ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Thorington Electrical and Construction Company	)	ASBCA No. 56997
	)	
Under Contract No. FA3300-05-C-0015	)	

APPEARANCE FOR THE APPELLANT: Michael Guy Holton, Esq.
Fuller, Taylor, & Holton, P.C.
Montgomery, AL

APPEARANCES FOR THE GOVERNMENT: Richard L. Hanson, Esq.
Air Force Chief Trial Attorney
Lawrence M. Anderson, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DELMAN ON GOVERNMENT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

In this appeal Thorington Electrical and Construction Company (appellant) seeks reimbursement for increased material costs due to unexpected cost increases during performance in the amount of $110,956. The government has moved to dismiss the appeal, or in the alternative moved for summary judgment, contending the appellant has no basis to recover these costs under this firm fixed-price contract.[1] Appellant opposes the motion. We have jurisdiction under the Contract Disputes Act, 41 U.S.C. §§ 601-613.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 30 September 2005, the Department of the Air Force, 42nd Contracting Squadron, Maxwell Air Force Base, Alabama (government) awarded to appellant Contract No. FA3300-05-C-0015. Contract performance required the construction of a new entry control facility located at the Bell Street Gate for the amount of $825,288. The contract was firm fixed-price (FFP), as stated in Section B of the contract documents under which appellant submitted its proposal. (R4, tab 1 at 1-4)

[1] The government's motion is actually captioned as a motion for "partial" summary dismissal, or in the alternative for "partial" summary judgment insofar as the motion seeks disposition of this one appeal, ASBCA No. 56997, amongst 13 other appeals with which it is consolidated.

2. The contract contained various standard clauses by reference, including FAR 52.233-1, DISPUTES (JUL 2002) ALTERNATE I (DEC 1991), and FAR 52.243-4, CHANGES (AUG 1987) (R4, tab 1 at 11 of 21). Insofar as pertinent, the Changes clause provided at (a) that "[t]he Contracting Officer may...by written order…make changes in the work within the general scope of the contract.…" The clause provided at (d) that "[i]f any change under this clause causes an increase or decrease in the Contractor's cost of…the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing." FAR 52.243-4. During the performance of the contract, the government issued 14 contract modifications, mostly under the Changes clause. Some of these modifications were unilateral and some were bilateral. (R4, tabs 1a-1n)

3. By letter dated 28 April 2009, appellant submitted a certified claim to the contracting officer (CO) in the sum of $764,813 (R4, tab 5u at 1, 6-7). This claim included 14 separate sub-claims (*id.* at 5-6). Insofar as pertinent, sub-claim no. 12 was described as "Material Cost Adjustment Factor Asphalt & Concrete (Asphalt Only)" in the amount of $110,956 (*id.* at 4-6), in which appellant claimed reimbursement for increased asphalt costs beyond those estimated in its proposal due to high gasoline prices. Appellant based its recovery upon FAR 52.216-4, ECONOMIC PRICE ADJUSTMENT–LABOR AND MATERIAL (JAN 1997) (EPA clause) (*id.* at 5). However, this clause was not included in the contract.

4. On 14 August 2009, the CO issued a decision on appellant's claim. Insofar as pertinent, the CO determined that the subject asphalt work was not expressly or constructively changed, the contract did not contain the EPA clause and the CO did not see the need to include such a clause in the contract. The CO pointed out that in an FFP contract without an EPA clause the contractor assumes the risk of any price increases. Nevertheless, the CO acknowledged that since there was an "out of the ordinary" price spike for petroleum during contract performance, he offered to reimburse appellant, apparently in the nature of a compromise settlement, the amount of $26,635.83 for the additional costs of asphalt. (R4, tab 5v at 1, 10-11)

5. Appellant did not accept the CO's offer. On 13 November 2009, appellant filed this appeal with this Board.[2]

6. On 28 January 2010, the government filed the instant motion, seeking dismissal of the appeal for failure to state a claim upon which relief can be granted, or in the

[2] Appellant's notice of appeal states that the CO's decision was not received until 21 August 2009. The government does not dispute the date the decision was received by the contractor, nor has it challenged our jurisdiction based on the timeliness of the notice of appeal, and we find that the appeal was timely.

alternative, seeking summary judgment. The government's motion relies on evidence in the Rule 4 file, and we treat the government's motion as one for summary judgment.

7. On 10 August 2010, appellant filed a response to the motion. Appellant contends, *inter alia*, that the government cannot support its argument that the contract was an FFP contract given that it issued 14 contract modifications during performance, under some of which appellant was paid its demonstrated increased costs. According to appellant, its increased asphalt costs should similarly be paid based upon the EPA clause in the FAR. Appellant contends that the government would be unjustly enriched if it did not compensate appellant for these increased costs.

DECISION

Summary judgment is properly granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States,* 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one that may affect the outcome of the decision. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). The moving party bears the burden of establishing the absence of any genuine issue of material fact and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment. *Mingus Constructors,* 812 F.2d at 1390-91.

To defeat a motion for summary judgment, more than mere assertions are necessary. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.,* 739 F.2d 624, 626-2 7 (Fed. Cir. 1984). Conclusory assertions do not raise a genuine issue of fact. The non-movant must submit, by affidavit or otherwise, specific evidence that could be offered at trial. Failing to do so may result in the motion being granted. *Id.*

Appellant's claim seeks recovery of additional material costs based upon the EPA clause. However the CO did not include this clause in the contract, nor is there any evidence to suggest that he otherwise considered it part of the contract. Appellant also has not shown that this clause was required to be part of the contract.

The EPA clause is a discretionary, not a mandatory clause. According to FAR 16.203-2: "[a] fixed-price contract with economic price adjustment *may be used* when (i) there is serious doubt concerning the stability of market or labor conditions that will exist during an extended period of contract performance, and (ii) contingencies that would otherwise be included in the contract price can be identified and covered separately in the contract" (emphasis added). FAR 16.203-3 also provides: "[a] fixed-price contract with economic price adjustment shall not be used unless the contracting officer determines that it is necessary either to protect the contractor and the Government against significant fluctuations in labor or material costs or to provide for contract price

adjustment in the event of changes in the contractor's established prices." Appellant has not provided any evidence to show that the CO acted wrongfully by failing to include the EPA clause in this contract. Appellant also does not show that the CO's offer of compromise in any way binds the government in this appeal.

Notwithstanding, appellant argues that the government's failure to pay these escalation costs constituted an unjust enrichment. This contract was clearly identified as an FFP contract in Section B of the contract documents (SOF ¶ 1). If appellant was unclear about the meaning of an FFP contract, it had the opportunity to address this matter with the CO prior to award. Under an FFP contract, absent inclusion of an EPA clause, the general rule is that the risk of fluctuation of material or labor cost is on the contractor. *Charles H. Siever Co.*, ASBCA No. 23968, 80-1 BCA ¶ 14,390, *recon. denied*, 80-2 BCA ¶ 14,589. There was nothing "unjust" about the government's reliance on this well settled principle. The fact that appellant may have been entitled to increased costs of performance under unilateral and bilateral contract modifications issued by the government under the Changes clause during performance has no bearing on appellant's claimed escalation costs here that were not incurred pursuant to changes under the Changes clause. Such contract modifications do not alter the essential nature of this contract as an FFP contract.

CONCLUSION

We have duly considered all of appellant's contentions. We believe that there are no material facts in dispute on the record and that the government is entitled to summary judgment as a matter of law. The government's motion for summary judgment is granted.

ASBCA No. 56997 is denied.

Dated: 13 December 2010

JACK DELMAN
Administrative Judge
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

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 No. 56997, Appeal of Thorington Electrical and Construction Company, rendered in conformance with the Board's Charter.

Dated:

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