



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

AGENCY MOTION FOR SUMMARY RELIEF GRANTED IN PART: August 4, 2016

CBCA 2326

ASW ASSOCIATES, INC.,

Appellant,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Marshall C. Prichard, President of ASW Associates, Inc., Lincoln, NE, appearing for Appellant.

Sara E. McGraw and Kenneth R. Pakula, Office of General Counsel, Environmental Protection Agency, Washington, DC, counsel for Respondent.

Before Board Judges **VERGILIO**, **GOODMAN**, and **SULLIVAN**.

VERGILIO, Board Judge.

ASW Associates, Inc. (contractor or ASW) filed this appeal from a contracting officer's denial of its certified claim to recover what it characterized as losses of revenue and damages resulting from work which could not be performed as a direct result of actions and inactions of the Environmental Protection Agency (agency or EPA) involving its contract to remediate residential property surface soil. The agency exercised an option for one year beyond the base year, but not the second option year. The contractor performed with labor hours, equipment usage, and the number of properties below the estimates in the contract.

The contractor asserts that the agency both interfered with the management and operation of the contractor on the project, and misrepresented the scope and quantity of work to be performed. In its claim, the contractor seeks to recover \$1,801,858.53. This amount consists of \$755,153.80 for the base year and \$604,420.73 for option year one (the contractor states that each amount reflects “personnel, equipment, delta for unilateral G&A [general and administrative costs] of 15%”), and \$442,284 for option year two (to recover for equipment only).

The parties engaged in some discovery. The agency moved for summary relief. The parties engaged in further discovery. The agency maintains that the contractor has failed to provide any evidence to support its allegation that the agency interfered with or hindered the contractor’s performance. Because the contractor has not identified instances of agency interference or hindrance of performance, the Board grants this aspect of the motion for summary relief; the contractor is not entitled to recover alleged damages relating to this aspect of its claim, which the Board denies.

The agency also contends that the contractor has provided no evidence to support its assertion that there were insufficient numbers of properties available for remediation. The claim is broader than the assumption in the motion. The contractor maintains that the agency so negligently prepared estimates of labor hours and equipment usage, and of the number of properties to be remediated, that the agency’s actions constitute a breach or the variances represent a cardinal change. The agency has not identified undisputed facts and a legal basis that support its entitlement to relief in the context of its motion and this aspect of the contractor’s claim. Factual and legal issues remain to be addressed and resolved; the contractor’s allegations and theories of relief go beyond the proposition underlying the agency’s motion. The Board denies this portion of the agency’s motion for summary relief.

Background

The contractor states in its claim and complaint:

When EPA intervened and began determining crew size, additional equipment needs etc, ASW could not be properly evaluated for their performance. When ASW management determined that additional resources should be added based on schedule and project goals, EPA personnel prevented them from doing so. EPA’s position from the outset was that ASW needed to show that the additional resources could be justified based on savings to the government. ASW was the successful low bidder on the Madison County project and cost analysis clearly indicated that the project would be completed substantially below estimates. EPA personnel had access to cost information on a daily

basis and yet continued to suggest that ASW's cost[s] were out of line.

ASW "on site" personnel, on numerous occasions, experienced instances where the verbal directions given by EPA personnel differed dramatically from the provisions of a performance based time and materials contract. These directions were generally verbal and presented as required technical directions to be followed and not as comments to assist ASW in performing the work. These directions were not in conformance with EPA Memorandum dated March 4th, 2009.

....

ASW contends the technical direction furnished by EPA personnel was not in accordance with the above clause [EPAAR (EPA Acquisition Regulation) 1552.237-71, 48 CFR 1552.237-71]. In fact, EPA specifically directed many actions of ASW's management and was not given to assist the contractor in performing the contract. Also, these technical directions were not followed up in writing. By mandating rather than assisting ASW, EPA personnel habitually violated both the letter and the spirit of EPA's Contracting Officer delegation memorandum dated March 4, 2009 for a Time and Material/Performance Based Contract.

Complaint at 8-10 (footnote omitted). The contractor provides no details of dates, individuals who gave or received the directions, the language of the directions, or documentary support for its allegations.

After the contractor had received voluminous discovery responses from the agency, the agency submitted a motion for summary relief. In support, in a submission dated September 17, 2015, the agency sets forth what it captions as eleven uncontested facts, in substance as follows.

1. On September 25, 2008, the agency awarded contract EP-R7-08-15 to the contractor. Exhibit 2 (all exhibits are in the appeal file, as supplemented, unless noted otherwise). The contract required the contractor to remediate lead-contaminated properties at a superfund site in Missouri. Exhibit 3.

2. The contract was a time and materials contract. Exhibit 2; Claim (Apr. 4, 2011) at 2; Contractor Response (Sept. 15, 2015) at 5 (¶ 1).

3. A time and materials contract requires appropriate Government surveillance

of contractor performance, as stated in the Federal Acquisition Regulation (FAR): “A time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, appropriate Government surveillance of contractor performance is required to give reasonable assurance that efficient methods and effective cost controls are being used.” 48 CFR 16.601(c)(1) (2008).

4. In this appeal, the contractor has alleged that the agency interfered with and hindered the contractor’s performance by (1) limiting the number of crews and equipment and (2) failing to provide the contractor with a sufficient number of properties for it to remediate. Claim (Apr. 4, 2011) at 7-10; Contractor’s Brief (July 20, 2015) at 8; Contractor’s Response at 5.

5. The Board has afforded the contractor at least eighteen opportunities to present evidence of the alleged factual underpinnings and legal bases for its claims. The agency cites to eighteen Board orders.

6. The contractor has not cited to any evidence and has not provided any document or witness testimony, via affidavits or declarations, that demonstrate that the agency improperly interfered with the contractor’s performance. Contractor Briefs (July 20 and 22, 2015); Contractor Response.

7. To date, the contractor has provided no legal basis for claiming that the agency’s oversight of the contractor’s performance was improper or not “appropriate Government surveillance.” Contractor Briefs (July 20 and 22, 2015); Contractor Response.

8. The agency has provided documentation that indicates that it did not improperly interfere with the contractor’s performance. *E.g.*, Exhibit 300 at 3.C (the agency’s on-scene coordinator noted in a communication with agency personnel: “As I told [the contractor], I can’t tell [the contractor] who to hire or how many people to have on staff. [The agency] can point out flaws and make recommendations to what is the best use of the [people’s] money.”); Declaration of Agency On-Scene Coordinator.

9. The contractor has not cited to any evidence and has not provided any document or witness testimony, via affidavits or declarations, that demonstrate that there were insufficient numbers of properties available for it to remediate. Contractor Briefs (July 20 and 22, 2015); Contractor Response.

10. The contractor has provided no evidence that it requested the agency to provide the contractor with more properties for remediation. *See* Contractor Answer to Board Order (Feb. 19, 2015) (contractor stated that “no additional documents are provided” on the issue

of whether it urged [the agency] to provide it with more properties for remediation.”).

11. To date, the contractor has provided no legal basis for its claim that there were an insufficient number of properties available for it to remediate. Contractor Briefs (July 20 and 22, 2015); Contractor Response.

After receipt of the motion and statement of uncontested facts, the parties engaged in further discovery. The import of the response to the agency’s motion was highlighted during a telephone conference:

The agency suggested that to date the contractor has not identified the factual information in support of its claim. The agency seeks the reply, which must specify material in support of the contractor’s claim, so as to place the agency in a position to evaluate the validity of the claim, in terms of liability and amount. The contractor will flesh out its arguments to provide this information sought by the agency and Board.

Conference Memorandum (Nov. 3, 2015). Thereafter, the contractor reviewed agency contract files.

In opposing the motion, the contractor submitted a Statement of Genuine Issues, raising various items with which it takes issue. The submission references and quotes from a report, 11-P-0217 (May 4, 2011), of the agency’s Office of Inspector General. The report reflects conclusions and interpretations of that office. The contractor asserts that the parties entered into a requirements, performance-based contract and that the agency must be held accountable for improper and inaccurate estimates, as the actual work was less than that estimated in the contract, the agency diverted work to another contractor, and there existed a cardinal change and a breach by the agency as evidenced by the difference between the estimated and the actual labor hours and equipment usage. The agency posits its motion without requesting a resolution of the contract type, beyond it being a time-and-materials contract.

Despite having the opportunity to supplement the appeal file with information initially within its control or obtained through discovery, and seeing the assertions in the agency’s motion, and the discussions during the telephone conference, the contractor has referenced no exhibit or document that indicates that the agency interfered with the contractor in staffing or performing a remediation of a given property. The contractor has submitted a declaration of its program manager. The declarant offers a very brief statement that comments upon a meeting that he states addressed how the remediation was being conducted. The declarant specifies that the awarding contracting officer “made the statement that ‘WE CAN’T DO

THAT' meaning EPA. I believed this was in reference to the fact [the contract] was a Performance-Based Contract." Contractor Response, Exhibit 14. Given the lack of detail, this declaration provides no credible support for the position of the contractor with respect to alleged interference. The contractor has not identified specifics (dates, contents, individuals involved for either party) of any of the alleged improper directives from agency personnel received by the contractor, or provided any supporting documentation.

Discussion

The contractor's claim is based on assertions that (1) the agency provided information, (2) the contractor relied on that information, (3) the agency information was false and misleading, (4) the agency interfered with the contractor's ability to direct and manage the project plan, and (5) the contractor was damaged. The referenced information relates to the estimated labor hours and equipment usage contained in the contract for the base year, and option years one and two, as well as the contractual statements: "This is a time and materials contract. There is no set number of properties. The number of properties that will be provided each year is dependent on good performance and available funding. EPA estimates that we'll do between 200 and 300 properties for the base year."

The Board resolves appeals on a de novo basis, such that the findings and conclusions of the contracting officer merit no particular weight. 41 U.S.C. § 7104 (2012); *Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994) (en banc). Further, while information in a report by an Inspector General may serve as a basis for factual findings, its legal conclusions merit no weight in resolving this dispute. *See Arakaki v. United States*, 71 Fed. Cl. 509, 512 n.4 (2006).

The agency has moved for summary relief. The standards for summary relief are well established. "Summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on the undisputed material facts." *CAE USA, Inc. v. Department of Homeland Security*, CBCA 4776, 16-1 BCA ¶ 36,377; *AutoFlex, Inc. v. Department of Veterans Affairs*, CBCA 4196, 16-1 BCA ¶ 36,356. The agency's motion addresses what the agency views to be two parts of the underlying dispute.

First, the agency contends that the contractor has failed to provide any evidence to support its allegation that the agency interfered with or hindered the contractor's performance, despite numerous requests that it do so. The burden of going forward with some factual support for the assertion in the claim, when the basic facts are in the contractor's possession, and the contractor had ample opportunity to respond to the discovery requests of the agency, lies with the contractor. Moreover, the contractor identified the issue, having correctly stated the agency's contention in its response to the motion: "ASSERTION

1: ‘*Appellant has provided no evidence whatsoever to support its assertion that EPA somehow wrongfully interfered with contract performance.*’” Contractor Response at 8. Despite recognizing the agency’s assertion and need for proof, this contractor has not identified individuals with the contractor who received, or those with the agency who gave, instructions or directions or took other actions which the contractor contends constitute inappropriate interference or hindrance, nor has the contractor provided documentary support for its allegation. The required information constitutes an essential element of the claim for which the contractor bears the burden of proof. Absent proof that could establish a factual basis for relief, this aspect of the contractor’s claim does not survive the agency’s motion for summary relief. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (“summary judgment must be entered against a party who fails to sufficiently establish an essential element to that party’s case where that party will bear the burden of proof at trial”); *P&C Placement Services, Inc. v. Social Security Administration*, CBCA 391, 07-1 BCA ¶ 33,492, at 166,010 (after observing that the contractor’s statement that it is prepared to meet the burden of proof is insufficient to overcome a motion for summary relief, the Board concluded that because the contractor “has failed to make the requisite showing that it can establish any of the three matters we identified as essential to proving this element of the claim, we grant [the agency’s] motion for summary relief on this element”); *Jane Kim & Co. v. General Services Administration*, CBCA 2809 *et al.*, 14-1 BCA ¶ 35,548, at 174,205 (Board determined that summary relief was appropriate when contractor failed to identify any facts to support its claim that the agency was responsible for alleged roof leaks and property damage). Because this contractor has failed to present proof that could establish agency interference with the contractor’s performance, the Board concludes that the contractor is not entitled to relief based upon its assertion that the agency interfered with or hindered the contractor’s performance.

Second, the agency contends that the contractor has provided no evidence to support its assertion that there were an insufficient number of properties available for remediation. As the contractor points out in its response to the motion, the contractor maintains that the contract was a requirements contract, the agency satisfied some of its requirements using another contractor, and the discrepancy between the estimated labor hours and equipment usage and the number of hours to be remediated reflects compensable cardinal changes or agency breaches in inaccurately developing and utilizing estimates. The contractor’s position relies upon facts and legal premises neither raised nor addressed in the agency’s motion. Accordingly, the Board denies this aspect of the agency’s motion for summary relief.

As the case moves beyond the present motion for summary relief, the parties should attempt to put into context various solicitation and contract provisions. *See United Healthcare Partners, Inc.*, ASBCA 58123, 16-1 BCA ¶ 36,374, at 177,320 (the board noted that the contract contained neither the Requirements nor the Indefinite Quantity clause; it

viewed the absence of the clauses as suggesting “that the contract was neither, [so] further briefing is needed on this highly relevant point”). For example, the type of contract, whether requirements, indefinite delivery/indefinite quantity (ID/IQ), or other, may affect the analysis of the agency’s actions in establishing the various estimates in the solicitation and contract and the reasonableness of the contractor’s reliance on the estimates in the solicitation and contract. The contractor points out that the contract does not contain a minimum quantity; it concludes that the contract cannot be an ID/IQ contract and must be a requirements contract. The contractor does not mention that the contract contains no requirements clause or specific statement that it is a requirements contract. The contract also contains the statements: “There is no set number of properties. The number of properties that will be provided each year is dependent on good performance and available funding. EPA estimates that we’ll do between 200 and 300 properties for the base year.” Also, the solicitation contains a Type of Contract clause, FAR 52.216-1 (APR 1984) Deviation, which states: “The Government contemplates award of a Fixed Rate Time and Material contract resulting from this solicitation.” Further, the pricing schedule of the contract incorporates the Contract Terms and Conditions--Commercial Items, Alternate I (FEB 2007) clause, 48 CFR 52.212-4. The parties have not had addressed the import, if any, of commercial pricing and the relationship to relief. In terms of pricing and payment, the contract states that the contractor shall voucher for only the personnel whose services are applied directly to the work called for in the contract and accepted by the agency, and only for the time equipment is in active use for work directly related to the contract and accepted by the agency. While the contractor maintains that it encountered a flawed contract, the contractor signed that contract.

In calculating its damages, the contractor has not addressed factors which may have limited the available properties and its efforts under the contract--namely, the periods when it could not perform because of bonding or other issues--and bilateral modification 7 (effective Sept. 9, 2009), in which it is stated expressly that the contractor understands and agrees that the contract will expire in its entirety at the conclusion of option period one and that option period two will not be exercised. Further, it appears that the contract identifies an estimated number of properties for the base year, but not the option periods, and the option periods were just that, options exercisable at the discretion of the agency.

Decision

The Board **GRANTS IN PART** the agency’s motion for summary relief, thereby denying the portion of the contractor’s claim for relief related to the alleged interference by the agency with the contractor’s performance, while the remaining basis of claim relating to the estimates in the contract and the alleged breach by the agency and cardinal change will proceed forward.

JOSEPH A. VERGILIO
Board Judge

We concur:

ALLAN H. GOODMAN
Board Judge

MARIAN E. SULLIVAN
Board Judge