



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

APPELLANT'S MOTION FOR SUMMARY RELIEF GRANTED IN PART AND
DENIED IN PART;
RESPONDENT'S MOTION FOR SUMMARY RELIEF DENIED: January 22, 2015

CBCA 3407

GROUP HEALTH INCORPORATED,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Karen L. Manos of Gibson, Dunn & Crutcher, LLP, Washington, DC; and Daniel P. Graham of Wiley Rein LLP, Washington, DC, counsel for Appellant.

Jeffri Pierre and Anthony Marrone, Office of the General Counsel, Department of Health and Human Services, Baltimore, MD, counsel for Respondent.

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

GOODMAN, Board Judge.

Appellant, Group Health Incorporated (appellant or GHI), sponsors this appeal on behalf of its subcontractor, Douglas Consulting & Computer Services, Inc. (DCCS), from a final decision issued by a contracting officer of respondent, the Department of Health and Human Services (respondent or DHHS), denying DCCS's claim. The parties have filed cross-motions for summary relief. Appellant's motion for summary relief is granted in part as to the issue of entitlement. Respondent's cross-motion for summary relief is denied.

Background

In 1994, DCCS developed the paper Initial Enrollment Questionnaire (IEQ) system pursuant to a contract with respondent's Health Care Financing Administration—now the Centers for Medicare & Medicaid Services (CMS). The paper IEQ system is used by CMS to comply with statutory requirements and to determine when Medicare should not be the primary payer for Medicare-covered services.

In 1999, respondent bundled the IEQ services into a cost reimbursement contract, contract no. HHSM-500-00-00001 (the prime contract), which was awarded to GHI. On November 1, 1999, GHI entered into subcontract no. GHI-DCCS-500-00-0001/COB (the subcontract) with DCCS, under which DCCS performed the paper IEQ portion of the prime contract.

On May 18, 2011, CMS partially terminated the prime contract to eliminate paper-based IEQs, and GHI notified DCCS that the subcontract was terminated in its entirety effective May 20, 2011. DCCS alleges that it terminated the employment of most of its employees as a direct result of the termination of the subcontract, and has since that time maintained a significantly reduced workforce to close out the subcontract.

On June 8, 2011, DCCS submitted to GHI a termination settlement proposal in the amount of \$1,608,278. GHI provided a copy of DCCS's proposal to CMS on June 13, 2011, and requested a meeting with CMS and DCCS to resolve the open cost issues.

Appellant states that after termination of the subcontract, during the summer and early fall of 2011, DCCS migrated all of the electronic IEQ data stored to GHI, arranged for the shipment of thousands of boxes of paper IEQs to GHI, obtained quotations from vendors for salvage of the hardware purchased in support of the contract, and performed other tasks associated with closing out the subcontract.

Between June 16 and June 28, 2011, attempts were made to arrange a meeting among GHI, DCCS, and the CMS contracting officer. By email message dated June 28, 2011, DCCS's chief financial officer (CFO) asked the CMS contracting officer to meet regarding CMS-requested audits that had been previously been performed and completed in 2011 by the Defense Contract Audit Agency (DCAA) for fiscal years 2003 through 2007. The CMS contracting officer responded, asking what the purpose was for the meeting and why it was necessary to include counsel.

DCCS's CFO replied:

The meeting is to discuss finalizing previous years' indirect cost rates. The finalization of these rates is preventing GHI and DCCS from closing out the subcontract, which will likely interfere with CMS's ability to settle the partial termination of GHI's prime contract.

In September 2011, DHHS began the audit of DCCS's incurred cost proposals for 2008 through 2010, rather than have DCAA perform the audits as it had for 2003 through 2007. At CMS's request, DCCS on September 9, 2011, submitted its incurred cost proposals for 2003 through 2010 to the CMS auditors, even though the incurred cost proposals for 2003 through 2007 had already been audited by DCAA.

Appellant states that from October 2011 through October 2013, DCCS responded to more than thirty auditor requests for information, providing supporting data and submitting written responses to the draft audit findings. Respondent states that its audit interaction with DCCS began in May 2012, and not in October 2011.

During respondent's audit of DCCS's costs, DCCS's termination costs were not audited. Respondent's audit manager states that "[t]ermination costs were not included in the scope of review We were not made aware by DCCS of the submission of a certified claim and did not discuss anything in that regards with DCCS."

On May 7, 2012, in response to an inquiry from the CMS contracting officer, GHI stated that while "all DCCS operational work under the contract has been completed, DCCS was continuing to incur costs to support final closeout." GHI's email message further stated: "We are awaiting CMS's determination as to whether these costs are allowable. Therefore, the termination settlement costs have not been fully paid. In addition, the costs for 2003-2007 have not been finalized and the costs from FY 2008 on are still awaiting audit and settlement."

On May 11, 2012, GHI requested that the contracting officer extend the one-year period for submission of GHI's final termination settlement proposal until completion of the audit of DCCS's indirect cost rates for 2008 through 2011. The contracting officer responded by stating:

I have been advised that the final settlement of termination and the audits are two separate items. We do not have privity of contract with DCCS other than to audit and settle their rates. It is GHI's decision if you want to continue to pay DCCS. Therefore, the Government will not authorize payments to GHI

for DCCS to standby until the audits are complete. I cannot provide you an estimate when the audits will be complete. After the audits are complete then we have to settle the results of the audits.

By email message transmitted May 11, 2012, GHI informed DCCS that CMS intended to disallow DCCS's costs of "standing by until an agreement is reached on the ongoing audits." GHI requested that DCCS "submit a final termination settlement proposal identifying all costs DCCS has incurred through April 30, 2012 that DCCS believes are reimbursable." GHI also requested that DCCS separately identify costs that have not previously been paid, costs incurred since termination, and costs that DCCS believes are outstanding based on prior years' audits for 2003 through 2007. GHI requested that DCCS include with its settlement proposal "an explanation for DCCS's position that the costs incurred since the cessation of work under the subcontract are allowable, as well as an explanation why those costs are reasonable."

In a letter dated July 11, 2012, the contracting officer informed GHI that costs submitted on behalf of DCCS associated with maintaining staff after the termination for the purpose of the DHHS indirect rate audits would be deemed unreasonable and unallowable.

On July 31, 2012, DCCS submitted its final termination settlement proposal to GHI. On August 21, 2012, GHI submitted a termination settlement proposal to CMS with respect to its subcontractor's costs.

Between June 10, 2011, and October 23, 2012, DCCS submitted twenty-three interim payment requests under the terminated subcontract. On October 23, 2012, GHI informed DCCS that CMS was not going to reimburse DCCS's interim payment voucher nos. 162 and 163. CMS's refusal to reimburse these interim payment vouchers was based primarily on CMS's contention that post-termination costs incurred in support of the DHHS audit are not allowable.

By letter dated November 16, 2012, and revised December 11, 2012, DCCS submitted a certified claim in the amount of \$997,651 for billed termination costs remaining unpaid. DCCS's claim requested that GHI submit a certified claim on DCCS's behalf to CMS.

GHI submitted the sponsored certified claim to the contracting officer on December 14, 2012. GHI's certified claim demanded payment in the sum certain amount of \$815,128, and explained that there were two items of cost in the DCCS claim to GHI that GHI was not presenting to CMS. Those two items of costs are not at issue in this appeal.

By final decision dated March 12, 2013, the contracting officer issued a decision denying GHI's sponsored claim in its entirety. Appellant appealed the contracting officer's decision to this Board on June 7, 2013. On September 12, 2013, after the complaint and answer were filed, respondent filed a motion to dismiss, alleging defective certification of the appellant's claim. After briefing of the motion concluded, the Board resolved the issue of defective certification in appellant's favor. *Group Health Inc. v. Department of Health and Human Services*, CBCA 3407, 14-1 BCA ¶ 35,487.

Between February 7 and April 15, 2014, proceedings were stayed in this appeal while the parties attempted to resolve the appeal by negotiation.

In this appeal, appellant has alleged that closing out the subcontract has been significantly delayed as a result of unresolved DCAA incurred cost audit issues for 2003 through 2007, and ongoing CMS incurred cost audits for 2008 through 2011. By letter dated February 21, 2014—more than three years after DCAA completed its audits—the contracting officer unilaterally established DCCS's final indirect cost rates for 2003 through 2007. CMS has not established final indirect cost rates for years 2008 through 2011, so that the subcontract can be closed out.

On April 15, 2014, by joint status report, the parties advised the Board they were unable to resolve the appeal. A conference call was held with the Board on April 28, 2014, during which appellant's counsel advised the Board of appellant's intent to file a motion for summary relief. Appellant filed a summary relief motion on June 18, 2014; respondent filed a cross-motion for summary relief on July 23, 2014; and briefing on the motions concluded on August 29, 2014.

Discussion

This appeal arises from respondent's contracting officer's denial of appellant's subcontractor's termination settlement claim. Appellant has filed a motion for summary relief, alleging that the contracting officer's reasons for denying the claim lack merit, and appellant is therefore entitled to relief as a matter of law. Respondent has filed a cross-motion for summary relief, asserting that appellant's recovery is precluded.

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); *Au' Authum Ki, Inc. v. Department of Energy*, CBCA 2505, 14-1 BCA ¶ 35,727.

The Parties' Cross-Motions for Summary Relief

The contracting officer's decision cites three reasons for denying the claim. The first reason—alleged defects in the claim certification—has been previously resolved by this Board in its ruling on respondent's motion to dismiss. Appellant's motion for summary relief challenges the contracting officer's second and third reasons for denying the claim.

The contracting officer's second reason for denying the claim was that the claimed costs are not allowable because the "costs were incurred by DCCS for staff and legal fees to continue the viability and operations of DCCS after termination of its subcontract with GHI." The contracting officer's decision states:

There are limits on what subcontractor post-termination costs can be covered. In determining the reasonableness of any subcontractor termination, guidance is found in the provisions of the FAR [Federal Acquisition Regulation] relating to the settlement of prime contracts. FAR 31.205-42(b) [48 CFR 31.205-42(b)] cost principles acknowledge that there are situations where, despite reasonable efforts, costs cannot be discontinued immediately after a termination. However, costs continuing after the effective date of the termination due to willful failure of the contractor to discontinue costs are unallowable. Additionally, when a contractor is terminated for convenience, the contractor is entitled to cover costs allowed under the contract and incurred prior to the date of termination for completed work. Nothing indicates that DCCS is seeking costs allowable under the contract for work completed prior to termination.

Further, it is unreasonable for a contractor or subcontractor to expect to be put in a better position than had the contract run its normal course. As applied here, had DCCS's contract continued until the end of its term, which would have been November 2011; there would be no basis for entitlement to the majority of the costs claimed. The contract would have ended by its own terms. In light of the fact that a contractor is not entitled to compensation from the government even if it goes out of business after a contract reaches its natural termination date, DCCS' claim is unreasonable.

In its motion for summary relief, appellant takes issue with the contracting officer's reasoning, stating that DCCS could not discontinue all costs upon termination of its subcontract, and has not been simply "standing by" since that time. As a direct result of the termination, DCCS terminated the employment of most of its employees. Since that time, DCCS has maintained a significantly reduced workforce to close out the subcontract.

However, DCCS had (and has) an unavoidable contractual obligation to support the Government's audit of its termination settlement proposal and indirect cost rates for all open years. FAR 31.205-42(b) expressly allows costs that cannot be discontinued immediately after the effective date of the termination, despite all reasonable efforts of the contractor, but disallows costs continuing after the effective date of the termination due to the negligent or willful failure of the contractor to discontinue the costs. Appellant alleges that DCCS undertook reasonable efforts to discontinue costs, terminating the majority of its employees, vacating its former offices, and moving its records to off-site storage. Additionally, appellant asserts that there is no evidence that supports the contracting officer's implication that the costs DCCS incurred after termination were the result of DCCS's negligent or willful failure to discontinue them.

Appellant describes its subcontractor's reasons for incurring the post-termination costs sought:

Had CMS audited and settled the open contract years or negotiated the termination settlement proposal in a timely manner, DCCS could have placed all of the audited records in permanent storage and discontinued operations. However, CMS did not do either of these things. Instead, CMS required DCCS to undergo a protracted audit. As a consequence, DCCS was compelled to continue to incur costs in order to close out the subcontract in accordance with the requirements of FAR 52.216-7.

Appellant argues further:

The final decision is also incorrect in asserting that DCCS expects to be put in a better position than it would have been in had the subcontract run its normal course. Even if the subcontract had run its normal course, the post-completion costs incurred by DCCS in supporting the Government's audit and settling final indirect cost rates would still be allowable and allocable to the subcontract. Contractors frequently continue to incur costs for this purpose after the end of a physically complete cost reimbursement contract since final indirect cost rate proposals are not submitted until after the end of each fiscal year.

In its cross-motion for summary relief, respondent counters that DCCS's alleged post-termination costs are out of proportion to the time spent by DCCS during the audit of the claim.

The contracting officer's third reason for denying appellant's sponsored claim is that DCCS's claimed costs are not supported by accounting data and other information sufficient for review by the Government. Appellant counters by asserting that DCCS made all of its accounting data and other information available for the Government's review, but CMS declined to review it. Thus, appellant asserts that respondent's "real complaint is that DCCS declined to make copies of the supporting data, but nothing in DCCS's subcontract or the FAR requires a contractor or subcontractor to incur the cost of copying voluminous records that are otherwise made available for the Government's review and inspection. . . . DCCS fully satisfied its contractual obligation by offering to make the records available for CMS's examination, audit and reproduction."

In its cross-motion for summary relief, respondent counters by alleging that termination costs were not included in the scope of the audit conducted and the auditors were not made aware by DCCS of the submission of a certified claim. Respondent asserts that DCCS's refusal to provide supporting documentation interfered with CMS's ability to consider which charges might constitute allowable charges.

The resolution of the parties' motions is governed by FAR 31.205-42, which reads in relevant part:

Termination Costs

Contract terminations generally give rise to the incurrence of costs or the need for special treatment of costs that would not have arisen had the contract not been terminated. The following cost principles peculiar to termination situations are to be used in conjunction with other cost principles in subpart 31.2:

. . . .

(b) *Costs continuing after termination.* Despite all reasonable efforts by the contractor, costs which cannot be discontinued immediately after the effective date of termination are generally allowable. However, any costs continuing after the effective date of the termination due to the negligent or willful failure of the contractor to discontinue the costs shall be unallowable.

Paragraph (g) of this FAR provision lists the various types of reimbursable settlement expenses, including those sought in this appeal, and paragraph (h) allows reimbursement of subcontractor claims.

Appellant is Entitled to Post-Termination Costs

While respondent has challenged DCCS's entitlement to post-termination costs, respondent has not provided evidence to create genuine issues of material fact as to entitlement. First, respondent implies that DCCS's costs continued after the effective date of the termination due to the willful failure of the contractor to discontinue costs. There is no evidence to support this allegation of willful failure to discontinue the types of costs sought by DCCS. Respondent also alleges that the magnitude of the costs claimed by DCCS is out of proportion to those incurred by subcontractor in responding to the audit of its indirect costs through 2011. However, respondent's allegation focuses on DCCS's response to the audit, and does not take into account the alleged costs for migration and storage of information after termination. Allegations as to magnitude of costs do not defeat entitlement to such costs, but only raise questions as to quantum. Appellant's motion for summary relief is granted as to the issue of entitlement to post-termination costs. Respondent's cross-motion to preclude recovery by appellant is denied.

Quantum Remains to Be Resolved

Genuine issues of material fact exist as to quantum. CMS has not established final indirect cost rates for years 2008 through 2011 so that the subcontract can be closed out. Also, while the parties differ as to the reasons why the post-termination costs have not been audited, there is no question that the audit of these costs has not been conducted. Failure to audit costs, even when documents are available, does not result in a finding of entitlement to the quantum requested. Without the costs being audited, the Board cannot make a decision as to quantum based on the current record. Appellant's motion for summary relief is denied as to the issue of quantum of post-termination costs.

The parties may engage in negotiations to resolve quantum or proceed in discovery, if necessary, to prepare for a hearing on quantum. If the parties wish to attempt to negotiate quantum, they should request a stay of proceedings in order to do so. If they wish to engage in discovery, they should submit a proposed discovery schedule within fourteen calendar days from the date of this decision.

Decision

Appellant's motion for summary relief is **GRANTED IN PART** on the issue of entitlement to post-termination costs and **DENIED** as to the issue of quantum. Respondent's cross-motion for summary relief is **DENIED**.

ALLAN H. GOODMAN
Board Judge

We concur:

CANDIDA S. STEEL
Board Judge

H. CHUCK KULLBERG
Board Judge