



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

CROSS-MOTIONS FOR SUMMARY JUDGMENT DENIED:
May 6, 2019

CBCA 6171

AT&T TECHNICAL SERVICES COMPANY, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Paul R. Hahn of AT&T Technical Services Company, Inc., Vienna, VA, counsel for Appellant.

Jason A.M. Fragoso, Office of General Counsel, Department of Veterans Affairs, Washington, DC; Chris Tiroff, Office of General Counsel, Department of Veterans Affairs, Austin, TX; and Frank V. DiNicola, Office of General Counsel, Department of Veterans Affairs, Eatontown, NJ, counsel for Respondent.

Before Board Judges **VERGILIO**, **LESTER**, and **CHADWICK**.

LESTER, Board Judge.

Pending before the Board are the parties' cross-motions for summary judgment. Appellant, AT&T Technical Services Company (AT&T), requests that we enter judgment finding that it successfully performed all services and adequately submitted contract deliverables under a task order with the Department of Veterans Affairs (VA) and that it is, therefore, entitled to full payment of its task order price. The VA, conversely, ceased making

payments under the task order during performance based upon what it alleges was AT&T's nonconforming and inadequate performance, and it requests that we enter judgment finding that AT&T's performance was defective and that it owes nothing to AT&T. The record in this appeal creates a genuine issue of material fact that precludes summary judgment in either party's favor. We deny both parties' motions.¹

Background

On August 3, 2016, the VA awarded a task order to AT&T under a General Services Administration (GSA) Federal Supply Schedule (FSS) contract. Under the task order, AT&T was to provide call center help desk services in support of the VA's Voice Access Modernization (VAM) Interactive Voice Response (IVR) system.² The task order also included various service-related deliverables that AT&T was required to provide to the VA during performance, including specifically identified reports and technical manuals.

Under the terms of the task order, performance was to run from August 3, 2016, through August 2, 2017. The VA never exercised any of the three twelve-month options contained in the task order.

The task order was issued under the Federal Acquisition Regulation (FAR) part 12 commercial item procedures and incorporated by reference the clause at FAR 52.212-4, Contract Terms and Conditions—Commercial Items (May 2015) (48 CFR 52.212-4 (2016)), which contained terms regarding the VA's inspection and acceptance of the contractor's work. In addition, the GSA contract underlying the task order contained an addendum provision regarding "Inspection and Acceptance" that defined three levels of possible nonconformances in performance: critical nonconformance, major nonconformance, and minor nonconformance.

Under the task order, the VA was to provide AT&T with several documents "upon award" that would contain guidance about the VA's IVR system and was to provide other documents "as soon as all security and privacy training is complete, background

¹ By motion dated February 22, 2019, AT&T requested that we strike the VA's statement of genuine issues, filed in response to AT&T's statement of undisputed facts, as untimely filed. We deny AT&T's motion.

² An IVR system allows individuals to access information in an organization's computer database and to receive that information either verbally using a touch-tone telephone or on a computer via the Internet. These systems enable customers to execute certain transactions on-line without the intervention of customer service personnel.

investigations have been initiated in the e-qip system, and network access has been granted.” AT&T asserts that the VA never provided these documents and that the absence of these documents contributed to any delays in AT&T’s performance. The VA asserts that it provided the documents to AT&T. Both parties cite documents from the record in support of their positions.

The task order also envisioned a “phase-in transition with the outgoing contractor” that would provide some overlap in performance between the incoming and outgoing contractors. AT&T alleges that the phase-in transition period never occurred because the incumbent contractor stopped performing in June 2016, before the VA awarded the task order at issue here to AT&T. The VA alleges that the phase-in transition it provided met contract requirements, citing to meetings that it held with AT&T at the beginning of contract performance, and that it mitigated any early contract transition issues by being somewhat flexible with AT&T with regard to early contract deliverables. Both parties cite documents from the record in support of their positions.

AT&T began performance in August 2016. Between September and November 2016, AT&T invoiced the VA three times for services performed, and the VA paid each of those invoices in full. AT&T contends that the VA was fully satisfied with its performance during this period and cites to record evidence in support of its position. The VA alleges that, even though it paid these invoices, it was dissatisfied with AT&T’s performance, but was trying to be somewhat forgiving. The VA cites to record evidence in support of its position showing that, as early as October 4, 2016, it was complaining about deficiencies in AT&T’s performance.

Beginning with AT&T’s January 30, 2017, invoice, the VA began rejecting AT&T’s invoices for payment. In so doing, the VA informed AT&T that it had not timely submitted certain deliverables and was not performing services in accordance with the requirements of the task order. These rejections continued over time, such that, for performance from December 2016 through August 2017, the VA paid AT&T nothing.

AT&T acknowledges that it was repeatedly notified during this period that its services and deliverables were materially nonconforming, but AT&T disputes the VA’s position, arguing that it fully satisfied the contract’s service and delivery requirements. It contends that it provided 24/7/365 help desk support throughout the life of the task order; that it opened, resolved, and closed, with the approval of the VA, over 150 help desk tickets; that, during the one-year period of performance, the system did not “go down” and continued to function; and that no severity incidents attributable to A&T occurred. AT&T also alleges that it submitted all contractually required deliverables to the VA, either by email or by uploading them directly to the VA’s IBM Rational Tool Suite, although it acknowledges that

the last deliverable was not provided until October 5, 2017, two months after the August 2, 2017, ending date for performance under the task order. At various points during contract performance and afterwards, AT&T responded to VA-generated spreadsheets attempting to refute the VA program manager's assertions of contract nonconformance. Both parties cite to record evidence in support of their conflicting positions as to whether AT&T was, or was not, performing in accordance with contract requirements.

On April 18, 2018, AT&T submitted a certified claim to the VA contracting officer seeking payment of \$1,139,07.57, plus past-due interest of \$13,061.82 under the Prompt Payment Act (PPA), 31 U.S.C. §§ 3901-3907 (2012), and requesting a contracting officer's decision. Sixty-two days later, on June 19, 2018, AT&T filed with the Board a notice of appeal of the contracting officer's "deemed denial" of its claim. At some point later that day, the VA contracting officer issued a decision denying AT&T's claim in its entirety.

The Board docketed AT&T's "deemed denial" appeal on June 20, 2018. AT&T filed its complaint on June 25, 2018, and the VA filed an answer denying liability on July 25, 2018. After the Board granted AT&T leave to file an amended complaint, the VA filed another answer denying liability on September 5, 2018. Discovery in the appeal concluded on December 7, 2018.

The parties filed cross-motions for summary judgment on December 31, 2018, which are now fully briefed. Each party contends that it is entitled to judgment in its favor, with AT&T arguing that the undisputed facts show that it delivered conforming services and fulfilled its obligations under the task order, at least in all material ways, and with the VA arguing that the undisputed facts show that AT&T's performance did not conform with task order requirements.

Discussion

It is difficult to understand how either party decided that summary judgment was a viable way of resolving this appeal. "Summary judgment 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 judgment as a matter of law." *Marine Metal, Inc. v. Department of Transportation*, CBCA 537, 07-1 BCA ¶ 33,554, at 166,175 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986)). Here, the record is replete with conflicting evidence about whether AT&T's performance conformed with task order requirements and the extent of nonconformance. The VA repeatedly complained to AT&T throughout task order performance, from at least October 4, 2016, onward, about what the VA viewed as deficiencies and problems with AT&T's performance, and AT&T has presented evidence of its efforts during performance and afterwards to rebut the VA's complaints. In such

circumstances, there is a genuine issue of material fact regarding whether, and the extent to which, AT&T's task order performance was deficient that will have to be resolved through fact-finding based upon the written record under Board Rule 19 or following a hearing. Further, the current record raises questions as to whether the deficiencies in AT&T's performance, to the extent that they existed, justify the VA's decision not to pay AT&T *anything* for work from December 2016 through the end of task order performance in August 2017, an issue that requires resolution through fact-finding.

To guide further proceedings in this appeal, we below address some of the arguments that have been raised in the parties' summary judgment briefing:

AT&T asserts that the VA's evidence of AT&T's performance failures relies "on statements made by VA personnel accusing AT&T of performance failures rather than underlying evidence that these accusations were not only true, but indisputably so," a type of evidence that AT&T apparently contends is inadmissible and therefore insufficient to create a genuine issue of material fact. Appellant's Response Brief at 3. A party opposing summary judgment must rely upon "competent evidence" that would be admissible were it presented at trial. *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 562 (7th Cir. 1996). Yet, in completing the record, the testimony (whether oral or written) of knowledgeable individuals who were personally involved in the matters at issue and have personal knowledge of what they believe to be AT&T's deficient performance, which would be similar to the substance of the statements to which AT&T is objecting here, is plainly admissible as part of the VA's case. See *McAllen Hospitals LP v. Department of Veterans Affairs*, CBCA 2774, et al., 14-1 BCA ¶ 35,758, at 174,972 (discussing when evidence is relevant and admissible); *Two State Construction Co.*, DOT CAB 78-31, et al., 81-1 BCA ¶ 15,149, at 74,935 (accepting and relying upon testimony of on-site government personnel regarding jobsite occurrences).³

³ To the extent that AT&T is attempting to argue that statements contained in documents contemporaneous to the events in question constitute inadmissible hearsay because the information is not presented through testimony or affidavits based on personal knowledge, we are not precluded from relying on the cited evidence in considering the parties' summary judgment motions. "[A]lthough the substance or content of the evidence submitted to support or dispute a fact on summary judgment must be admissible [under the current version of Rule 56 of the Federal Rules of Civil Procedure], the material may be presented in a form that would not, in itself, be admissible at trial." 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 2722 (Supp. 2018) (citing *Lee v. Offshore Logistical & Transport, L.L.C.*, 859 F.3d 353, 355 (5th Cir. 2017)); see *Cedar Lumber, Inc. v. United States*, 857 F.2d 765, 769-70 (Fed. Cir. 1988)

AT&T argues that the VA's failure to issue a show cause order or to terminate its task order for default establishes that AT&T's performance was not deficient. Although AT&T might attempt to rely upon this fact as evidence that its performance was not deficient, the absence of a default termination does not automatically establish AT&T's contract compliance. The Government may elect to take monetary deductions for underlying performance deficiencies, as the VA has attempted to do here, in lieu of terminating a contract. *See Cal-Pacific Building Services, Inc.*, GSBCA 7388, 85-1 BCA ¶ 17,905, at 89,656 (discussing Government's potential remedies for deficient contract performance).

AT&T also argues that, to the extent it failed to deliver certain contractually-required reports, "those reports are, at most, 'minor items of a punch list nature' which, under the law, need not be delivered in order for the services to be deemed accepted." Appellant's Motion at 13. AT&T appears to rely, at least in part, upon a clause in the FSS contract distinguishing between critical, major, and minor nonconformances. Yet, even under that clause, the Government is entitled to receive the services and products for which it is paying, subject to a price reduction to account for defects. *See Gladwynne Construction Co.*, VABCA 6594, et al., 02-1 BCA ¶ 31,848, at 157,384-85 (discussing price reduction to which the Government was entitled because of defective or incomplete punch list work). To the extent that AT&T relies upon the decision of our predecessor board in *Monaco Enterprises, Inc.*, VABCA 1126, 76-1 BCA ¶ 11,769, to argue that it is not responsible for defects in work that are of a punch-list nature, the matter at issue in *Monaco* related to acceptance under a construction contract, a situation very different from the type of services contract at issue here, and, contrary to AT&T's suggestion, the board in *Monaco* did not eliminate the Government's ultimate entitlement to either full and proper performance of the work for which it was paying or an adjustment for nonconformance. We can explore the extent to which the VA should be able to take monetary deductions for minor defects in AT&T's performance, if they exist, through future proceedings.

AT&T further argues that, because the VA agrees that the IVR system did not "go down and continued to function" throughout task order performance, "any purported nonconformance [in AT&T's performance] was immaterial to the VA's benefit from the

(summary judgment evidence need not be in a form that would be admissible at trial so long as its substance would be if properly presented). Moreover, the Board, as an administrative tribunal, may accept hearsay evidence, unless we find it unreliable, and assign to it the weight that is appropriate. 48 CFR 6101.10 (2018); *see Dawson Construction Co. v. United States*, 225 Ct. Cl. 704, 706 (1980); *Cascade Pacific International*, GSBCA 6268, et al., 84-2 BCA ¶ 17,354, at 86,482, *aff'd sub nom. Cascade Pacific International v. United States*, 773 F.2d 287 (Fed. Cir. 1985).

system” and should be ignored. Appellant’s Motion at 13-14. That is a factual issue requiring the Board to measure AT&T’s performance and any complaints that the VA has about that performance against the requirements of AT&T’s task order. It is the task order that identifies what the VA was paying for. The mere fact that the system did not crash-and-burn does not automatically mean that AT&T properly met all of its contractual performance obligations.

AT&T also asserts that, through what it refers to as the parties’ “course of dealing,” the VA waived any delivery schedule for contract deliverables, meaning that AT&T could submit those deliverables outside of the task order’s actual delivery schedule. To the extent that AT&T is relying on the course of dealing doctrine, that doctrine applies only where parties have expressly or implicitly interpreted “the provisions of a similar, *previously performed* contract in a certain manner,” a situation that does not exist here. John Cibinic, Jr., James F. Nagle & Ralph C. Nash, Jr., *Administration of Government Contracts* 199 (5th ed. 2016) (emphasis added); see *Regency Construction, Inc. v. Department of Agriculture*, CBCA 3246, et al., 16-1 BCA ¶ 36,468, at 177,712 (“[T]he course of dealing must pre-date the agreement in question.”). To the extent that AT&T is arguing that the VA somehow waived delivery deadlines during the performance of this particular task order, AT&T can attempt to establish waiver during further proceedings.

Decision

The parties’ cross-motions for summary judgment are **DENIED**. Further proceedings will be scheduled by separate order.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

We concur:

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

Kyle Chadwick
KYLE CHADWICK
Board Judge