ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Calculus Cranes	)	ASBCA Nos. 53728, 53729,
	)	53912
	)	
Under Contract Nos. DABT51-00-P-1708	)	
DABT51-00-P-1636	)	

APPEARANCE FOR THE APPELLANT: Sam Zalman Gdanski, Esq.
Suffern, NY

APPEARANCES FOR THE GOVERNMENT: COL Anthony M. Helm, JA
Chief Trial Attorney
LTC James Lewis, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE VAN BROEKHOVEN
PURSUANT TO RULE 11

Appellant timely appealed a contracting officer's decision denying its claims under Purchase Order Nos. DABT51-00-P-1708 and DABT51-00-P-1636. (ASBCA Nos. 53728 (53728) and 53729 (53729)) Appellant also appealed the contracting officer's decision denying a claim asserted under Purchase Order No. DABT51-00-P-1636, and terminating this purchase order for default by filing a direct suit before the United States Court of Federal Claims. The Court, on an unopposed motion by the government to transfer the case to this Board, transferred the appeal to the Board, together with the original documents that comprised the record. (ASBCA No. 53912 (53912)) Following further investigation, the contracting officer converted the termination for default to a termination for the convenience of the government, and increased the Purchase Order No. DABT51-00-P-1636 amount by $4,200.00, thereby resolving the issues arising out of the appeal of the termination for default. The parties have elected to proceed under Rule 11. Only entitlement is before the Board for decision.

FINDINGS OF FACT

1. The government awarded appellant two purchase orders for repair of overhead cranes at Fort Bliss, Texas. Purchase Order No. DABT51-00-P-1708 required appellant to repair, service, and load test an overhead crane in the south wing of Building 2624. (53728, R4, tab A) Purchase Order No. DABT51-00-P-1636 required appellant to repair, service, and load test the overhead cranes in the west side of Building 9482, and 7.5 ton

cranes in Buildings 9479 and 9481. (53729, R4, tabs A, B, C, D) This latter purchase order was subsequently modified to upgrade the two outside 7.5 ton cranes from single to double collectors located at Building 9481 with an increase in price of $700.00 for both cranes (*id.*, at tab D).

ASBCA No. 53728, Purchase Order No. DABT51-00-P-1708

2. Appellant completed work on this purchase order and submitted an invoice for payment of the contract price of $2,375.00 (53728, R4, tab B). Several months later, appellant submitted an additional invoice revising the prior invoice to a new total of $7,635.72 (53728, R4, tab C). According to this invoice, appellant asserted that it had performed additional repair work on the overhead crane in Building 2624 south bay to repair hidden damage to a wire rope guide that was broken, and work in the north bay of the same building that, according to appellant, had been authorized by government officials. There was no explanation in the record regarding the submission of the first invoice and the submission of a second invoice several months later.

3. By letter dated 30 September 2001, the contracting officer denied appellant's request for payment. (53728, R4, tab D) The contracting officer stated that the person requesting this service did not have the authority to obligate the government, and in any event, the request for such services was not properly processed, and that inspectors did not verify that the cranes were functioning properly. Moreover, she had requested appellant to provide an invoice that reflected the breakdown for the costs of service and parts appellant claimed to have provided, which appellant failed to submit. Accordingly, the contracting officer declined to authorize payment for "this unauthorized commitment." This letter denying the claim was not issued as a formal contracting officer's final decision.

4. According to exchanges of correspondence, and particularly, the contracting officer's final decision, the government conducted an investigation to determine what work had been done, as asserted by appellant, and what government official or officials authorized that work (53728, R4, tabs E-H). There is no investigation report in the record, nor is there any first-hand information about the investigation in the form of affidavits, declarations, sworn statements, or correspondence and other business records. Moreover, according to the contracting officer's final decision, the government was unable to verify from the requiring activity or the government inspector that the work, as claimed by appellant, had been performed, and that since the additional services alleged to have been provided by appellant were not authorized through proper channels, and indeed, were performed by another contractor under a different contract, the contracting officer denied appellant's claim. Appellant responded to the contracting officer disputing the assertions in the decision concerning the improper processing of the procurement for the additional services, that the work was inspected by a government inspector, and that

the repair work on the crane which was subject to the dispute was performed by another contractor (53728, R4, tab I). Appellant timely appealed the contracting officer's decision.

5. Appellant filed what purported to be a three paragraph complaint in which it alleged that it had performed additional work to replace the wire rope guide in the south crane and additional repair on the north crane. Appellant further alleged that it requested verification of the services, submitted a request for authorization and ratification of the services to the contracting officer, and that it had submitted supporting data to the contracting officer verifying that the work had been performed and processed through proper authorized channels.

6. In its answer, the government denied these allegations, alleging further that the purchase order was limited to repair of the south crane, that it had not authorized any additional work to replace the wire guide rope or to effect any repairs on the north crane, and that no accurate and supporting data had been submitted to verify the work and that it was authorized through proper procurement channels. The government further alleged that, by certified invoice, appellant informed the government that it had completed the work on the south crane. However, when the government contract specialist sought the government's material and receiving report, she discovered that appellant had never contacted the government official responsible for arranging job site visits, nor had appellant obtained the required government inspection of the completed work, or notified the project manager when appellant had completed the work. The government further alleged in its answer that it had contracted with Ederer Services under a separate contract to inspect, load test, and repair the overhead crane in the north wing of the building, and had paid Ederer Services upon completion of that work. This was the same work appellant alleged to have performed and for which it sought recovery, and which was not covered by appellant's purchase order. Appellant did not file an amended complaint addressing the allegations raised in the government's answer.

7. Although these appeals were scheduled for hearing, appellant subsequently elected to proceed under Rule 11 of the Board Rules, and the parties submitted affidavits and declarations. Indeed, appellant filed its declarations by facsimile on 2 December 2004 and on 18 January 2005 after the appellant's president had read the government brief filed on 15 December 2004. (First, second decls. of R. Thurl (Dick) Bowen) The gist of appellant's president's revised latter declaration was that the government has been unable to refute any of the facts outlined by appellant that it did indeed perform the extra work for which it billed the government. Moreover, according to the declarations, appellant discovered during the performance of this purchase order that a piece of the hoisting drum, a wire rope guide was broken. Unable to reach the inspector, appellant ultimately contacted the chief warrant officer in charge of the bay and outlined the problem to him. According to appellant, it was instructed to check the crane in the

adjacent bay, and upon doing so, found the wire rope guide on that crane also badly damaged. Appellant's president asserted that the chief warrant officer contacted the battalion commander who, according to appellant's president, instructed the warrant officer to initiate the paper work for the repair of both cranes. Declarations from appellant's technicians involved in performing the work essentially repeat the main points asserted by appellant's president in his declarations. (Decls. of Warren August and Mike Madrid)

8. The appeal file in this appeal is limited to the purchase order, appellant's invoice which asserted a demand for the work provided under the contract and for additional work on the wire rope guide on the crane in the south bay, and the additional work asserted to have been performed on the crane in the north bay that was not covered by the purchase order, and exchanges of correspondence. Appellant's president certified the invoice stating that all the work covered by the invoice was done in a professional and workmanlike manner (53728, R4, tab C). The exchange of correspondence merely addressed the question of whether the individuals alleged to have ordered the additional work had proper authority to order the work since the cost for the additional work exceeded the authorized credit limits of the IMPACT card, or the individuals who were asserted to have ordered or approved the procurement of such services were not authorized to do so, whether under the IMPACT card or otherwise. (53728, R4, tabs D, F, G) The record is devoid of any description of the IMPACT card, its limits, and who was authorized to make purchases through the use of that card, except that the chief warrant officer who, according to appellant, ordered the work, was not an authorized government purchase card holder (gov't supp. R4, tab 3; decls. of R. Thurl (Dick) Bowen). Further, there is no evidence in the record concerning any possible inspection of the work and acceptance by the government.

9. The contracting officer stated in her affidavit that appellant had claimed that a LTC McDonough had authorized the additional work and had intended to charge it to the IMPACT credit card, but that the cost of the work exceeded the card limit, and neither LTC McDonough or appellant made arrangements with the contracting office to modify the contract. (Gov't supp. R4, tab 1) There is no independent evidence in the file that would provide any details or information regarding what LTC McDonough said or did in the alleged authorizing of the additional work. There is no evidence in the record to suggest that either the chief warrant officer or LTC McDonough had any authority with respect to the administration of this purchase order, had authority to purchase the services in question with the government IMPACT purchase card, or made any request to the contracting office to have the contract modified thereby authorizing appellant to perform the additional services. Moreover, although appellant asserts that it performed this additional work, for reasons unclear from the record, the government awarded a separate purchase order to another contractor, Ederer Services, Inc., which according to the

contracting officer's affidavit and inspection reports and correspondence from Ederer Services, was performed by Ederer Services.

10. This is the evidence on which appellant relies for recovery. Although the parties filed declarations and affidavits, much of the information contained therein was unsupported hearsay.

ASBCA Nos. 53729 and 53912, Purchase Order No. DABT51-00-P-1636

11. Under this purchase order, appellant was required to repair three cranes in Building 9479, 9481, 9482 (53729, R4, tabs A- C). The government modified the purchase order to provide for upgrading two outside cranes at Building 9481 (53729, R4, tab D). Once again, the record is exceedingly skimpy and it is difficult to determine just what work was done under this purchase order. In any event, the contracting officer terminated the purchase order for default (53729, R4, tabs E, F; gov't supp. R4, tab 1). The record contains no inspection reports or any other similar document that would reflect any performance or completion of work on the part of appellant. Appellant, by its own admission stated that the controls had been cannibalized from the hoists, and that appellant had performed all the work required by the contracts within the limitations that missing and cannibalized parts would permit. (53729, R4, tab G) According to appellant's initial declaration, controls had been cannibalized from the two hoists, and could not be replaced because they were obsolescent. Moreover, appellant asserted in its initial declaration that the two cranes stored outside were unprotected and required servicing, cleaning and new pendants. The record and appellant's declaration are unclear as to whether these two cranes were included within the scope of the purchase order. Appellant's president stated that he had observed another contractor working on the same cranes under a subsequent contract.

12. The contracting officer requested appellant to submit documentation for the load test appellant asserted that it had performed and detailed cost information concerning the asserted services for which appellant had invoiced the government. (53729, R4, tab J) Appellant simply responded that it had previously submitted the load test reports and was enclosing copies therein, and stated what the various summarized cost amounts were for the services. (53729, R4, tab K) However, the record does not contain any of the load test reports, and the cost information appears to be related to some unauthorized informal commitments that may have been made at some subsequent time. Although the government had paid appellant $16,000, the basis for the termination was the government inspector's belief that appellant had not complied with the terms of the contract and that the cranes were inoperable. (Supp. R4, tabs 1 and 2) The records in this appeal are inadequate to make any specific findings regarding the extent and acceptability of appellant's performance under Purchase Order No. DABT51-00-P-1636 and the alleged inoperability of the cranes after the alleged completion of the contract

work. The affidavits and declarations are generally filled with hearsay assertions concerning what was and what was not done. Nevertheless, by letter dated 10 December 2004 and Contract Modification No. P00004, dated the same day, the contracting officer converted the termination for default to a termination for the convenience of the government and increased the contract amount by $4,200.00 (app. br., attach. 1). There appears to be no dispute that appellant was unable to complete the repair work on the cranes at Buildings 9482, 9481, and 9479, and the only question posed by appellant is whether it was possible to do so in light of the amount of cannibalization and level of disrepair of these cranes.

13. According to appellant's declarations, appellant was performing warranty work, apparently not related to either of these purchase orders, when CW2 Burns indicated that there were several cranes that had been down for over a year and asked if appellant could accept the IMPACT card for this work. (Decls. of R. Thurl (Dick) Bowen) There are no statements, affidavits, declarations, or any other form of documentation, including any contemporary correspondence or electronic messages, from CW2 Burns in the record. According to appellant's president, these cranes had not been tested for many years although pertinent OSHA, ANSI, and DOT regulations require annual service and load testing. Appellant's president stated CW2 Burns informed him that the repairs had been approved, directed him to perform the required repairs and testing, and to submit the invoice to him. Again, there is no independent evidence or contemporaneous documentation in the record to support the hearsay conclusion that the cranes had not been tested for many years, or the nature or events surrounding any directions or instructions, if any, that may have been given by CW2 Burns to appellant. However, even based on the declaration of appellant's president made in response to the government's brief, we are unable to make any findings concerning CW2 Burns' authority to commit the government to the work, which according to the appellant's president, CW2 Burns had "indicated" had been approved and "indicated" that an invoice should be prepared so that he could get it approved by Major Garrett. Indeed, CW2 Burns did not have either a warrant to contract on behalf of the government or authority to use the IMPACT card to make purchases at any time during the events giving rise to appellant's claim. The record is devoid of any identification of MAJ Garrett, other than her name, and is silent with respect to her authority, if any, for the maintenance of these cranes, or the scope of her authority, if any, to bind the government. What is clear from the record, however, is that there was no contract or purchase order executed for the performance of the work alleged to have been performed by appellant. Moreover, the record does not contain any description of the work that the government requested appellant to perform, nor does it contain any description of the work performed other than the assertion by appellant's president in his declarations. There were no purchase requests, purchase orders, purchase order modifications, or government receiving and inspection reports.

14. Appellant submitted a number of documents which purported to be requests for payment for the work which appellant asserted that it performed as a result of the request by CW2 Burns (53729, R4, tab L). This was followed by an exchange of correspondence, including appellant's letter to the Commanding General of Fort Bliss, Texas (53729, R4, tabs M-Q). The appeal record contained no invoices and the amounts asserted and discussed in various document did not correspond with a $12,000.00 amount mentioned in appellant's letter to the post commanding general. The gist of the dispute was the lack of authority on the part of CW2 Burns to "order" the services on the cranes which were not subject to any purchase order, including Purchase Order No. DABT51-00-P-1636. Appellant also objected to the contracting officer's request that appellant provide cost data, such as material and labor costs to support the amount appellant was requesting for this additional work. According to the contracting officer's affidavit, appellant was directed to stop the work, and the contracting officer determined that ratification of the unauthorized commitment was appropriate for the repair of three of the overhead cranes. Appellant was paid that amount. (Supp. R4, tab 1) That is it. No testimony or contemporary documentation in the record necessary to support any findings we might make regarding who ordered the work, under what circumstances, the scope of authority to bind the government, the nature of the work to be performed, and any other information that might shed some light on appellant's entitlement, if any, to compensation.

Contracting Officer's Final Decision and Appeals

15. Following appellant's letter to the Commanding General of Fort Bliss in which appellant demanded prompt payment of appellant's invoices in the amount of $12,000.00, the contracting officer issued a final decision dated 19 February 2002 (53729, R4, tab R). In her final decision, the contracting officer addressed appellant's request to the Commanding General and demand for prompt payment of the invoices totaling $12,000.00.

16. With respect to Purchase Order No. DABT51-00-P-1708, the contracting officer affirmed her decision of 30 September 2001 denying this claim (finding 3, *supra*). The final decision essentially repeated what had been said in the 30 September 2001 letter, with the additional point that appellant had not provided the requested accurate supporting data to verify the amount claimed and that the services had been provided as asserted.

17. With respect to Purchase Order No. DABT51-00-P-1636, the contracting officer first affirmed its prior termination for default and stated that she was unable to either grant appellant's claim for the additional work which appellant asserted to have performed, or reinstate the terminated contract because another contractor had performed the services required under appellant's purchase order. Moreover, appellant's claim for

work alleged to have been performed on cranes not covered by Purchase Order No. DABT51-00-P-1636 was due to work which was performed, if at all, by appellant pursuant to an unauthorized informal commitment. Nevertheless, the government allowed payment in the amount of $1,222.65 for the repair of three overhead cranes and one pendant as a result of the government's processing this action as ratification of an unauthorized informal commitment.

18. Appellant replied to the contracting officer's final decision in a vitriolic and vituperative rant, alleging laziness, incompetence, and corruption allegedly common in government bureaucratic institutions, alleging false assertions on the part of the contracting officer regarding the work performed on the cranes by another contractor (53728, R4, tab I). With respect to the alleged informal unauthorized commitments made by CW2 Burns, there was no evidence that appellant understood the import of the contracting officer's decision in this regard. Nevertheless, appellant stated that he was turning the matter over to his attorney for collection, and hoped that the correspondence between appellant and the government would convince the military leadership at Fort Bliss that it was time for a change of leadership in the contracting office.

19. Appellant filed a timely appeal of the contracting officer's final decision. The appeal addressing claims submitted under both purchase orders was docketed as ASBCA Nos. 53728 and 53729. Appellant also filed an action in the United States Court of Federal Claims appealing the contracting officer's final decision with respect to appellant's claims under Purchase Order No. DABT51-00-P-1636, including those claims arising out of the alleged informal unauthorized commitments and seeking conversion of the termination for default to a termination for convenience of the government. This case was transferred to this Board on 21 August 2002, and docketed as ASBCA No. 53912. By Order of the Board, both ASBCA No. 53729 and ASBCA No. 53912 were determined to be appeals under Purchase Order No. DABT51-00-P-1636, with ASBCA No. 53729 involving the assertion of monetary claims and ASBCA No. 53912 involving an appeal from the termination for default. According to its Rule 11 brief, appellant seeks $5,260.72 under Purchase Order No. DABT51-00-P-1708, $4,200.00 under Purchase Order No. DABT51-00-P-1636, and $1,050.00 "for work performed on the cranes in Building 2961 and 2962" (app. br. at 21).

DECISION

It is difficult to understand what the parties expect of the Board in these appeals in which they have chosen to leave the record essentially blank. After the appeals were filed, the contracting officer issued a contract modification to Purchase Order No. DABT51-00-P-1636, converting the termination for default to a termination for the convenience of the government, and paying appellant the remaining contract amount of $4,200.00. Although appellant continued to argue against the propriety of the contracting

officer's initial action terminating the contract for default, and in its reply brief claimed victory for this action, it is unclear what appellant seeks here. Nevertheless, we hold that the appeal filed under ASBCA No. 53912 resulting from the transfer from the Court of Federal Claims, is moot and dismiss it as having been settled.

With respect to the claims asserted and appeals docketed as ASBCA Nos. 53728 and 53729, these are essentially claims from unauthorized, informal commitments. It is a long and well-established rule that the appellant has the burden of proving the fundamental facts of liability and damages, that is, the necessary elements of liability, causation, and resultant injury. *Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994) (*en banc*); *Wunderlich Contracting Co. v. United States*, 173 Ct. Cl. 180, 199, 351 F.2d 956, 968 (1965); *Craft Cooling, Inc.*, ASBCA Nos. 52494, 54127, 06-1 BCA ¶ 33,268, at 164,875. In order to prevail, appellant must prove that it had performed work required by the two purchase orders, or that the work appellant performed were services resulting from constructive changes to the contract requirements, or that the purchase orders were modified by a government agent with authority to bind the United States. *Winter v. Cath-Dr/Balti Joint Venture*, 497 F.3d 1339, 1344 (Fed. Cir. 2007).

That appellant chose to pursue its claim under Rule 11 of the Board Rules does not relieve it of the burden of establishing its entitlement to the asserted costs it claims in these appeals. This is particularly true in light of the inadequate quality of the appeal file for the purposes of our making any relevant factual findings. Finding no relevant and adequate evidence in the record upon which we can rely with any degree of confidence, we have turned to the declarations of appellant's owner, the latter of which was filed after appellant had filed its brief and after he had read the government's brief. In his declarations, appellant's owner essentially attempted to switch the burden of proof to the government, asserting that the government had "repeatedly defended its decision not to pay Calculus Cranes for the work performed because they were unable to determine whether the work claimed was actually performed" (2nd decl. ¶ 3).

What appellant appears to misunderstand is that the burden of proof "derives from the nature of the specific claims before this Board." *Systems & Computer Information, Inc.*, ASBCA No. 18458, 78-1 BCA ¶ 12,946 at 63,069; *Ahmed S. Al-Zhickrulla Est.*, ASBCA No. 52137, 03-2 BCA ¶ 32,409 at 160,430. Here, appellant's claims before us are claims for unpaid invoices resulting from work which appellant allegedly performed pursuant to directions from government officials that did not have any authority to bind the government. Moreover, we have held that:

> The mere assertion of a claim or contention is not a sufficient basis on which to determine that appellant is entitled to relief. Generalized conclusory, unsupported opinion type statements do not demand weight when such statements are little more

> than self-serving conclusions. *L. B. Samford, Inc.*, ASBCA No. 32645, 93-1 BCA ¶ 25,228 at 125,660; *Newell Clothing Co.*, ASBCA No. 28306, 86-3 BCA ¶ 19,093, *aff'd*, 818 F.2d 876 (Fed. Cir. 1987) (table).

Atherton Construction, Inc., ASBCA Nos. 44293, 46053, 51178, 02-2 BCA ¶ 31,918 at 157,711

The issue here is that without testimony representing both sides of the dispute, we are left with considerable hearsay in the form of declarations that basically assert a claim which is lacking any supporting documentation in the record. As we said in *Ahmed S. Al-Zhickrulla Est.*, *supra*, at 160,429-30:

> Appellant seeking entitlement for unpaid services has the burden of proving that it delivered the equipment in accordance with the contract requirements, that it properly and timely submitted invoices for those services, and that such invoices were unpaid by the Government. . . . Moreover, the fact that the Government presented no witnesses directly rebutting appellant's evidence concerning its alleged "claim invoices" does not make appellant's evidence compelling or substantial.

We hold that appellant simply has not carried its burden to establish government liability for the claims asserted by appellant. Since the work alleged to have been performed by appellant for which it now asserts entitlement was performed outside any purchase order or contract awarded to appellant, and the record is inadequate for the purpose of finding entitlement under any contract or under the Contract Disputes Act of 1978, as amended, 41 U.S.C. §§ 601-613, we deny the appeals.

Dated: 16 July 2008

ROLLIN A. VAN BROEKHOVEN
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

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. 53728, 53729, 53912, Appeals of Calculus Cranes, rendered in conformance with the Board's Charter.

Dated:

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