



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: February 1, 2011

CBCA 1325

MARUT TESTING & INSPECTION SERVICES, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Joseph E. Marut, II, President of Marut Testing & Inspection Services, Inc., Pennel, PA, appearing for Appellant.

Lesley M. Busch, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **STERN**, and **HYATT**.

STERN, Board Judge.

This matter is before us on the motion of respondent, General Services Administration (GSA), for summary relief with respect to the appeal filed by appellant, Marut Testing & Inspection Services, Inc. (Marut).

Background¹

On June 25, 1990, Marut entered into a “firm fixed price indefinite delivery” contract with GSA to provide construction inspection services to GSA on various construction projects in seven different counties in New Jersey. The contract was to run for a period of one year. GSA was given the option of extending the contract for two additional one-year periods. GSA exercised those options, so the inspection services were to be performed by Marut through June 24, 1993. Appellant’s “evaluated offer price” of \$186,719 for each year was based on the hourly rates Marut set forth for various inspectors that might be called upon, were GSA to issue work orders during the period of performance. This total amount was thus set forth as “estimated and indefinite.”

Marut claims that it was called to perform services for GSA on a regular basis. Marut alleges the following in its complaint:

- Marut invoiced GSA for each phase of its performance, believing that GSA owed Marut the sum requested pursuant to a price formula contained in the contract.
- As GSA issued a work order, Marut’s invoices reflected that fact and reduced the amount requested by the amount paid.
- GSA never paid Marut’s invoices in full, in spite of the fact that Marut fully performed the services/work ordered in a satisfactory manner.
- For some time, Marut unsuccessfully pursued payment of its invoices.

GSA counters that the contract was an indefinite quantity contract under which it paid only for work performed under work orders. GSA also states that it did not receive invoices from Marut for the amounts involved in this claim until 2007 and 2008. GSA first received certified claims in May 2007.

Marut has failed to produce any documentation supporting its claims. The record contains no invoices or other requests for payment prior to March 7, 2007. The record also contains no documentary evidence of the amount of payments actually made by GSA under the contract.

¹ The facts stated herein are those as set forth by the parties. Some of the documents relied on by the parties may not be accurate copies of the actual contractual documents. Because of the conclusion we reach, we do not find this to be pertinent.

Appellant claims it is due \$168,047 for the base contract year, \$173,949 for the first option year, and \$186,719 for the second option year. Appellant claims it is entitled to recover for its services, including costs of its building, equipment, insurance, telephone, and other items used to perform the services. Appellant also claims it is entitled to recover the “fixed” contract price based on its availability to perform the services required by the contract, whether or not GSA actually ordered such services.²

Appellant has produced what it alleges is a complete copy of the contract. GSA was unable to find the relevant contract file after searching over the past two years. GSA’s document retention program calls for contract file destruction six years and three months after the end of the fiscal year in which the file becomes inactive. Respondent’s Motion for Summary Relief, Exhibit 5. GSA conducted a search at its offices and at the federal records center and has been unable to locate the contract file pertaining to this contract. Affidavit of Adria R. Friedman, GSA contracting officer (Mar. 24, 2009). Thus, GSA was unable to locate and produce any contract documents. In addition, GSA submits that nearly all personnel that were involved with this contract have retired or otherwise left the agency.

In chronological order, the first item submitted to the Board, after Marut’s version of the contract itself, is an invoice submitted by Marut on March 7, 2007. The record is devoid of any correspondence or other material relevant to this dispute for a period of over fifteen years, including the years of contract performance.

Discussion

Respondent seeks summary relief on the basis that, since a complete copy of the contract is unavailable, appellant has failed to meet its burden of proving a breach of contract by GSA. GSA also argues for summary relief on the basis that appellant’s argument that the

² It appears that Marut made similar arguments on a 1993 contract it had with GSA. That contract contained a “Minimum/Maximum Contract and Order Limitation” clause. The GSA Board of Contract Appeals permitted recovery up to the limits set forth in that clause. *Marut Testing & Inspection Services, Inc. v. General Services Administration*, GSBCA 16079, 03-2 BCA ¶ 32,382. The board in that case held that there was no reasonable basis for Marut’s argument that it was entitled to fixed-price payments beyond those for the services actually ordered by GSA. The board interpreted the contract as providing for payment only pursuant to GSA work orders. The board stated that the contract was fixed-price only to the extent of the fixed hourly rates agreed to by the parties and to be used in pricing work orders. *See also Marut Testing & Inspection Services, Inc. v. General Services Administration*, GSBCA 16079, *et al.*, 06-1 BCA ¶ 33,252, reconsideration denied, 06-2 BCA ¶ 33,350.

contract is a fixed-price contract is baseless. Further, GSA states that Marut's invoices provide no substantiation or documentary support. Finally, respondent argues for summary relief on the basis of laches or the tardiness of the claim. Marut failed to file a timely opposition to the GSA motion. In deciding this motion, we consider the entire record, including all supplemental materials filed by the parties.

We are guided by the well-established rules applicable to summary relief motions. Summary relief is only appropriate where there is no genuine issue as to any material fact (a fact that may affect the outcome of the litigation) and the moving party is entitled to relief as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Any doubt on whether summary relief is appropriate is to be resolved against the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The moving party shoulders the burden of proving that no question of material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

Laches is "the neglect or delay in bringing suit to remedy an alleged wrong, which taken together with lapse of time and other circumstances, causes prejudice to the adverse party and operates as an equitable bar." *A.C. Aukerman Co. v. R.L. Chaides Construction Co.*, 960 F.2d 1020, 1028-29 (Fed. Cir. 1992) (en banc). To prevail on a defense of laches, the defending party must show unreasonable, unexcused delay by the claimant, and prejudice to the other party. The prejudice may be a "defense prejudice" -impairment of the ability to mount a defense due to circumstances such as loss of records, destruction of evidence, or witness unavailability." *JANA, Inc. v. United States*, 936 F.2d 1265, 1269-70 (Fed. Cir. 1991); see also *Costello v. United States*, 365 U.S. 265 (1961); *JRS Management*, ASBCA 57238, 10-2 BCA ¶ 34,571.

Here, performance under the contract ended on June 24, 1993. There is no documentary evidence that Marut made any claim for additional amounts due under the contract until March 2007, some fourteen years after performance concluded. Appellant has offered no explanation for this lengthy delay in filing its claims.

In the interim, GSA, in accordance with its written policy, disposed of its contract files related to this contract. GSA has conducted a thorough search and has been unable to locate the contract or correspondence related to this matter. Furthermore, most of the GSA personnel who were involved with the contract are no longer employed by GSA. Under these circumstances, we find that GSA would be unfairly hampered in mounting a defense to appellant's claims.

We find that the fourteen year unexcused delay by Marut in submitting its claims is unreasonable. We also find that GSA was prejudiced by this undue delay. The doctrine of laches applies. There is no issue of fact. GSA is entitled to summary relief.

Decision

GSA's motion for summary relief is granted. The appeal is **DENIED**.

JAMES L. STERN
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

CATHERINE B. HYATT
Board Judge