UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

CROSS-MOTIONS FOR SUMMARY RELIEF DENIED: April 10, 2015

CBCA 3632

URS ENERGY & CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Daniel R. Frost of Snell & Wilmer L.L.P., Denver, CO, counsel for Appellant.

Brady L. Jones, III, Office of Chief Counsel, Environmental Management Consolidated Business Center, Department of Energy, Cincinnati, OH, counsel for Respondent.

Before Board Judges **SOMERS**, **HYATT**, and **SHERIDAN**.

SOMERS, Board Judge.

URS Energy & Construction, Inc. (URS) submitted a certified claim in the amount of $1,051,166.76 for attorney fees and costs incurred under a cost reimbursement contract with the Department of Energy (DOE). When the contracting officer failed to act on its claim, URS appealed to this Board on the basis that the claim had been denied.

Pending before the Board are the parties' cross-motions for summary relief. Upon extensive review of the parties' papers, the relevant legal authorities, and the entire record in this case, we find that genuine issues of material fact prevent us from granting either motion for summary relief.

Background[1]

Pursuant to the Uranium Mill Tailings Radiation Control Act of 1978, Public Law 95-605, DOE is responsible for remediation of twenty-four inactive uranium mill tailings sites contaminated with residual radioactive materials. In 1983, DOE entered into a cost reimbursement contract with URS.[2] The contract required URS to manage remediation projects throughout the United States.

The contract contained various standard clauses. One clause, entitled "Allowable Cost, Fixed Fee, Payments and Advances," provides that the Government will pay the contractor for any cost that is determined to be allowable by the contracting officer in accordance with Federal Acquisition Regulation (FAR) subpart 31.2 (48 CFR subpt. 31.2 (1994)), as modified by 48 CFR 931.2 . These provisions authorize contractors to, among other things, engage lawyers to defend lawsuits, subject to such conditions as the contracting officer deems appropriate and with prior written authorization of the contracting officer. *See* 48 CFR 970.5204-31.

Standard regulatory provisions also authorize contracting officers to determine whether the costs charged are reasonable and therefore allowable when allocable to contract work. *See* 48 CFR 970.5204-13. 48 CFR 970.5204-31(g), also applicable to the contract, states that a contractor shall not be reimbursed for liabilities and expenses incident to such liabilities, including litigation costs, counsel fees, judgments, and settlements.

The contract also incorporated FAR 52.232-20, Limitation of Costs (APR 1984) (LOC), and 52.232-22, Limitation of Funds (APR 1984) (LOF). The contract specifically notes that the LOC clause "shall apply to the contract whenever the contract is fully funded to the contract face value."

On March 1, 1995, with the approval of the DOE contracting officer, URS subcontracted with Ground Improvement Techniques, Inc. (GIT), for "remediation and site

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[1] This appeal follows a previous appeal submitted to the Board, CBCA 2260. There, we granted URS's claim for reimbursement for the cost of the supersedeas, or surety, bond mentioned in this decision. *See URS Energy & Construction, Inc. v. Department of Energy*, CBCA 2260, 12-2 BCA ¶ 35,094, *reconsideration denied*, 12-2 BCA ¶ 35,147.

[2] During the course of the contract, the contractor changed names and legal entities. These names include MK Ferguson, Morrison Knudsen Corp., Washington Group International, and URS Energy & Construction. For simplicity, this opinion similarly refers to the prime contractor and real party in interest as URS.

restoration of Union Carbide and North Continent uranium mill sites, and construction of a disposal cell, located in Burro Canyon, near Slick Rock, Colorado," for an estimated price of $9,294,051.30. The subcontract provided that disputes between the prime contractor and the subcontractor would be decided in Colorado state or federal court.

In 1995, URS, with DOE's approval, terminated the GIT contract for default. URS asked the contracting officer for authority to engage a law firm to assist it with the default termination, and DOE agreed. URS submitted a series of cost proposals for legal services necessary to litigate the termination action in court. DOE approved the proposals. URS filed suit against GIT in the United States District Court for the District of Colorado (the district court), and GIT countersued. DOE reimbursed URS for litigation expenses arising from this litigation.

On November 26, 1996, a jury rendered its verdict in favor of GIT for wrongful termination, and awarded GIT damages in the amount of $5,600,000. The district court entered judgment on December 4, 1996. DOE reimbursed URS for litigation expenses arising from this litigation.

While DOE and URS discussed whether to appeal the decision, the parties sought to stay enforcement of the judgment. As a condition for staying enforcement of the judgment pending appeal, the district court required URS provide a supersedeas, or surety, bond. With DOE approval, URS posted the bond and filed its appeal. URS submitted a cost proposal for estimated legal expenses required to appeal the district court judgment. DOE approved the proposal and reimbursed the costs related to the appeal.

In 1999, the appellate court affirmed the district court's judgment, but vacated the damages award and remanded the case for a new trial limited to the issue of damages. The contracting officer agreed that URS could retain outside legal counsel for the new trial.

In a letter dated April 20, 2005, in preparation for the new trial, URS requested an increase in the not-to-exceed amount for legal fees. The contracting officer informed URS that due to an impending reorganization of DOE, oversight and administration of the contract would be transferred to another office. The contracting officer cautioned URS that:

> You are advised to not exceed the current contract value. You are entitled by the contract terms to stop work when the funding or cost limit is reached, and any work beyond the funding or cost limit will be at the contractor's risk.

After receiving the contracting officer's warning not to exceed the current contract value, URS engaged a new law firm and submitted a litigation management plan to the same

contracting officer. The plan proposed to expend an anticipated $627,000 in legal expenses. On July 18, 2005, URS acknowledged the order not to exceed the current contract value, and requested reconsideration of that decision on the grounds that if a court found the judgment to be valid, "[URS] would incur an allowable cost under the contract that could potentially far exceed the cost of defense." The contracting officer did not respond to URS's request for reconsideration at that time.

By letter dated February 22, 2006, the contracting officer forwarded a contract modification to URS, reflecting the transfer of administrative responsibility of the contract from the National Nuclear Security Administration to the Department of Energy Environmental Management Consolidated Business Center (CBC), located in Cincinnati, Ohio. The modification did not increase funding for legal services.

URS contacted a contracting officer at CBC to obtain approval and payment for outstanding invoices for legal services, as well as reconsideration of the previous contracting officer's order not to exceed the current contract value. URS explained that funding should be increased because, among other things, URS intended to litigate the issue of whether the surety bond remained in effect during remand.

The second trial began in May 2006. Again, URS submitted cost proposals to the contracting officer for these legal services. The contracting officer approved the proposals, and reimbursed URS as required. On May 24, 2006, the jury rendered a verdict of $15,644,587 in favor of GIT. Ultimately, DOE reimbursed URS $502,451.89 for the outside counsel fees and expenses arising from the second trial.

On June 1, 2006, GIT filed its motion for entry of judgment jointly and severally against the surety and URS. URS contacted the contracting officer to request an increase in the contract value, reiterating that "if [URS] should be found liable for any part of the judgment (including liability to indemnify the surety on the bond), [URS] would incur allowable costs requiring a substantial increase in the contract's cost and funding ceiling, pursuant to FAR 52.232-20 and 52.232-22." URS again requested that DOE pay the outstanding legal expense invoices and sought an increase of $200,000 to the cost ceiling to cover legal expenses.

Initially URS advised DOE that it would not appeal the anticipated judgment unless DOE would agree that all legal expenses for an appeal would be reimbursable under the contract. Meanwhile, the surety entered an appearance and challenged the judgment. The district court rejected all motions seeking relief from the judgment, which led URS to reconsider its position regarding an appeal. By letter dated August 28, 2006, counsel for URS advised DOE counsel that URS would join the surety in an appeal or would pursue an

appeal of its own. URS noted that if GIT succeeded in enforcing the bond, URS would be required to indemnify the surety for the amount of the bond ($7,075,000). URS notified DOE that it would continue to pursue litigation related to the actual bond, and was awaiting a decision on a motion pending in bankruptcy court.

In a letter dated September 22, 2006, apparently referring to a plan for settlement, the Chief Counsel for the DOE Office of Legal Services asked URS to formally submit, in writing, the proposed terms for a possible settlement. In addition, counsel stated: "At this time, the DOE is not authorizing [URS] to appeal any issue arising from the trial and post-trial rulings made by [the district court judge]." URS acknowledged receipt of this letter, confirming in a letter dated October 2, 2006, that: "[URS] understands that the DOE does not agree to authorize this appeal and may not reimburse [URS] for any costs associated with the appeal."

On October 4, 2006, URS and the surety appealed the final judgment issued by the district court. By letter dated February 27, 2007, counsel for DOE confirmed that DOE had not changed its position with response to the appeal of the ruling finding the bond still valid, and that DOE did not authorize any appeal.

On July 8, 2008, the United States Court of Appeals for the Tenth Circuit held that the surety bond remained valid and that the surety's liability was limited to the penal sum of the bond. The district court issued an order on July 29, 2008, directing the surety to deposit the sum of $7,075,000 plus post-judgment interest into the registry of the court.

On November 15, 2012, URS submitted a certified claim, seeking reimbursement of $1,047,503.40, the amount URS had paid for attorney fees from multiple law firms involved in the second (unauthorized) appeal, as well as other fees arising from litigation ancillary to the default termination. When the contracting officer raised questions about documents supporting URS's claim, URS submitted a revised invoice with additional documentation on May 31, 2013. The revised invoice sought $1,051,166.78.

When the contracting officer did not act on its claim, URS appealed the deemed denial of the claim.

Discussion

Standards for Motions for Summary Relief

The parties have cross-moved for summary relief. Summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based upon undisputed

material facts. *McAllen Hospitals LP v. Department of Veterans Affairs*, CBCA 2774, et al., 14-1 BCA ¶ 35,758, at 174,974, (citing *Butte Timberlands, LLC v. Department of Agriculture*, CBCA 3232, 13 BCA ¶ 35,383, at 173,627). The moving party bears the burden of demonstrating the absence of genuine issues of material fact, and all justiciable inferences must be drawn in favor of the non-movant. *Government Marketing Group v. Department of Justice*, CBCA 964, 08-2 BCA ¶ 33,955, at 167,990-91. A material fact is one that will affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

When, as here, both parties have moved for summary relief, each party's motion must be evaluated on its own merits and all reasonable inferences must be resolved against the party whose motion is under consideration. *First Commerce Corp. v. United States*, 335 F.3d 1373, 1379 (Fed. Cir. 2003); *DeMarini Sports, Inc. v. Worth, Inc.*, 239 F.3d 1314, 1322 (Fed. Cir. 2001); *Charleston Marine Containers, Inc. v. General Services Administration*, CBCA 1834, 10-2 BCA ¶ 34,551. The mere fact that both parties have moved for summary relief does not impel the grant of one of the motions. *Charleston Marine*, 10-2 BCA at 170,398; *Electronic Data Systems, LLC v. General Services Administration*, CBCA 1552, 10-1 BCA ¶ 34,316, at 169,505 (2009).

The Positions of the Parties

a. Appellant's motion for summary relief

URS contends that it is entitled to receive as an allowable cost under the contract $1,051,166.76 for attorney fees and costs charged by outside counsel to URS, as well as the fees and costs charged by the surety's attorneys. URS argues that the issue of liability for costs related to the GIT litigation has already been decided in the case cited in footnote 1, and that DOE is bound by the doctrine of collateral estoppel. URS contends that the costs at issue here fall within the same category and should be found allocable, allowable, and reasonable under the contract.

b. Respondent's motion for summary relief

DOE argues that the contracting officer did not agree to reimburse URS for attorney fees and costs incurred as a result of its decision to challenge the validity of the surety bond in the second appeal. These costs, DOE states, exceed the funding allocated for outside counsel fees and costs under the LOF clause contained in the contract. In the event that the LOF clause does not apply, DOE asserts that the fees which URS seeks are unreasonable and/or not allocable to the contract.

c. Appellant's response to respondent's motion for summary relief

In response to DOE's motion for summary relief, URS contends that DOE waived the affirmative defense that the limitation of funds clause applied to bar recovery of the attorney fees and costs. Alternatively, URS asserts the Government has presented no evidence concerning the total amount allocated to the contract, or that the amount sought by URS exceeds that amount. URS also contends that because DOE authorized the original lawsuit, it is responsible for all fees that have been incurred as a consequence of the initial authorization. Finally, URS "had unavoidable issues and obligations arising from the parallel bankruptcy proceedings as the Plan Committee for the Estate in URS's bankruptcy proceeding took the position that URS was legally obligated to continue with the second appeal."

d. Respondent's response to appellant's motion for summary relief

DOE questions whether the surety agreement requires URS to reimburse its surety for attorney fees and costs. In the event that it does, DOE disputes that URS provided adequate documentary support for the costs claimed, noting that the invoices do not establish that the fees charged arose from the GIT litigation. DOE points out that the invoices are "executed in block billing style," making it impossible to determine how much time had been spent on a particular task. The invoices presented by the law firms fail to describe the work performed and appear to bill for tasks related to ancillary litigation, for which DOE is not responsible.

Analysis

Both parties have separately submitted statements of proposed findings of fact as well as genuine issues of material fact. We find that genuine issues of material fact exist, requiring the development of a more comprehensive record before these issues can be resolved. Specifically, at a minimum, the record needs to be developed on the following matters:

a. The existence and terms of any agreements that mandated URS reimburse the surety for attorney fees and costs in whole or in part;

b. Whether the Limitation of Funds clause applies to preclude the award of attorney fees and costs under the facts of this appeal;

c. Whether DOE "partnered" with URS for all the litigation that followed the remand, to include the second appeal;

d. Whether it was in the best interests of both URS and DOE to contest the validation of the bond;

e. Whether the plan committee in the bankruptcy proceeding legally obligated URS to continue with the second appeal;

f. Whether the fees and costs for which URS seeks reimbursement arise from the litigation related to the GIT default litigation, or from matters outside this litigation;

g. Whether the fees and costs are properly documented in the invoices submitted by URS under DOE regulations that apply to the reimbursement of legal fees for outside counsel; and

h. Whether DOE had the right to refuse to participate or to pay for URS's litigation fees in the second appeal.

Decision

At this point, we are unable to make a determination as to which party should prevail. Accordingly, the cross-motions for summary relief are **DENIED**.

JERI KAYLENE SOMERS
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

PATRICIA J. SHERIDAN
Board Judge