ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
L-3 Services, Inc., Unidyne Division	)	ASBCA Nos. 56304, 56335
	)	
Under Contract No. N00024-05-C-2225	)	

APPEARANCES FOR THE APPELLANT: Michael J. Gardner, Esq.
Christopher A. Abel, Esq.
Dawn L. Serafine, Esq.
Troutman Sanders LLP
Norfolk, VA

APPEARANCES FOR THE GOVERNMENT: Thomas N. Ledvina, Esq.
Navy Chief Trial Attorney
Richard A. Gallivan, Esq.
Assistant Director
David L. Koman, Esq.
Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DELMAN ON GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

The Department of the Navy (Navy or government) filed a motion for summary judgment on these appeals, seeking judgment on claims filed by L-3 Services, Inc., Unidyne Division (appellant or L-3) to recover costs to perform work allegedly not required by the contract. Appellant filed a brief opposing summary judgment. The Board heard oral argument on the motion. We have jurisdiction under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

On 15 April 2005, the Government awarded Contract No. N00024-05-C-2225 to L-3 to perform work under the Service Life Extension Program ("SLEP") on five Landing Craft, Air Cushioned units (LCACs), nos. 37, 42, 43, 45 and 47. The scope of work on the contract was defined in work item specifications and supporting technical drawings. (R4, Vol. 1, Tab 1(L))

A work item specification typically contained a number of paragraphs. Paragraph 1 of the specification was entitled "Scope" which provided a top-level, summary description of the nature of the work to be performed. Paragraph 2 was entitled "References." Paragraph 3 was entitled "Requirements," which specified the contract

work to be performed in conjunction with the "References" listed in ¶ 2. The References in ¶ 2 were listed and numbered in subparagraphs; each subparagraph identified a specific drawing, standard, test or technical data package relating to the work to be performed. Paragraph 4 of the specification was entitled "Notes." Paragraph 5 was entitled "Government Furnished Material (GFM)." (*See, e.g.*, work item no. 423-85-005, tr. oral argum., ex. A-3)

During the course of the work, there arose a dispute regarding the scope of the work to be performed under the contract. Relevant to the dispute was the following contract provision:

> C-15 SPECIFICATIONS AND STANDARDS (NAVSEA) (AUG 1994)
>
> (a) Definitions.
>
> (i) A "zero-tier reference" is a specification, standard, or drawing that is cited in the contract (including its attachments).
>
> (ii) A "first-tier reference" is either: (1) a specification, standard, or drawing cited in a zero-tier reference, or (2) a specification cited in a first-tier drawing.
>
> (b) Requirements.
>
> All zero-tier and first-tier references, as defined above, are mandatory for use. All lower tier references shall be used for guidance only.

(R4, Vol. 1, tab L at C-18)

By letter to the administrative contracting officer dated 28 March 2006, appellant asserted that work identified in lower tier references that are "not listed in paragraph 2 of the individual work specification work items" are to be used "for guidance only" per C-15(b) above. Appellant sought a determination as to whether all such lower tier references "must be invoked in paragraph 2 in the individual work specification item" in order to properly execute the work. (R4, Vol. 5, tab 76)

By letter to appellant dated 16 May 2006, the contracting officer (CO) disagreed with appellant's interpretation and contended that all the contract work need not be identified in ¶ 2 (References) of the work specification item. The CO stated as follows:

> [T]he individual craft work items that comprise the technical data package are zero-tier documents. All documents cited in any paragraph of the work items are thus first-tier documents. The work called out in all of these work items is mandatory. It should be noted that the repairs described in the work items are mandatory even if the reference describing the required work is labeled 'guidance', as in the following example: "Remove existing and install new wiring using 2.2 for guidance."
>
> Lower-tier documents (as defined by General Requirement C-15, Specifications and Standards) exist as guidance, whether for installation methods or material identification, and to aid the contractor in executing the work specified in the zero-tier work items.
>
> It is not necessary for the Government to list all references in section 2 of the work item that provide information needed to perform the work item. If a lower-tier document describes methods or identifies materials not delineated in the work item, but necessary to accomplish the work specified in the work item, the contractor may perform the required work by either following the Government warranted guidance provided in the lower tier documents or using materials or methods calculated to produce an equivalent result.

(R4, Vol. 6, tab 79)

Appellant took issue with the CO's interpretation. On 8 September 2006, appellant submitted a request for equitable adjustment (REA) related to the parties' dispute over the scope of the work as it pertained to four work item specifications (R4, Vol. 6, tab 81). The REA was amended on 9 November 2006 (R4, Vol. 7, tab 82). On 26 January 2007, appellant certified the REA as a claim and requested a CO decision (*id*., tab 85). Having failed to receive a CO decision, L-3 appealed to this Board and the appeal was docketed as ASBCA No. 56304.

On 9 May 2007, L-3 submitted a certified claim related to the scope of the work as it pertained to 14 other work item specifications (ASBCA No. 56335, compl., ex. A). Having failed to receive a CO decision, L-3 appealed to this Board and the appeal was docketed as ASBCA No. 56335. The Board consolidated the appeals, and the parties filed their pleadings. The government's motion for summary judgment followed.

In its brief opposing the motion, appellant attached an affidavit from its project manager, Mr. Hans VanOekel, setting out in detail the work-related disputes between the parties for each LCAC (br., appendix 1). The government's reply did not address this affidavit. At oral argument, the government stated that many of the factual matters raised by the affidavit are disputed, but that these fact disputes are not "material" in view of the unreasonableness of appellant's contract interpretation (tr. at 37- 40).

DECISION

The law on summary judgment is familiar. As stated in *Riley & Ephriam Construction Co. v. United States*, 408 F.3d 1369, 1371-72 (Fed. Cir. 2005):

> Summary judgment is appropriate when the moving party is entitled to judgment as a matter of law and no disputes over material facts remain (citation omitted). The moving party bears the burden of demonstrating the absence of a genuine issue of material fact (citation omitted). All justifiable inferences should be drawn in favor of the nonmovant (citation omitted).

The government conceded at oral argument that the VanOekel affidavit raised a number of fact disputes between the parties regarding the work performed. While the government argued that such disputes were immaterial, this argument was conclusory and unpersuasive. Having reviewed the affidavit and drawing all reasonable inferences in favor of appellant, we cannot state that the facts setting forth the work disputes are immaterial to the government's motion. Hence, summary judgment is not appropriate.

We hear the government to argue that appellant's interpretation of C-15 is unreasonable on its face because it renders all lower-tiered drawings "purposeless" and "meaningless" (mot. at 5, 7). However the government has not persuaded us that appellant's interpretation requires this result. Indeed, appellant's view is that such lower-tiered references shall be used for "for guidance only," which is precisely what C-15(b) states, and which means, according to appellant, they are to be used for "informational purposes" (br. at 19).

The contract does not define "for guidance only" under C-15(b). It would seem that the use of lower tier references "for guidance only" must be a different use than the use of zero-tier and first-tier references that are "mandatory for use". Whatever the distinction, appellant's interpretation does not render the relevant contract provisions "meaningless" or "purposeless" as the government contends. For this reason as well, we must deny the motion.

At this early stage in the proceedings we do not decide the reasonableness of the parties' contract interpretations or whether the relevant contract terms are clear or ambiguous (latent or patent). A better developed record, including evidence of the parties' contemporaneous interpretations as applied to the disputed work items, will enable us to address these issues. *PK Contractors, Inc.*, ASBCA No. 53576, 04-2 BCA ¶ 32,661 at 161,662.

CONCLUSION

For reasons stated, the government's motion for summary judgment is denied.

Dated: 21 May 2009

JACK DELMAN
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. 56304, 56335, Appeals of L-3 Services, Inc., Unidyne Division, rendered in conformance with the Board's Charter.

Dated:

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