UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: November 13, 2015

CBCA 4777

SERVITODO LLC,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

William J. Acuff, Management Officer of ServiTodo LLC, Atlanta, GA, appearing for Appellant.

Scott C. Briles, Office of the General Counsel, Department of Health and Human Services, Atlanta, GA, counsel for Respondent.

POLLACK, Board Judge.

This appeal arises out of contract no. 200-2012-M-51078, between ServiTodo, LLC (appellant) and Centers for Disease Control and Prevention (CDC), Department of Health and Human Services. The contract called for appellant to provide the equivalent of one health communications specialist to satisfy the overall programmatic objectives of the Division of Unintentional Injury Prevention (DUIP) at the CDC. The total adjusted claim before the Board is $57,264. The claim consists of added costs associated with recruiting the health communication specialist and costs incurred by appellant in preparing a request for equitable adjustment (REA).

Appellant has elected the small claims procedure, Board Rule 52, 48 CFR 6101.52 (2014). Therefore, this is a single judge decision; it is final and conclusive and may not be set aside except for reasons of fraud, and it has no value as precedent. A hearing was held in Atlanta, Georgia. Virtually all the testimony on behalf of appellant was provided by Mr.

William Acuff, appellant's managing officer. Accordingly, when this decision references appellant's testimony, it is referring to the testimony of Mr. Acuff.

The contract was awarded on June 6, 2012. The signed contract sheet identified Vallerie Redd as the contracting officer (CO), Chester L. Pogostin as the CDC technical point of contact (project officer), and Mike Davis as the contract specialist point of contact. The contract contained no delegations of authority to either Dr. Pogostin or Mr. Davis.

Appellant claims costs for added recruitment efforts beyond what was contemplated. Much of the recruitment work was handled by appellant's subcontractor, All Things Administrative. CDC does not challenge that extra work was ordered and done, but asserts that the added work was directed not by the CO, but by employees of the program office, who had no contracting authority. CDC further charges that appellant has not adequately established its costs. The claim for legal and accounting fees is for costs of preparing a request for equitable adjustment (REA) in 2014. Appellant says the REA was prepared for purposes of negotiations. CDC says it was in contemplation of a claim.

Appellant reasonably anticipated a limited recruiting effort. The hired employee was not to begin work until September 2012. Appellant was to be paid from the start of the hire's work in September 2012 through August 31, 2013, on a fixed-price basis. Appellant performed recruitment work that was not contemplated by the contract. The added effort started some time in the summer of 2012 and ran into the end of November 2012. The employee was not hired until the end of November 2012 and did not start work until mid-December 2012. The hired employee had first been identified by appellant in September 2012, but program officials were not willing to accept the hire. The added recruitment effort was directed by two CDC program officials, one of whom was Dr. Pogostin and the other Ms. Michelle Huitric.

Although appellant was performing tasks beyond those called for in the contract during the summer and into the fall of 2012, appellant did not at the time identify or seek compensation for added work. Up to that time appellant had followed directions of the program officials. Mr. Acuff testified that he believed he had to follow the program officials' directions and did not understand that their authority to direct him was limited. On or about October 23, 2012, appellant balked at a plan by the program officials to split the position into a two-person hire. He thought that such a dramatic change needed to be approved by someone above the program officials before he could proceed. On October 23, 2012, as a result of Mr. Acuff's concerns,x Dr. Pogostin contacted Mr. Davis, the CDC contract specialist designated in the contract. Dr. Pogostin related to Mr. Davis the concerns raised by Mr. Acuff as to the split hire. Mr. Davis worked for Ms. Redd and was located physically in the same office. Mr. Davis then contacted Ms. Redd by e-mail message, on that same day.

Ms. Redd handled between 300 and 400 contracts. She did no direct monitoring of this contract, nor did she specifically delegate monitoring. Day-to-day contract management was totally in the hands of the program officials. From award in June 2012 until late October 2012, Ms. Redd had no involvement. She noted that Mr. Davis was the contracting official who would have had more day-to- day interaction, but there is no evidence of his involvement until October 23, 2012. According to Ms. Redd, she first communicated with the program officials as to this contract on or about October 23, 2012, after being contacted by Mr. Davis as to the request for direction by the program officials. She testified that she advised the program office that the decision to hire any person under the contract would be the contractor's and not the Government's. It was at that point that Ms. Redd first learned that the services under the contract had not yet begun.

Nevertheless, appellant received no response concerning his October 23 request to Dr. Pogostin. Therefore, on November 7, 2012, having heard nothing from Dr. Pogostin, Mr. Acuff called the CO directly for direction.

Ms. Redd was aware, by October 23, 2012, that the position to be filled through appellant's efforts was still vacant. Nonetheless, nothing further appears to have transpired concerning this matter until nearly two weeks later, when Mr. Acuff telephoned Ms. Redd. At that point, Ms. Redd told Mr. Acuff to hire someone immediately and instructed the program officials to allow him to do so. E-mail messages show that both program officials were aware of Ms. Redd's direction, but remained on the program as end users. They continued to interfere with appellant's ability to hire a person for the job, with no oversight from Ms. Redd.

In April 2014, appellant secured counsel to assist it in putting together an REA to CDC. The effort ran through October 2014. The initial purpose was to identify the legal basis and eligible costs for the added recruitment work and to secure the balance appellant believed was still owed. According to Ms. Redd, it was her understanding in late April 2014 that appellant was moving forward with filing a claim. She cited an e-mail message in April 2014 that referenced a discussion with appellant regarding her having addressed his concerns with her upper management. She told Mr. Acuff to direct the claim to her and she would process the request and give him a response.

On August 1, 2014, appellant submitted its REA, which addressed both the contract balance and recruitment costs. The contract balance matter has been resolved and is not at issue in this appeal. The REA sought $47,695 for costs of REA preparation. Thereafter, on October 14, 2014, the appellant filed a formal claim, which essentially repackaged the earlier REA.

Appellant revised its claims by submitting updated costs on March 26, 2015. The CO issued her final decision on April 8, 2015. On June 3, 2015, appellant filed a timely appeal. The appeal identified the dollars in dispute as $58,740.87 (subsequently reduced to $57,264). To clarify the breakdown of its costs, appellant filed a submission on June 19, 2015, which showed $6843.75 for in-house labor costs chargeable to the extra recruiting efforts and $12,570 for the costs (weekly bills from September 8 to December 22, 2012) from All Things Administrative. All Things Administrative evidently performed much of the recuritment work for appellant. Appellant also sought $12,625 for in-house labor on REA preparation, $3200 for audit support, $7380 for accounting fees, and $14,646.11 in legal costs from July 15 through September 30, 2014. The backup for legal costs provided a redacted description of the work done. In an earlier e-mail message, dated February 11, 2015, appellant identified legal costs that it had to pay for REA as $10,136.58. The accounting cost breakdown appears to involve costs for other claims, and particularly claims as to unabsorbed overhead and employee time cards.

Appellant presented a separate sheet listing the daily time spent by Mr. Acuff from September into December 2012 for recruitment (in-house effort). The costs shown for October 24 to November 30, 2012, total $3608.75 for Mr. Acuff's efforts. All Things Administrative's billings from November 2 (the subcontractor billed in arrears) through December 3, 2012, total $3028.

Discussion

Even when we are adjudicating a small claim, we are bound by precedent and well-established law. It is black-letter law that the Government cannot be bound by the acts of unauthorized officials. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947), *Nu-Way Concrete Company, Inc. v. Department of Homeland Security*, CBCA 1411, 11-1 BCA ¶ 34,636. There is no question that the work for which appellant seeks reimbursement was directed by individuals without contracting authority.

However, while the holding in *Federal Crop Insurance* is clear, the law also provides that in limited instances the Government can be bound, even though the contractor cannot show specific direction emanating from one with actual contracting authority. That limited exception comes into play where a contractor can show that even though the direction was not given by one with contracting authority, the authorized official was either on actual or constructive notice that the extra work was being directed. *See Williams v. United States*, 127 F. Supp. 617 (Ct. Cl. 1955); *Parking Co. of America, Inc.*, GSBCA 7654, 87-2 BCA ¶ 19,823; *W. Southard Jones, Inc.,* ASBCA 6321, 61-2 BCA ¶ 3182.

On October 23, 2012, Ms. Redd was contacted by Mr. Davis. She knew on that date that the hire had not even been made, and had to know that almost two months had passed since the planned hire date. Yet, but for telling Dr. Pogostin to advise appellant that the job could not be split, and telling Dr. Pogostin to tell appellant to hire someone for the position, she took no further action. Once she was contacted, it should have been evident that there was a problem with the contract and she, as the CO, needed to become involved. That did not happen. Instead, at that point, she provided Dr. Pogostin a limited direction and otherwise let what was obviously a troubled contract continue to drift under the direction of the program officials. Later, when contacted on November 7, 2012, by Mr. Acuff, she expressed surprise at the contract status, but while she did again contact Dr. Pogostin, telling him not to interfere with the hire, she took no further active role. She apparently assumed that he and Ms. Huitric would comply with her directions. They, however, had not complied up to that point, and merely directing Dr. Pogostin to comply with the contract was not enough. Thus, the CO knew or should have known of the performance of added non-contract work, but nevertheless stood by and allowed the work to continue.

The record shows that prior to October 23, 2012, the CO had not been contacted and thus was not on notice as to the added work. We do not allow recovery prior to that date. Recovery is therefore limited to costs incurred after Ms. Redd was contacted.

From November 3 through December 1, 2012, All Things Administrative billed appellant $3028 for extra recruiting efforts. From October 24 to November 30, 2012, Mr. Acuff, in his calculation of added in-house recruitment efforts, showed charges of $3608.75. While CDC challenges the rates and hours, it has provided no alternative rates or given a convincing basis to question the hours.

Legal costs are allowable for assistance in preparing an REA as long as they are incurred for purposes of negotiation and not for submitting a claim. *Bill Strong Enterprises, Inc. v. United States*, 49 F.3d 1541 (Fed. Cir.1995). While there is no universal litmus test as to what would qualify as purposes of negotiation, we look at the overall context, including timing, what items were included in the REA, and the posture of the parties at the time. *Moshe Safdie & Associates, Inc. v. General Services Administration*, CBCA 1849, *et al.*, 14-1 BCA ¶ 35,564. The preparation costs allowed by the Board can be allocated based on consideration of such factors. We find that a segment of appellant's legal costs can be identified as properly incurred for purposes of negotiation. Appellant was attempting to explain to CDC what efforts it had expended and explain why it was entitled to the remaining contract balance. The fact that at the hearing, Ms. Redd labeled the REA efforts as a claim, does not change the REA's intent and initial use. It was prepared by appellant to provide CDC with information to enable settlement of an equitable adjustment. As such, appellant is entitled to some compensation for necessary costs associated with that effort.

As to the amount to be allowed for legal costs in preparing the REA, we find that the attorney backup provided with the claim includes a number of items that appear not to address the REA preparation. We therefore are more comfortable with using the estimate of Mr. Acuff in his e-mail message of February 11, 2015, as a base. There, he identified $10,137 as the costs for preparing the REA. Using $10,137 as a base, and applying to it criteria associated with allocating costs, we find, using a jury-verdict approach, that $6000 of the legal fees are payable for REA preparation.

Appellant is not entitled to recover its claimed accounting costs. Neither the nature of the claim for extra recruitment costs nor the dispute over the contract balance raised the type of significant accounting effort that would justify added payment. Accounting costs are a normal element of overhead and the costs here do not seem to be extraordinary. As to the costs attributed to Mr. Acuff's in-house efforts in preparing the REA, those efforts constitute an administrative task that should be absorbed in appellant's overhead costs. There may be situations where the administrative costs involved in putting an REA together are so high and out of proportion that relief is merited. But that is not the case here.

Appellant is entitled to a total of $15,290, which includes 10% overhead and 10% profit. Interest is payable from October 14, 2014, the date on which the CO received the claim.

Decision

The appeal is **GRANTED IN PART**. Appellant is entitled to $15,290 for the recruiting and justifiable legal fees, plus interest from the date of the contracting officer's receipt of the claim, October 14, 2014.

HOWARD A. POLLACK
Board Judge