual dispute); *Ver-Val Enterprises, Inc.*, ASBCA No. 49892, 01-2 BCA ¶ 31,518 at 155,597-98; *United Excel Corporation*, VABCA No. 6937, 04-1 BCA ¶ 32,485 at 160,693-94. The government has not raised a genuine dispute of fact. The appellant has established its costs and profit. The amount due, after subtracting the monies already paid to Griffin, is \$111,888.33.

Griffin is entitled to be compensated for its reasonable, actual cost and profit. Moreover, in a follow-on contract, the government paid considerably more per month than the appellant claims for similar services. We noted that the government admitted that it awarded a follow-on contract for these services at a monthly price of \$106,034 -- accepting such prices as reasonable. Although the government denied these facts in response to this motion, its earlier admission of these facts in its unamended answer constitutes a judicial admission by which it is now bound. *Systems & Computer Information, Inc.*, ASBCA No. 18458, 78-1 BCA ¶ 12,946 at 63,066, 63,068-69, n.17. See *McDonnell Douglas Helicopter Systems*, ASBCA Nos. 50447 *et al.*, 00-2 BCA ¶ 31,082 at 153,465; *Trilon Research Corporation*, ASBCA Nos. 18116 *et al.*, 81-2 BCA ¶ 15,259 at 75,540. See also Rule 8(d) of FED. R. CIV. P. We conclude that Griffin's incurred costs and profit are reasonable.

CONCLUSION

Appellant's motion for summary judgment is granted. These appeals are sustained. No separate award is made under ASBCA No. 54247, since that claim is

subsumed by ASBCA No. 54246. The appellant is awarded the amount of \$111,888.33, together with such interest that accrues under section 12 of the Contract Disputes Act of 1978, as amended (41 U.S.C. § 611), from 1 February 1999, the date the claim was received, until payment thereof.

Dated: 20 July 2004

RONALD A. KIENLEN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

EUNICE W. THOMAS
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 Nos. 54246, 54247, Appeals of Griffin Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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