UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: September 11, 2012

CBCA 2771

SINGLETON ENTERPRISES,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Wayne Singleton, Owner of Singleton Enterprises, Luthersville, GA, appearing for Appellant.

Wilbert Jones, United States Coast Guard, Department of Homeland Security, Washington, DC, counsel for Respondent.

SOMERS, Board Judge.

This appeal arises out of a contract between Singleton Enterprises (Singleton or appellant) and the Department of Homeland Security, United States Coast Guard (USCG or Government) for construction work at USCG Loran Station Jupiter in Jupiter, Florida. After the Government terminated the contract for convenience, Singleton submitted a termination settlement proposal, seeking $91,833 for various costs incurred. The contracting officer determined that Singleton would be entitled to receive $30,237.41. Singleton challenges this decision.

Appellant has elected to proceed under the Board's small claims procedure.[1] Accordingly, the decision is not precedential nor is it appealable.

Background

On November 8, 2008, the USCG awarded a contract to Singleton for the replacement of fire suppression systems in the amount of $211,110. As required by the contract, Singleton furnished performance and payment bonds, procured materials, and performed other actions in preparation for performing the contract.

After contract award, Singleton submitted a proposal for changes to the specifications due to preexisting conditions. The Government reviewed the proposal and recognized the complexity of the fire suppression systems as well as the implications of allowing Singleton to proceed according to contract specifications. The Government sought to modify the work by deleting some parts of the contract. The parties discussed the various options from December 2008 until March 2009; however, they could not agree on a price for this modification.

Meanwhile, in December 2008 and January 2009, the Government approved various submittals and the contractor delivered components of the fire suppression systems to the site. Singleton submitted an invoice for these materials, totaling $22,008. The Government paid for these materials on March 6, 2009. This occurred even though the Government had yet to issue a notice to proceed and the preconstruction conference had not occurred.

On May 7, 2009, the contracting officer notified Singleton that the Government had decided to terminate the contract for convenience. After prompting by the Government, Singleton submitted a settlement proposal, which the contracting officer received on May 10, 2010, three days beyond the one-year time frame set forth in the Federal Acquisition Regulation (FAR) at 48 CFR 52.249-2(j) (2009).

After reviewing Singleton's settlement proposal, the Government requested additional information to substantiate the costs claimed. Singleton failed to provide any additional information to support is claim. The contracting officer issued a settlement by determination as authorized by FAR 52.249-2. The settlement determination listed the items

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[1] The Board issued a scheduling order to facilitate the timely resolution of this appeal. However, during the course of the proceedings, the Board granted the parties' request for additional time in which to file their record submissions. Accordingly, the time for processing this appeal under this procedure has been extended. Board Rule 52(d).

and amounts proposed in Singleton's settlement proposal, and made a final determination with appropriate findings for each such item.

First, the contracting officer accepted Singleton's claim of $3070 for bonds, as this item was supported by an invoice. The contracting officer denied or decreased the remainder of the claims. The contracting officer denied Singleton's claim of $216 for miscellaneous inventory, stating that Singleton had failed to submit a termination inventory. Singleton claimed $11,700 for superintendent standby time for eight weeks; the contracting officer granted one week of performance, based upon the fact that Singleton had not submitted any documentation to support the claim. In any event, because the Government had never issued a notice to proceed or held a preconstruction conference, the superintendent's duties would have been limited to coordinating shipment and the arrival of site materials, which could not have taken eight weeks.

For similar reasons, the contracting officer rejected Singleton's claim of $3225 for project manager activities claimed over the course of 129 days. The contracting officer reasoned that the project manager would have participated in activities leading up to the termination, including overseeing submittals, and coordinating with subcontractors. Accordingly, despite the lack of any supporting documentation, the contracting officer granted Singleton $2000, estimating that amount would be reasonable to cover these duties.

Singleton claimed general and administrative (G&A) expenses of $13,280, calculated at 15% of $88,530, the total cost claimed. The contracting officer determined that 15% would be reasonable and consistent with industry standard and granted Singleton $5972.24, calculated at 15% of $39,814.95, which was the total cost of all work prior to termination, excluding bonds. Finally, profit was limited from $10,181 for 10% of total cost including G&A to $942.22, 10% of total cost of work by the prime contractor excluding bonds. The contracting officer did not grant profit on the subcontractor settlement in accordance with FAR 52.249-2 and FAR 49.202(c) because no actual work had been performed or completed at the job site.

In sum, the contracting officer determined that Singleton was entitled to a net payment of $30,237.41. Singleton disagreed. This appeal followed.

Discussion

The purpose of a termination settlement is to fairly compensate a contractor for work performed prior to the termination. 48 CFR 49.201(a). After termination, the contractor is required to submit a settlement proposal detailing costs incurred no later than one year from

the effective termination date. 48 CFR 52.249-2(e).[2] If the contracting officer denies the damages sought, the contractor may appeal the unsatisfactory settlement amount. *James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1542-46 (Fed. Cir. 1996). The burden is upon the contractor to prove entitlement in excess of the final decision. *See Nicon v. United States*, 331 F.3d 878, 885 (2003) (citing *General Dynamics Land Systems, Inc.*, ASBCA 52283, 02-1 BCA ¶ 31,659, at 156,411). The contractor's claimed costs must be "reasonable, allocable, and in accordance with prescribed standards." *See Silver Enterprises*, DOTBCA 4459, 06-2 BCA ¶ 33,370, at 165,421 (citing *Nicon*, 331 F.3d at 885; *Lisbon Contractors Inc. v. United States*, 828 F.2d 759, 767 (Fed. Cir. 1987); *Airo Services, Inc. v. General Services Administration*, GSBCA 14301, 98-2 BCA ¶ 29,909, at 148,071-72). Of the six claims in its settlement proposal, Singleton identified three in its appeal. These are standby costs for the superintendent and project manager, profit, and settlements with subcontractors.

Singleton is not entitled to additional standby costs for either the superintendent or the project manager. In the absence of the issuance of a notice to proceed or a preconstruction conference, Singleton has failed to show why it needed to have a superintendent on site during the time period at issue. Since Singleton was not contractually obligated to have a superintendent on standby before contract performance, nor did significant work occur in preparation for contract performance, the evidence does not establish a basis for these additional costs.

Likewise, Singleton does not meet its burden of proving that the contracting officer was unreasonable in granting one week of project manager performance. In light of the fact that Singleton had failed to provide any substantiation of this claim for 129 days of project manager work in its settlement proposal, the contracting officer acted reasonably in granting costs for one week of work on "activities leading up to the termination to include submittal submissions and subcontractor coordination."

Singleton is not entitled to additional profit on subcontractor's costs incurred before the termination date. FAR 49.202(c)(3) "exclude[s] profit on the prime contractor's settlements with construction subcontractors for materials on hand and for preparations made to complete the work." While Singleton claims that the 10% profit is not on subcontractor settlement costs but instead on subcontractor work before the termination, the 10% is still

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[2] Although the record indicates that Singleton may have presented its termination settlement proposal late, the contracting officer did in fact exercise her discretion to receive and act upon the proposal upon receipt. *See* 48 CFR 52.249-2(e).

derived from the $70,318.88 settlement with Singleton's subcontractor. The contracting officer properly rejected that cost element.

Nor did Singleton show that the contracting officer incorrectly denied the subcontractor-claimed material costs of $2112.20, shipping costs of $531.67, and per diem costs of $21,254. The contracting officer rejected the subcontractor material costs because Singleton failed to show that the government had actually received the supplies. Nor did Singleton establish a basis for claiming per diem in the amount of $21,254, covering the dates of January 3, 2009, to May 9, 2009, when no notice to proceed had been issued at that time. The contracting officer's determination of $1246 for one week's worth of work is appropriate.

Singleton argues that it was entitled to an equitable adjustment under the suspension clause of the contract due to the contracting officer's delay in issuing a notice to proceed. FAR 52.242-14(b) states: "If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted [. . .] by the Contracting Officer's failure to act within the time specified in this contract (or within a reasonable time if not specified), an adjustment shall be made for any increase in the cost of performance (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption, and the contract modified in writing accordingly." FAR 52.242-14(c) continues: "A claim under this clause shall not be allowed [. . .] unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of the suspension, delay, or interruption, but not later than the date of final payment under the contract.

Regardless of whether the Government failed to act within a reasonable period of time when it did not issue the preconstruction conference or notice to proceed for six months after contract award, Singleton is not entitled to a suspension clause claim because it did not assert its claim as soon as practicable after the termination of delay or issuance of the termination for convenience. The first and only time Singleton claims excessive delay in writing is in its briefs to the Board. Therefore, FAR 52.242-14(c) prevents Singleton from asserting the claim.

Decision

For the reasons stated above, the appeal is **DENIED**.

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JERI KAYLENE SOMERS
Board Judge