



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY JUDGMENT DENIED: July 22, 2020

CBCA 6477

MISSION SUPPORT ALLIANCE, LLC,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Marisa M. Bavand and Allison L. Murphy of Groff Murphy PLLC, Seattle, WA, counsel for Appellant.

Paul R. Davis and Andrew J. Unsicker, Office of Chief Counsel, Department of Energy, Richland, WA, counsel for Respondent.

Before Board Judges **SOMERS** (Chair), **LESTER**, and **CHADWICK**.

SOMERS, Board Judge.

Pending before us is the motion for summary judgment of Mission Support Alliance, LLC (appellant or MSA). MSA seeks a ruling as a matter of law that the Department of Energy (respondent or DOE) is not entitled to disallow \$15,419,830 in subcontractor-incurred costs or seek reimbursement of those costs. DOE opposes the motion, contending that genuine issues of material fact preclude summary judgment at this early point in the litigation. We agree.

Background

In April 2009, DOE and MSA entered into a performance-based cost-plus-award-fee contract in the amount of \$3,059,369,580. Under the contract, MSA provided infrastructural support to the Hanford Site, a decommissioned nuclear production complex located adjacent to the Columbia River in Washington State. The scope of work required MSA to provide, among other things, laboratory services, security services, transportation infrastructure, utilities, telecommunications and IT support, and various business administrative services. MSA subcontracted a substantial percentage of this work. DOE required MSA to maintain records, with supporting documentation, adequate to demonstrate that any costs claimed were incurred, were allocable to the contract, and complied with the applicable cost principles. The contract also required MSA to conduct internal audits of costs claimed and to include this audit requirement in certain cost-reimbursable subcontracts.

At the beginning of the contract, the Defense Contract Audit Agency (DCAA) audited subcontractor-incurred costs for prime contractors such as MSA for submission to DOE. In February and March 2013, MSA provided DOE with incurred cost submissions for fiscal years 2009–2012, certifying that all claimed costs, including those for subcontract costs, “are allowable in accordance with the principles of the Federal Acquisition Regulation (FAR) and its supplements applicable to the contract.”

After the passage of the 2016 National Defense Authorization Act, however, DCAA was prohibited from performing audit services for customers outside the Department of Defense. As a result, in March 2016, MSA submitted to DOE a plan for performing audits, in which it outlined a “threshold-and-risk-based” approach to selecting subcontractors for incurred cost audits. In MSA’s belief, DOE approved MSA’s FY 2009–2014 audit plan in June 2016. In contrast, DOE contends that it did not “approve” the plan, but rather was “agreeable with MSA proceeding with the plan as submitted.” Meanwhile, at the same time, DOE asserts that it reminded MSA of its obligation to conduct audits of subcontractor-incurred costs.

In December 2018, MSA updated DOE on its efforts to conduct the required cost audits. DOE examined MSA’s report and determined it revealed a “broad assortment of incomplete audits, and audits for which findings remained unresolved.” As outlined in the contracting officer’s final decision, DOE identified several categories where MSA failed to provide sufficient support for subcontractor-incurred costs. The contracting officer disallowed \$15,419,830 of these costs. MSA appealed.

Discussion

The standards of review and obligations of each party to prevail on a motion for summary judgment are well established. *Pernix Serka Joint Venture v. Department of State*, CBCA 5683, 20-1 BCA ¶ 37,589. Thus, a party may move for summary judgment on all or part of a claim or defense which we will only grant if the party “is entitled to judgment as a matter of law based on undisputed material facts.” Rule 8(f) (48 CFR 6101.8(f) (2019)); *CSI Aviation, Inc. v. General Services Administration*, CBCA 6543, 20-1 BCA 37,580; *Marine Metal, Inc. v. Department of Transportation*, CBCA 537, 07-1 BCA ¶ 33,554 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986)). We draw inferences in the light most favorable to the party opposing the motion. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). In cases involving issues of contract interpretation, if we are required to examine the conduct and the intent of the parties in order to resolve the issue, any genuine questions of material fact that arise will jettison the possibility of granting summary judgment to the moving party. *See, e.g., Beta Systems, Inc. v. United States*, 838 F.2d 1179, 1183 (Fed. Cir. 1988); *Au’ Authum Ki, Inc. v. Department of Energy*, CBCA 2505, 14-1 BCA ¶ 35,727.

Here, MSA contends that DOE has no reasonable basis for determining that MSA failed adequately to audit subcontractor-incurred costs, and, as a result, DOE erred when it disallowed those costs. Drawing all reasonable factual inferences in favor of DOE, we conclude that several issues preclude us from granting summary judgment for MSA

Generally, DOE contends that MSA has failed to provide adequate support for \$15,419,830 in subcontractor-incurred costs that MSA charged to the contract and that DOE paid. MSA disagrees, arguing it has supported these costs using the representative sample audit plan approved by DOE, and asserting that DOE changed the rules by requiring MSA to audit all subcontractors, rather than a representative sample. DOE disputes that, asserting that not only did DOE not agree to the plans as claimed by MSA, but points out that the terms of the contract require MSA to provide appropriate support for payments to subcontractors, and absent that, the costs are unallowable. DOE concludes that MSA’s method using a representative sample approach did not eliminate the requirement that MSA support its costs.

The parties highlight correspondence between MSA and DOE, each identifying portions of emails and letters purportedly reflecting this alleged understanding of a planned course of action for conducting audits of subcontractors. A significant portion of the parties’ arguments presented highlight the divergence between the parties’ interpretations and actions. For example, pointing to a letter from DOE to MSA dated March 5, 2013, MSA states that, because the contract (specifically clause DEAR 970.5232-3) “provides that a contracting officer (not a contractor) request an audit from the DCAA or another cognizant

agency, MSA provided DOE with contacts at each cognizant agency to follow up. DOE did not object to MSA's letter, and MSA proceeded according to the outlined plan." In opposition, DOE states that it "*did* object and make it known, shortly after MSA provided its first certified incurred cost submission (ICS), that MSA was required to conduct audits of its subcontractors' incurred costs."

As to MSA's statements of fact, DOE has responded to each, highlighting points of dispute, with references to the contract, the appeal file, the supplemental appeal file, and declarations. We discount DOE's argument suggesting that ongoing discovery forms a basis for denying the motion for summary judgment. Once discovery is underway, a party opposing summary judgment must "state with some precision the materials he hope[s] to obtain with further discovery, and exactly how he expect[s] those materials would help him in opposing summary judgment. It is not enough simply to assert, à la Wilkins Micawber, that 'something will turn up.'" *Simmons Oil Corp. v. Tesoro Petroleum Corp.*, 86 F.3d 1138, 1144 (Fed. Cir. 1996) (quoting Charles Dickens, *David Copperfield* (1850)). In sum, we find that genuine issues of material fact preclude us from granting summary judgment.

Decision

MSA's motion for summary judgment is **DENIED**.

Jerí Kaylene Somers

JERI KAYLENE SOMERS

Board Judge

We concur:

Harold D. Lester, Jr.

HAROLD D. LESTER, Jr.

Board Judge

Kyle Chadwick

KYLE CHADWICK

Board Judge