



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: January 18, 2023

CBCA 7315

SAL LOGISTICS,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

President of SAL Logistics, Kabul, Afghanistan, appearing for Appellant.

Alexandra N. Wilson, Office of the Legal Adviser, Buildings and Acquisitions, Department of State, Washington, DC, counsel for Respondent.

O'ROURKE, Board Judge.

Appellant, SAL Logistics, seeks \$8280 for additional work on servicing equipment that it maintains was outside the scope of its original contract. Respondent (agency) denied payment for additional work on the basis that no one with authority approved the additional work and that the costs were either unreasonable or unsubstantiated. Because we find that appellant only substantiated a portion of his labor costs, we grant the appeal in part.

This appeal was processed under Board Rule 52 (48 CFR 6101.52 (2021)), which governs small claims procedures. Decisions issued under this rule are final and may not be appealed or set aside except for fraud. The rule permits a decision to be issued in summary form, and such decisions are not precedential. 41 U.S.C. § 7106(b)(4), (5) (2018).

Findings of Fact

The United States Embassy in Kabul, Afghanistan (embassy), provided medical support to its personnel through an in-house medical clinic. In June 2021, the embassy's procurement office issued a solicitation to replace an x-ray tube and perform specified updates on a broken mobile x-ray machine. No details about the machine's condition or maintenance history were included in the solicitation. Only two line items were identified: "X-Ray Tube DX-D100-AGFA" and "Services Charges" for replacing the x-ray tube, updating the software, calibrating the machine, updating the license, and performing maintenance.

The contract was awarded to the lowest priced, technically acceptable offeror. Among the criteria for award was the requirement that the contractor be an authorized reseller or distributor of the product or service being sought. The record included a "target price" of \$22,500 for the award. Nine vendors submitted bids in response to the solicitation. Appellant was awarded the contract in the amount of \$14,500—\$12,500 for the x-ray tube and a \$2000 service charge for the labor. A clinic representative expressed his concerns about the award in an email message to the procurement supervisor and contract representative:

As you know our X-Ray [machine] has been down for almost a year now and we were requesting to have the repairs done by the original [manufacturer] machine distributor. . . . We see a new vendor has been chosen and we have concerns that while this vendor came in at [a] lower cost, they may not be able to make the repairs, or at least they do not understand the extent of the repairs given the low cost estimate. Is there a way to confirm the new company can actually make the repairs and provide a warranty of work? We are concerned that once they assess the problem they will requote the repairs.

To allay these concerns, appellant submitted a copy of its certification as an authorized reseller/distributor. Appellant also reassured the contract representative that it could perform the work specified in the contract, as it had done many times in the past on such medical equipment under other federal contracts. Notwithstanding those assurances, the contract representative asked appellant to conduct a site visit to be sure. Appellant agreed and dispatched an engineer to the embassy to inspect and assess the condition of the machine.

As the clinic representative predicted, the engineer determined that merely replacing the tube and updating the software would not render the x-ray machine operational. The engineer discovered that the machine did not function at all, and he could not perform the work that he was tasked to do under the contract until the machine was restored to some level of functionality. To begin that process, the engineer asked clinic staff for the original

software disks, the drivers, and other data that came with the machine, but no one could locate them.

After realizing the extent of the requirement, the contract representative decided not to terminate the contract for convenience and re-solicit it. Instead, she permitted appellant to obtain the necessary software and drivers and to proceed with the additional work, which she knew was beyond the scope of the contract as awarded. In response to the question, “Will you increase the quotation? If yes, please let us know,” appellant responded, “We will quote only for the additional task which is not covered within our contract. We will present the bill if your procurement officer accepted that [would] be great [or] else we have to pay it from our own pocket.”

Appellant purchased the software package for \$5800 through AKYAAS, a company based in the United Arab Emirates. Rather than waiting for the disks to arrive by courier, appellant’s engineer downloaded them electronically, along with the product keys, late at night—when the internet speed was better. The engineer copied the software onto compact disks and then transported the disks to the embassy, where he reinstalled them onto the x-ray machine. Appellant’s engineer made multiple visits to the embassy to perform all of the work. This included not only the work that was specified in appellant’s contract but also the initial, additional work necessary to “bring the machine back to life.”¹ The engineer drafted four handwritten reports in English and left them with agency personnel after some of the visits. The reports included dates and times of the visits and a basic summary of the work accomplished.

Upon concluding all of the work, the engineer provided the agency with a printed list of the deliverables (“the delivery note”). The delivery note identified thirty-four separate requirements for inspection, maintenance, and calibration of the machine. Each listed item had been checked off by a clinic representative verifying completion of the task. The delivery note also included a section entitled “Software Update and Licensing.” Twenty-three separate items were identified in that section. These items were also checked off by hand, verifying that the engineer had installed, configured, and renewed the license for each one. A signature and stamp of the clinic representative appeared on the delivery note. Above the stamp, the representative hand-wrote: “X-Ray still not functional.”

In addition to the documentation, pictures of the machine taken after the work was performed show that the machine was on and the light was working. However, because appellant’s efforts did not render the machine fully functional, clinic representatives did not

¹ Appellant testified at the hearing that agency personnel used this phrase often when referring to what they needed appellant to do with the x-ray machine.

consider appellant's performance successful. The flat panel was still not working, and replacing it would be costly. The flat panel was not identified in the solicitation, and appellant did not consider it within the scope of its contract or within the scope of the "additional task" that it agreed to perform to "bring the machine back to life." Appellant did offer to get the part and continue working on the machine. However, appellant informed the contract representative that it had completed its contract, and on August 8, 2021, it submitted an invoice to the procurement office for \$14,500, which was the amount of its original bid.

A clinic representative expressed his frustration in an email message to the contract representative, dated August 9, 2021, as the clinic expected a fully restored and 100% functional machine at the conclusion of appellant's performance. The representative asked: "Is it possible we can just pay this company and thank them for their service and then hire a company that has a certified technician with the ability to procure the correct software?" The contract representative replied, "We will restart the process but we need you to identify the exact software that is needed."

Due to the forcible takeover by the Taliban and the fall of Kabul on August 15, 2021, additional repair efforts, along with the x-ray machine itself, were abandoned. Embassy personnel evacuated Afghanistan without processing appellant's invoice for payment. Although multiple government employees were involved in this process and copied on emails from appellant urgently requesting payment, months went by without any progress. Clinic staff refused to mark the work as completed, and the office of finance would not release payment until the work was verified as complete. Appellant was finally paid \$14,500, on October 21, 2021.

The following month, appellant submitted a claim to the contracting office, in the amount of \$8280, for the "additional work." Appellant identified this as the cost of the original installation software (\$5800) that it had purchased, plus labor costs for the engineer and program manager (\$2480). After sixty days passed with no action, on February 2, 2022, appellant appealed to the Board the deemed denial of its claim. The agency filed a jurisdictional motion, which the parties agreed to suspend while attempting an informal resolution of the claim. When negotiations failed, in November 2022, a contracting officer issued a final decision on the claim, denying it in full. The agency withdrew its jurisdictional motion, and appellant elected to pursue its appeal under the Board's small claims procedure. A half-day hearing took place virtually in December 2022.

Discussion

The issue before us concerns appellant's claim for the additional work, which the agency denied on the bases that the work was not authorized and the costs were either unreasonable or unsubstantiated. We briefly address these arguments.

A fundamental premise of government contract law is that the Government cannot be held liable for the actions of employees who are not authorized to take such actions. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947); *Nu-Way Concrete Co. v. Department of Homeland Security*, CBCA 1411, 11-1 BCA ¶ 34,636, at 170,697 (2010). “The authority of any Government employee or representative must be determined from the facts of each case.” *Stephenson Associates, Inc.*, GSBCA 6815, et al., 86-3 BCA ¶ 19,071, at 96,326. In examining the documentary evidence and considering the testimony of the contracting officer at the hearing, we find that the contract representative had the authority to direct appellant to perform the additional work, which included purchasing and installing the necessary software, drivers, and other files to “bring the X-ray machine back to life.”

The Federal Acquisition Regulation (FAR) defines cost reasonableness as follows: “A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business.” 48 CFR 31.201-3(a). Appellant paid \$5800 for the software. The Board has found, however, that “[p]roof of reasonableness should entail some independent evidence of the reasonableness of the dollars spent—not merely evidence of the contractor’s own behavior.” *Mission Support Alliance v. Department of Energy*, CBCA 6477-R, 22-1 BCA ¶ 38,210, at 185,560 (internal quotation marks omitted) (citing *Kellogg Brown & Root Services, Inc. v. United States*, 728 F.3d 1348, 1363 (Fed. Cir. 2013)). Evidence in the record covers a broad price spectrum. The agency points to two different quotes: \$350 and \$1200. Besides appellant’s actual cost of \$5800, its representative testified that he could have purchased the software from a local competitor for \$10,000, but declined the offer as too high.

The agency submitted into the record an email exchange with a manufacturer’s representative who stated that certified AGFA² partners would only pay a \$350 service fee for the software. The agency relies on this information to support its argument that appellant’s cost is unreasonable. Although our rules permit consideration of hearsay evidence, we decline to give any weight to the AGFA representative’s statements, which were made outside of the hearing and during the course of litigation. The representative was not called as a witness, so there was no opportunity to cross-examine him about his statements. “When the persons having the greatest familiarity with events are not called, but a litigant seeks to rely on second-hand, hearsay evidence, a tribunal may draw an inference that the testimony of the persons not called would not support a litigant’s position.” *Navigant SatoTravel v. General Services Administration*, CBCA 449, 09-1 BCA ¶ 34,098, at 168,604 (quoting *TDC Management Corp.*, DOT BCA 1802, 91-2 BCA ¶ 23,815, at 119,259).

² AGFA is the manufacturer of the x-ray machine at issue.

In addition to the remaining quotes, we also note that appellant began this process without knowing for certain how much it would be reimbursed. To minimize this risk, appellant's program manager conducted extensive market research by contacting multiple sources in different countries to get the best price. Appellant's conduct satisfies the prudent person test articulated in the FAR. *See* 48 CFR 31.201-3(a). For these reasons, we conclude that \$5800 was a reasonable price to pay for the software.

Although we also find the program manager's rate and number of hours reasonable, we take issue with appellant's claim for ninety-seven labor hours for the engineer. We agree with the agency that it is difficult to distinguish how many hours were devoted to the original task versus the additional task. Appellant has the burden of proving its costs and clearly delineating the difference. *Navigant SatoTravel v. General Services Administration*, CBCA 449, 11-1 BCA ¶ 34,765, at 171,103. Notwithstanding appellant's credibility, the consistency of its position, and explanation for gaps in the record—to include files in Kabul being inaccessible after the takeover by the Taliban—a stamped invoice with the total number of hours is not sufficient to meet this burden. When questioned by the contracting officer about this amount, appellant's representative repeatedly explained the tedious and time-consuming work required to download copious software and drivers—large files that could not be downloaded during the day due to the slow speed of the internet in Kabul, as well as the time needed to install the additional software, file by file, driver by driver, onto the machine in order to restore some level of functionality.

We do not doubt that appellant's engineer spent numerous hours performing all of the work, but appellant must support its claim with more than an invoice and fervent statements about long hours. The delivery note conflates the tasks in the original contract with the additional work, and it is appellant's burden, not the agency's—nor the Board's—to parse those tasks and the underlying hours so that the agency does not pay twice for the same work. Based on information in the record, the engineer submitted multiple reports documenting the start and end time of his work, along with the dates of his embassy visits. From this information, we can substantiate forty hours of work at the embassy and twenty-four hours of work outside of the embassy, downloading and installing the software onto the laptop, for a total of sixty-four hours. We deny the remaining hours claimed for the engineer as unsubstantiated.

Finally, we note that the agency's target price for this work at the very start was \$22,500 for just the original scope of work. Appellant's original work plus the substantiated additional work totals \$22,120, which we consider further evidence of cost reasonableness in this case.

Decision

We **GRANT IN PART** the appeal. The agency shall pay to appellant \$7620, plus interest pursuant to the Contract Disputes Act, 41 U.S.C. § 7109(a)(1), running from November 3, 2021, until paid.

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge