



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY JUDGMENT DENIED: March 14, 2007

CBCA 121

G&R SERVICE COMPANY, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Lowery T. Gay, Chief Financial Officer, G&R Service Company, Inc., Evans, GA, appearing for Appellant.

Mark R. Simpson, Office of the General Counsel, Department of Agriculture, Atlanta, GA, counsel for Respondent.

Before Board Judges **STEEL**, **KULLBERG**, and **WALTERS**.

WALTERS, Board Judge.

Background

This appeal originally had been before the Department of Agriculture Board of Contract Appeals (AGBCA) (docketed on August 8, 2006 as AGBCA No. 2006-148-1), and was transferred to this Board effective January 6, 2007, upon consolidation of the various civilian agency boards of contract appeals, pursuant to Public Law 109-163.

Appellant, G&R Service Company, Inc. (G&R), of Evans, Georgia, seeks compensation under its contract with respondent, the Department of Agriculture Forest Service (Forest

Service, FS, or Government), in the total amount of \$30,901.12 for costs relating to materials it had delivered to the jobsite in connection with its performance of a fixed price construction contract, materials never incorporated into the work and which the Forest Service retained after G&R had successfully completed its work on the contract. Once the complaint, answer, and appeal file were filed by the parties, the Forest Service submitted to the Board a motion for summary judgment, seeking summary denial of the appeal. G&R submitted a response to that motion. In its motion, the Forest Service contends that there are no genuine issues of material fact to be tried and urges that the Board find, as a matter of law, that the Government owes G&R nothing for the materials in question, having acquired for itself title to those materials by reason of their being covered by contract progress payments made to G&R, pursuant to the express terms of the contract's Payments clause.

We deny the Government's motion and instead find G&R entitled to recover for materials improperly retained by the Government, for the reasons enunciated below.

Undisputed Facts

Based on the pleadings and documents in the appeal file as well as in the Forest Service's motion and G&R's response, the following facts appear as undisputed.

On September 26, 2005, the Forest Service awarded G&R a fixed price construction contract in the amount of \$128,560, calling for G&R to furnish "all necessary personnel, material, equipment, services, facilities, related site work and utilities to install new underground electrical system and replace 8 existing water valves and valve boxes for the Big Biloxi Recreation Area." Appeal File at 248-49. The contract incorporated by reference many standard Federal Acquisition Regulation (FAR) contract provisions, including the Payments clause set forth at 48 CFR 52.232-5 (2005) (FAR 52.232-5), entitled "Payments Under Fixed-Price Construction Contracts (SEPT 2002)"; the standard Changes clause, entitled "Changes (AUG 1987)," under FAR 52.243-4; and the standard Disputes clause, entitled "Disputes (JULY 2002)," under FAR 52.233-1. Appeal File at 256. The Payments clause calls for the Government contracting officer to make progress payments to the contractor either "monthly as the work progresses" or "at more frequent intervals as determined by the Contracting Officer." Such payments, the clause states, are to be based "on estimates of work accomplished which meets the standards of quality established under the contract, as approved by the Contracting Officer." FAR 52.232-5(b). The clause allows for the contracting officer, in conjunction with such "estimates," to "authorize material delivered on the site . . . to be taken into consideration." *Id.* The contract made no provision for contractor delivery of material other than that which was to be incorporated into the construction.

With respect to any materials that are covered by such periodic progress payments, the provision states that, “at the time of payment,” they are to “become the sole property of the Government” FAR 52.232-5(f).

G&R successfully completed performance of the contract on March 28, 2006, as evidenced by a Forest Service Certificate of Final Inspection dated April 20, 2006. Appeal File at 22. During the course of performance, G&R submitted several progress payment invoices upon which payment to G&R was made. Appeal File, Section IV. Among the invoices paid to G&R was a Request for Payment dated November 8, 2005 in the amount of \$44,581.08. Appeal File at 90. Payment of that invoice appears to have been made on December 12, 2005, by electronic funds transfer (EFT) under a voucher dated December 8, 2005, in the full amount requested, \$44,581.08. Appeal File at 87, 89. Included within that invoice was a total of \$41,367.08 for certain materials, including, *inter alia*, 8000 ten-foot sections of Schedule 40, one and one-quarter inch PVC conduit; 800 ten-foot sections of Schedule 40, one and one-half inch PVC conduit; a total of 8500 linear feet each of both four-strand THHN wire and two-strand THHN wire; 2400 linear feet of single strand THHN wire; and 500 linear feet of 3/0 strand wire. Appeal File at 93, 97, and 99. The appeal file contains no documentation that G&R ever invoiced or was paid for any quantity of either two-inch or three-inch Schedule 40 PVC conduit.

Upon G&R’s completion of performance, the Forest Service retained certain materials that G&R had delivered to the site but had not used in its performance of the work. G&R, by letter dated June 21, 2006, submitted a claim under the contract’s Disputes clause for such materials in the total amount of \$30,901.12, seeking a contracting officer’s decision. The claim was detailed by G&R in the June 21, 2006, letter as follows:

CFO’s time preparing communications and claims. Researching the FAR and seeking legal advise [sic].

100 hours	65.00 per hour	\$ 6,500.00
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Material

4700’	1 1/4 Sch. 40 PVC Conduit	90.00 c	4,230.00
150’	1 1/2 Sch. 40 PVC Conduit	145.00 c	217.50
20’	3” Sch. 40 PVC Conduit	167.00 m	33.40
20’	2” Sch. 40 PVC Conduit	150.00 m	30.00
3000’	4-STR-THHN	418.19 m	1,254.57
6000’	2-STR-THHN	697.91 m	4,187.46
2400’	1-STR-THHN	744.68 m	1,787.23
800’	3/0-STR-THHN	1,750.17 m	1,400.14
	Sales tax		919.82

Labor			
80 Hrs	Labor finders	16.83 per hr	1,346.40
40 Hrs	Superintendent	33.75 per hr	1,350.00
40 Hrs	Head Laborer	13.50 per hr	<u>540.00</u>
			23,796.75
	Overhead 15%		<u>3,569.51</u>
			27,366.26
	Profit 10%		<u>2,736.63</u>
			30,103.38
	Bond 2.65%		<u>797.74</u>
	Total Claim		\$30,901.12

Appeal File at 20.

The Forest Service contracting officer, by decision dated August 1, 2006, denied the claim in its entirety, relying upon the language of the contract's Payments clause, stating: "The material is the sole property of the government at the time payment is made." Appeal File at 14.

Discussion

This Board, in *P&C Placement Services, Inc. v. Social Security Administration*, CBCA 391 (Jan. 29, 2007) observed:

Resolving a dispute on a motion for summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The purpose of summary relief is not to deprive a litigant of a hearing, but to avoid an unnecessary hearing when only one outcome can ensue. *Vivid Technologies, Inc. v. American Science & Engineering, Inc.* 200 F.3d 795, 806 (Fed. Cir. 1999).

Slip op. at 7, quoting *P&C Placement Services, Inc. v. Social Security Administration*, GSBGA 16363-SSA, 06-2 BCA ¶ 33,300, at 165,135.

Summary relief in the present case is wholly inappropriate. The Government cites to

no supporting case authority dealing directly with the issue of title to materials covered by interim progress payments that are not incorporated into the construction work and that remain unused after successful completion of a federal construction contract. Indeed, this appears to be a case of first impression in that regard. As explained below, the Board does not concur with the Government's position that it paid for and now has title to the materials in question. To the contrary, and notwithstanding the Payments clause "sole property" language, we find that G&R had title to all materials remaining and unused after contract completion here.

Progress payments under federal contracts are made either: (1) based on costs incurred; or (2) based on completion of work. John Cibinic, Jr. & Ralph C. Nash, Jr., *Administration of Government Contracts* (3d ed. 1995) 1138. For contracts where progress payments are based on costs, FAR 32.502-4(a) specifies the mandatory inclusion of the standard clause entitled "Progress Payments (APR 2003)" as set forth at FAR 52.232-16. That clause calls for title in "[p]arts, materials, inventories, and work in process" to "vest in the Government" either "immediately upon the date of [the] contract, for property acquired or produced before that date" or "when the property is or should have been allocable or properly chargeable to [the] contract." FAR 52.232-16(d)(1) and (2). This vestiture of title in the Government is intended to provide a form of security of the amounts paid under the progress payment, *i.e.*, against potential contractor default and/or bankruptcy, pending contract completion. *See CBI Na-Con, Inc.*, ASBCA 37626, 89-3 BCA ¶ 22,250, at 111,823 (board found the "obvious purpose" of the language as being "to provide security to the Government for progress payments made"), *aff'd*, 909 F.2d 1495 (Fed. Cir. 1990) (table); Donald P. Arnavas & William J. Ruberry, *Government Contracts Guidebook* (1986) 14-10, ¶ 3, Title. The clause goes on to provide that "[w]hen the Contractor completes all of the obligations under the contract . . . title shall vest in the Contractor for all property . . . not (i) [d]elivered to, and accepted by, the Government under the contract; [or] (ii) [i]ncorporated in supplies delivered to, and accepted by, the Government under [the] contract and to which title is vested in the Government under this clause." FAR 52.232-16(d)(6). Therefore, the passage of title for purposes of securing progress payments under this clause clearly is not intended as a permanent divestiture of property rights other than for materials that become part of finished products delivered to the Government. It is instead a temporary arrangement, pending completion of contract performance and acceptance of the work. At the point of contract completion and acceptance, where all progress payments have been liquidated and there no longer is a need to secure the progress payments, for any materials and other items not consumed in the production of or incorporated into the final product that is delivered and accepted by the Government, title reverts automatically to the contractor.

For fixed price construction contracts, progress payments *generally* are geared to completion of work. In other words, the contractor is provided periodic progress payments

as construction progresses, based on estimates of the percentage of completion achieved, as measured against a schedule of values, a breakdown of the contract price into various work items. *See* Appeal File at 100. Progress payments for such contracts, however, are not restricted to work completion. As noted earlier, the “Payments Under Fixed Price Construction Contracts” clause contemplates additional consideration being given to materials delivered to the site (or to an offsite storage facility, with the approval of the contracting officer). At least for purposes of materials-related progress payments, the payments are based on costs incurred. Thus, even though the “Progress Payments” clause under FAR 52.232-16 may not be specifically incorporated into federal fixed price construction contracts, because that provision is mandatory whenever progress payments under any fixed price contract are to be cost-based, FAR 32.502-4(a)(1)(ii), the clause’s treatment of title reversion upon contract completion should be applied to any progress payments that the Government may make on the basis of costs -- such as the December 12, 2005, progress payment in this case. Accordingly, we refuse to read the “sole property of the Government” language of the present contract’s “Payments Under Fixed Price Construction Contracts” clause as prescribing a permanent divestiture of title to any materials other than those that have become part of “discrete work items completed during the course of construction.” *See Reddick & Sons of Gouverneur, Inc. v. United States*, 31 Fed. Cl. 558, 561 (1994). Payments for materials under the construction contract Payments clause is intended solely for “material delivered on site for incorporation in the work.” *See C. Lawrence Construction Co.*, ASBCA 45270, 93-3 BCA ¶ 26,129, at 129,886 (emphasis supplied). Thus, although the Payments clause language created “a security interest in favor of the Government in materials . . . covered by the progress payments” made to G&R, *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1581 (Fed. Cir. 1993), once G&R completed the construction and the construction was inspected and accepted by the Forest Service, there no longer was a need to secure the prior progress payments, and, as with other contracts where progress payments have been completely liquidated by a final delivery of product, title to any unused materials in this case reverted in the contractor, G&R. At that juncture, the terms and conditions of the Payments clause of the instant contract regarding Government property interests in materials covered by interim progress payments, other than materials incorporated into the completed construction, no longer were operative.

As noted above, the present contract called for G&R to “furnish all necessary personnel, material, equipment, services, facilities, related site work and utilities to install new underground electrical system and replace 8 existing water valves and valve boxes for the Big Biloxi Recreation Area.” Appeal File at 249. Nothing in the contract indicated that the contractor was expected to furnish for the Government’s use extra conduit, wire, and other materials that would not be needed for completion of this electrical and mechanical work. Thus, contrary to the Forest Service’s contention that it “paid” for the unused materials, *see* Answer, the only thing specified and paid for under this fixed price construction contract was

the construction work that G&R completed and that the Forest Service accepted. To interpret the Payments clause of this contract otherwise would result in an unjustified windfall for the Government, one that, as G&R correctly indicates, would unfairly deprive the contractor of a substantial portion, if not all, of the profit earned by reason of the successful completion of the work.

In sum, then, we do not find the Government entitled to summary judgment as a matter of law. Instead, we find G&R legally entitled to recover for the unused materials the Government retained. Such recovery could be obtained either for a constructive change under the terms of the contract's Changes clause or for a breach, since delivery of materials not incorporated into the construction was beyond the scope of the parties' agreement.

In either regard, G&R will bear the burden of proof, both as to the quantities of material allegedly kept and as to the amounts due for the materials. Although the Forest Service acknowledges that it retained conduit and wire, it does not confirm specific quantities of either, and denies that it retained *any* two- or three-inch conduit. As to amounts being sought for conduit and wire, G&R will have to explain some obvious discrepancies. For example, unit costs claimed do not match the unit costs previously invoiced in most instances. Appeal File at 20, 99. Also, G&R will have to provide more detail on: (1) the labor costs claimed; and (2) the \$6500 claimed for FAR research and legal advice, *i.e.*, when and for what purposes the costs were incurred, how the hours and hourly rate were derived, and what amounts were paid to an attorney for legal assistance. If it is established that all of the \$6500 relates solely to claim preparation, it would be non-recoverable, as a matter of law. 48 CFR 31.205-47(f)(1); *Silvics, Inc.*, AGBCA 88-243-1, 93-2 BCA ¶ 25,783, at 128,307 and cases cited therein.

Decision

The motion for summary judgment advanced by the Forest Service is **DENIED**. The Board instead finds G&R legally entitled to recover for whatever quantities of unused materials it can prove were kept from it by the Forest Service after contract completion. In this connection, G&R also bears the burden of proof as to claimed dollar amounts.

RICHARD C. WALTERS
Board Judge

We concur:

CANDIDA S. STEEL
Board Judge

H. CHUCK KULLBERG
Board Judge

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