



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION FOR SUMMARY RELIEF DENIED: July 1, 2016

CBCA 4554, 4610

ALLTECH, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Jennifer A. Mahar and Stephen D. Knight of Smith Pachter McWorter PLC, Vienna, VA, counsel for Appellant.

Nathaniel J. Greeson and Erik Claudio, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Respondent.

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

SOMERS, Board Judge.

The Federal Emergency Management Agency (FEMA) is authorized, pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. ¶ 5172 (2006), to provide assistance to entities and individuals affected by presidentially declared disasters and emergencies.¹ A presidential disaster declaration occurs after a sequence of events, beginning with the disaster incident. Following the incident, if the recovery

¹ This background comes from the Performance Work Statement, Section J, Attachment 1, of the contract at issue.

requirement exceeds local and state resources, the state's governor may request a preliminary damage assessment and assistance with recovery efforts.

FEMA hires contractors to perform residential damage inspections in the field. In this case, in 2007, FEMA entered into a multiple award indefinite delivery/indefinite quantity (IDIQ) contract with ALLTECH, Inc. (Alltech), which required Alltech to perform on-site inspections of residences and to provide FEMA with photographs of the inspected dwellings. The contract required Alltech to maintain a level of readiness sufficient to provide enough inspectors to assess the actual disaster-related damage and the overall habitability of residences when called upon by FEMA.

In October 2012, FEMA issued task orders to Alltech to assess damage to residences in New York and New Jersey incurred as a result of Hurricane Sandy. Alltech contends that it encountered difficulties in meeting the contract requirements because of the extraordinary circumstances presented by Hurricane Sandy and that its claims ask for costs that were not required by the contract, but which were necessitated to meet the agency's demands for timely performance. Alltech has submitted two claims to recover the claimed costs incurred. In its first claim, docketed as CBCA 4554, Alltech seeks an equitable adjustment to recoupe additional costs incurred when it implemented an incentive plan allegedly approved by FEMA, to retain its current inspectors and recruit additional inspectors. In the second claim, CBCA 4610, Alltech requests an equitable adjustment for additional costs attributed to FEMA's delays in fingerprinting and running credit checks which impacted Alltech's ability to get its proposed inspectors approved and on the job.

FEMA has moved for summary relief, asserting that Alltech did nothing more than is required by the contract. Alltech raises genuine issues of material fact and asserts that FEMA has failed to meet its burden to show that it is entitled to prevail as a matter of law. For the reasons set forth below, we deny the motion.

Statement of Facts

I. The Incentive Plan Claim (CBCA 4554)

As noted above, FEMA contracted with Alltech to inspect houses damaged after disasters and emergencies. Under the contract, FEMA paid Alltech a monthly fee of \$902,260, referred to as the readiness fee, to ensure an adequate response to future disasters. FEMA would then issue task orders for services in response to a presidentially declared disaster or emergency. The contract required Alltech to "provide scalable and robust inspection staff to include experts in all hazard recovery assistance by delivering timely and appropriate residential damage verification to individuals and families

following acts of terrorism, natural disasters and other emergencies 24 hours a day, 7 days a week, 365 days a year and maintain an operational workforce . . .” and to “maintain a readiness level adequate to meet the performance capabilities” required by the contract. The contract set forth certain specific requirements relating to the performance capabilities:

PWS Section C.8.4 Mandatory Performance Capabilities

While maintaining an average turnaround time of 72 hours starting immediately after the briefing, the Contractor shall produce 10,000 inspections per day by the 7th day following the briefing and 20,000 inspections per day by the 15th calendar day following the briefing and continue at 20,000 inspections per day, on average until the outstanding inspection workload is completed.

PWS Section C.8.5 Commitment

The readiness levels established by the Contractor constitute the firm’s commitment to perform residential damage inspections. In many instances, task orders will not require mandatory performance capabilities. Conversely, there may be instances that FEMA will expect the Contractor to initiate actions that will require them to exceed the mandatory performance capabilities. There have been several instances in the current contract where the frequency and magnitude of disaster incidents were comparable to the highest level of production specified above C.8.4. Therefore, it is assumed that there could possibly be a higher performance needs in this contract.

On October 26, 2012, in anticipation of Hurricane Sandy, FEMA and Alltech held a pre-disaster briefing. On October 29, 2012, Hurricane Sandy made landfall near Brigatine, New Jersey. FEMA issued task orders to Alltech the following day.

Alltech alleges that its inspectors encountered numerous obstacles in disaster areas impeding their ability to perform their duties due to the scale of the storm.² As a result of

² Alltech claims that FEMA contemporaneously recognized the large scale impact of Hurricane Sandy on travel in and to the affected region as indicated in several internal FEMA emails.

the hurricane, many regional airports were closed. Alltech claims that its inspectors had to fly into Pittsburgh, Pennsylvania and Charlotte, North Carolina and secure rental cars, which were in short supply, to drive into the affected region. Additionally, with the large number of displaced residents, inspectors had difficulty obtaining lodging. Alltech further contends that closed roads, tunnels, and subway stations, gas shortages, curfews, and other local restrictions in affected areas hindered the ability of its inspectors to get to the inspection sites.

By November 2, 2012, Alltech had deployed more than 600 inspectors to conduct over 14,000 FEMA-ordered inspections. FEMA then ordered an additional 1,000 inspectors to New York and New Jersey. That same day, FEMA transmitted a contract discrepancy report (CDR) to Alltech requesting a status report regarding its operational capabilities. Alltech responded to the CDR by providing FEMA with details about the obstacles faced by its inspectors getting to the inspection sites. Alltech then requested that FEMA increase the unit price by seven or eight dollars. FEMA denied the request.

In an internal FEMA email message dated November 5, 2012, a FEMA employee acknowledged that the availability of inspectors has been a problem for the last fifteen years. In another internal email from November 5, 2012, an administrative contracting officer stated that FEMA “may be throwing contractors at a problem that is not in the control of the contractor.” The next day, the same administrative contracting officer sent another email to several FEMA employees:

So, sounds like we can all possibly agree that [their] model needs to change and there may be a limited pool of qualified inspectors based upon what the contractors are willing to pay them. Why don't we request the current contractors pay the inspectors more to incentivize them to work and deal with the cost through request for equitable adjustments. I'm sure we'll have incentive award fee funds left to pay for the increase in cost since they're not meeting the turnaround times. That is if this is our ultimate goal, to get qualified inspectors on the ground which I think it is. Just a suggestion as well.

In a November 7, 2012, conference call, Alltech informed FEMA that, despite having deployed 700 inspectors, problems still remained with obtaining inspectors. FEMA reiterated the need for increasing inspectors in the disaster areas. FEMA discovered that Alltech had only performed 3,570 inspections, or 35% of its contractual requirement, by the seventh day.

On November 8, 2012, Alltech sent FEMA an outline of a plan to retain its current inspectors and recruit additional inspectors.³ The plan included incentives to encourage inspectors to increase production and to stay in the field despite the hardships encountered.

On November 11, 2012, FEMA issued a second CDR for Alltech's continued non-conforming performance concerning the number of inspections completed. FEMA requested a plan to remedy the deficiency and mitigate the potential performance failure. Alltech responded that same day acknowledging that it failed to perform the required number of inspections and once again outlined its incentive plan, which it had already implemented. The record does not indicate whether FEMA responded to Alltech's proposed incentive plan.

Alltech submitted a certified claim on July 28, 2014, seeking additional costs of \$1,215,422.50 plus interest, which it claims it incurred as a result of implementing the incentive plan. When the contracting officer denied Alltech's claim, Alltech appealed.

II. The Security Adjudication Claim (CBCA 4610)

In addition to requiring minimum performance metrics and contractual responsibilities, the contract required the contractor's employees to undergo background and credit checks.

Alltech alleges that FEMA promised to complete fingerprint processing of the contractor's inspectors within twenty-four to forty-eight hours of receipt of all documents related to the background check. Despite FEMA's twenty-four to forty-eight hour fingerprint processing estimate, Alltech asserts that many fingerprint adjudications took several weeks, with the average adjudication period lasting approximately thirty days. As a result, many inspectors could not perform their duties and Alltech resorted to compensating some inspectors to keep them from leaving the field. Alltech also mobilized two fingerprint equipment operators in an effort to expedite the fingerprint adjudication process. FEMA's failure to complete these adjudications on time impacted Alltech's performance because inspectors sat idle while awaiting clearance.

In addition, Alltech alleges that FEMA instituted a change to the credit report threshold, and, as a result of this change, FEMA recalled 19 inspectors and required them

³ Alltech alleges that when it submitted the incentive plan, approximately 220 inspectors had withdrawn from working for Alltech.

to submit a second consumer credit report. Alltech contends that it incurred additional expenses by paying incentives to the nineteen inspectors awaiting their second consumer credit review. Ultimately, Alltech claims that it began releasing inspectors from service around November 20, 2012, in an effort to mitigate the additional costs incurred following the incentive plan implementation.

On December 12, 2014, Alltech submitted certified claim for \$213,329.83 plus interest for additional costs incurred as a result of FEMA's delay in adjudicating fingerprint results and modifying the credit report. When the contracting officer denied appellant's claim, Alltech appealed.

Discussion

Summary relief is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247. The moving party has the initial burden of informing the court of the basis for its motion and identifying those portions of the pleadings, depositions and affidavits, admissions, and answers to interrogatories, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Only disputes over facts that might affect the outcome of the case under governing law will properly preclude the entry of summary judgment. *Anderson*, 477 U.S. at 248. The party moving for summary judgment bears the burden of demonstrating that there is no genuine dispute as to any material fact, and all justifiable inferences must be made in favor of the non-moving party. *Celotex*, 477 U.S. at 322-23. In considering summary relief, the tribunal will not make credibility determinations or weigh conflicting evidence. *Anderson*, 477 U.S. at 249.

Contract interpretation is a question of law and is often suitable for disposition on summary relief. *Corners and Edges, Inc. v. Department of Health and Human Services*, CBCA 648, 07-2 BCA ¶ 33,706, at 166,890. The contract must be considered as a whole and interpreted as such to give reasonable meaning to all of its parts. *McAbee Construction, Inc. V. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996).

In support of its motion for summary relief, FEMA asserts that the resolution of this appeal is merely a matter of contract interpretation. FEMA claims that Alltech failed to provide evidence of a formal change order, a constructive change order, and constructive acceleration. Further, FEMA maintains that any requests made to Alltech were within the duties and responsibilities set forth in the contract.

I. The Incentive Plan Claim (CBCA 4554)

FEMA contends that Alltech has failed to present evidence that FEMA issued a change order, formal or otherwise. Specifically, FEMA states that it “did not issue a change order, or cause the events that led to Alltech’s ostensible cost increase.” Therefore, FEMA says, Alltech has failed to “prove that the government somehow delayed, accelerated, augmented, or complicated the work, and thereby caused the contractor to incur specific additional costs,” citing *Morrison Knudsen Corp. v. Fireman’s Fund Ins. Co.*, 175 F.3d 1221, 1243-44 (10th Cir. 1999). In addition, FEMA alleges that the conditions that led to Alltech’s increase in cost were not “materially different from what the contract documents indicated” nor “reasonably unforeseeable based on all information available to the contractor.” FEMA claims that “the conditions that led to the increase in costs were precisely what was contemplated and wholly foreseeable based on the contractor’s past performance, knowledge and status as a sophisticated contracting counterparty” and that Alltech knowingly assumed the risk.

Alltech asserts that it believed that, based on its communications with FEMA, both parties agreed to pursue the incentive plan, despite the fact that the parties did not formally agree to the incentive plan in writing. In support of its position, Alltech presents several internal FEMA emails showing that FEMA acknowledged the hardships Hurricane Sandy presented and discussed ways in which it could resolve such issues.

Based upon a review of the record presented thus far, it is apparent that a genuine issue of disputed material fact exists concerning whether FEMA encouraged Alltech to create and implement a plan to increase the amount of inspectors in the area. When deciding a motion for summary relief, “the Board may not make determinations about the credibility of potential witnesses or the weight of the evidence.” *Partnership for Response & Recovery, LLP v. Department of Homeland Security*, CBCA 3566, et al., 14-1 BCA ¶ 35,805, at 175,114. And, as noted previously, all justifiable inferences must be drawn in favor of the nonmovant. *Celetex*, 477 U.S. at 332-23; *West Bay Builders, Inc. v. Department of the Interior*, CBCA 2722, 13 BCA ¶ 35,293, at 173,263. The record presented thus far indicates that the parties may not have had a meeting of the minds as to whether FEMA required Alltech to implement a plan to increase inspectors, or whether FEMA agreed with the plan that Alltech proposed. A determination of what the parties intended and agreed upon will have to await development of the record. *West Ridge, LLC v. General Services Administration*, CBCA 1230, 09-1 BCA ¶ 34,114, at 168,686 (citing *Petula-Midrise IV, LLC v. General Services Administration*, GSBCA 16085, 06-2 BCA ¶ 33,386, at 165,518).

II. The Security Adjudication Claim (CBCA 4610)

Alltech alleges that FEMA acted contrary to the contract requirements regarding the fingerprint adjudication process, and that FEMA's delay in fingerprint processing caused Alltech to incur additional costs. However, in its motion, FEMA fails to specifically address Alltech's security adjudication claim, except to note that, in response to Alltech's contention that FEMA lowered the threshold for credit reports from \$7,500 to \$5,000, FEMA argues that it actually raised the amount to \$25,000.

We find that FEMA has failed to meet its burden to prove it must prevail as a matter of law. The record does not contain enough facts to enable us to decide this claim on a motion for summary relief. Accordingly, we deny FEMA's motion for summary relief.

Decision

Respondent's motion for summary relief is **DENIED**.

JERI KAYLENE SOMERS
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

PATRICIA J. SHERIDAN
Board Judge