Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

MOTION FOR PARTIAL SUMMARY RELIEF
GRANTED: June 21, 2005

GSBCA 16404

GILDERSLEEVE ELECTRIC, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Willis J. Gildersleeve, President of Gildersleeve Electric, Inc., Oakland, CA, appearing for Appellant.

M. Leah Wright, Office of General Counsel, General Services Administration, Auburn, WA, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **HYATT**, and **DeGRAFF**.

HYATT, Board Judge.

Gildersleeve Electric, Inc. filed this appeal in connection with the terms of a

termination settlement agreement it entered into with the General Services Administration (GSA) following GSA's decision to terminate for its convenience a contract under which appellant was to reconfigure a parking lot and replace exterior lights for the Social Security Administration Building in Richmond, California. One of the items of relief Gildersleeve Electric seeks in its appeal is recoupment of attorney fees incurred to defend against a suit brought by one of its subcontractors in United States District Court, seeking payment from appellant for work it did under this contract. Respondent, the General Services Administration (GSA), has moved for partial summary relief, contending that the pertinent facts are not in dispute and that, as a matter of law, even if appellant is otherwise successful in its appeal, appellant cannot be awarded these attorney fees by the Board in this action. For the reasons stated, we grant the motion.

Undisputed Facts[1]

On February 26, 1998, GSA awarded to Gildersleeve Electric, through the Small Business Administration, a contract to reconfigure the parking lot at the Social Security Administration Building in Richmond, California. The contract also required appellant to replace the exterior lights in the lot. Appeal File, Exhibits 3-5.

The contract estimated that the work would require 120 calendar days to perform. Gildersleeve Electric received a notice to proceed on April 2, 1998, with the work to commence on May 2, 1998. Appeal File, Exhibits 2, 5.

The initial contract award was in the amount of $842,847. Appeal File, Exhibit 5. Several modifications were issued to the scope of the work. By December 1998, the total contract price was increased to $1,036,417.13. *Id.*, Exhibits 6-18.

On December 7, 1998, Gildersleeve Electric contracted with Paragon Construction to perform work on Phase II[2] of the project for the amount of $213,000. This work included

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[1] These facts are essentially those stated by GSA to be undisputed. Appellant disagrees with GSA's assertion that it cannot recover the attorney fees it claims, but has not contested any of the facts that GSA has stated to be undisputed. Our independent review of the record shows that the facts as stated by GSA are supported therein.

[2] Various items of correspondence in the appeal file and supplemental appeal files suggest that the contract work was divided into two phases, although the contract itself does not provide for this or explain what it means. Apparently the work was divided into phases to accommodate the Social Security Administration's desire to keep at least part of its parking lot open at all times. Thus, the contract work was divided up and

complete landscape installation, installation of concrete walks and curbs, complete installation of new electrical site lighting (labor only), application of slurry seal in the parking lot, and installation of concrete bollards. Appellant's Supplemental Appeal File, Exhibit 4.

Prior to December 1998, payments to Gildersleeve Electric under the contract totaled $899,846.92. On December 29, 1998, Paragon Construction submitted two invoices to Gildersleeve Electric. One invoice asserted that ninety percent of Paragon Construction's work was completed and billed Gildersleeve Electric for $191,700. The second, corrected, invoice claimed that seventy percent of the work was completed and billed Gildersleeve Electric for the amount of $149,100. Appellant's Supplemental Appeal File, Exhibit 3.

On January 15, 1999, GSA terminated Gildersleeve Electric's contract for the convenience of the Government. GSA's termination letter to Gildersleeve Electric advised appellant to contact its subcontractors immediately and instruct them to stop work under the contract. Further, appellant was instructed to have its subcontractors promptly submit settlement proposals for any unpaid work. The letter also reminded appellant that it was liable to the subcontractors for their settlement proposals and should settle with the subcontractors and then submit costs to GSA under its own settlement proposal. Appellant's Supplemental Appeal File, Exhibit 8.

Also on January 15, 1999, Paragon Construction sent its second progress billing to Gildersleeve Electric, asserting that it had completed ninety percent of its work under its contract with Gildersleeve Electric and claiming it was due an additional $42,600, bringing the total owed to $191,700. Appellant's Supplemental Appeal File, Exhibit 3.

On January 22, 1999, the contracting officer and project manager met with Gildersleeve Electric to discuss the terms of the termination settlement. The contracting officer told appellant that there was a shortfall of money for the project. It was agreed, however, that Gildersleeve Electric would complete the punch list items for Phase I by January 29, 1999. Following this meeting a representative of GSA's construction management firm, Abide International Inc., and Gildersleeve Electric assessed which items on the punch list were appellant's responsibility. Appellant's Supplemental Appeal File, Exhibit 10.

On January 28, 1999, GSA issued a letter contract to Paragon Construction in the

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approximately half of the lot was renovated in Phase I; the remainder of the lot was renovated in Phase II. Appellant's Supplemental Appeal File, Exhibit 26.

amount of $125,000 to complete the work on the project. Appellant's Supplemental Appeal File, Exhibit 10.

On February 9, 1999, GSA's construction management firm notified appellant that many items on the punch list for Phase I were still incomplete. Appellant's Supplemental Appeal File, Exhibit 13.

On March 4, 1999, GSA and Gildersleeve Electric met to discuss the termination of the contract. On March 11, 1999, following this meeting, the contracting officer sent appellant a letter requesting a written settlement proposal to be provided on the settlement proposal form previously supplied to appellant for that purpose. Appeal File, Exhibit 21.

On March 16, 1999, appellant sent the following proposal to the contracting officer:

> Pursuant to the terms and conditions of the termination for convenience of the Government issued to Gildersleeve Electric, Inc. on January 15, 1999, this letter hereby releases Gildersleeve Electric, Inc. from any further liability pertaining to completion of the punch list items still remaining on Phase I, and the completion of Phase II. Furthermore it exonerates Gildersleeve's performance bond. This letter also releases the Government from any liabilities arising from this termination in the form of settlements to Gildersleeve Electric, Inc.
>
> As per our previous discussions, any deficiencies in Phase I or Phase II will be completed by Paragon at the Government's expense. In accordance with this agreement all monies held [b]y CDS [Contractor Disbursement Services, Inc.] for Gildersleeve Electric, Inc. will be retained by CDS to resolve disputes with Gildersleeve's subcontractors, Allen Landscaping Inc., CPM, and Environmental Construction. All monies due and owing to Gildersleeve Electric, Inc. by the Government will be retained by the Government to correct any deficiencies in Phase I and Phase II and to pay Paragon Construction any and all monies due for work on this project.
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> This offer is for the purpose of settlement only and should not be used against the parties in the event it is not accepted. Please accept this agreement by signing on the line below.

Appeal File, Exhibit 22. Gildersleeve Electric also provided a signed release of "any and all claims arising under or by virtue of said contract or any modification or change thereof." The release of claims contained no exceptions. *Id.*, Exhibit 23.

GSA issued contract modification PS16 as a settlement agreement for the termination for convenience. The modification provided that the termination was a "no cost termination settlement agreement which releases the Government from any further liability from any settlement claims arising from this termination for convenience (dated Jan. 15, 1999)." Appellant's settlement proposal letter, set forth above, was attached to the modification. Appeal File, Exhibit 24.

After the issuance of the contract modification providing for a no cost termination for convenience, Paragon Construction filed a Miller Act suit in the United States District Court for the Eastern District of California against Gildersleeve Electric, contending that it was due $213,000, the amount of its subcontract with Gildersleeve Electric. Paragon's lawsuit alleged that it had performed work under its contract with Gildersleeve Electric from December 1998 through March 26, 1999, and that appellant had paid nothing to Paragon. Appellant's Supplemental Appeal File, Exhibit 21.

On May 19, 1999, Gildersleeve Electric contacted GSA's contracting officer and requested that she pay Paragon Construction the money owed to that company by Gildersleeve Electric in connection with Paragon Construction's subcontract to perform work required under Gildersleeve Electric's contract. The contracting officer responded that she did not understand the settlement agreement to obligate the Government to pay Paragon Construction for any work performed under its contract with Gildersleeve Electric. Appeal File, Exhibit 25.

In November 1999, appellant filed a claim with the contracting officer seeking $213,000 with interest, costs and related expenses in defending against Paragon Construction's law suit. Appellant further requested declaratory relief that any monies the district court found due to Paragon Construction were the responsibility of the Government and asked that the Government indemnify Gildersleeve Electric against any and all claims of Paragon Construction in connection with the contract work. Appellant's Supplemental Appeal File, Exhibit 1.

On July 30, 2002, the district court entered judgment against Gildersleeve Electric in the amount of $108,000. Appellant's Supplemental Appeal File, Exhibit 21. On April 3, 2004, the attorney who represented appellant in the district court suit submitted an invoice to Gildersleeve Electric in the amount of $76,666.38 for legal services in connection with that matter. *Id.*, Exhibit 22.

On February 23, 2004, the contracting officer issued a final decision taking the position that Gildersleeve Electric had been paid for work completed prior to the termination of its contract and that under the negotiated no cost termination settlement agreement Gildersleeve Electric was no longer held responsible for completing remaining punch list items in Phase I or for the completion of the work in Phase II. The Government retained the right to contract directly with Paragon Construction for completion of the work, using remaining contract funds. Gildersleeve Electric remained responsible for paying its subcontractors for work performed prior to the termination. Respondent's Supplemental Appeal File, Exhibit 35.

Appellant appealed this decision. In its complaint, appellant seeks $76,666.38 in attorney fees, reimbursement of the $108,000 judgment issued by the district court in favor of Paragon Construction, and payment of the alleged retention in the contract in the amount of $77,299.35.

Discussion

Appellant contends that under its termination agreement with GSA, GSA was required to directly reimburse its subcontractor, Paragon Construction, for work Paragon Construction had performed under its contract with Gildersleeve Electric. When Paragon Construction was not paid by GSA as Gildersleeve Electric expected, Paragon Construction successfully sued Gildersleeve Electric in United States District Court under the Miller Act. 40 U.S.C. §§ 270a-270d (2000). As a result, Gildersleeve Electric incurred $76,666.38 in attorney fees to defend against the lawsuit and was required to pay Paragon Construction the amount of $108,000. Appellant seeks reimbursement of both the judgment amount and the attorney fees, as well as the amount of $77,299.35, the amount it states was retained under its contract with GSA, in damages to compensate for GSA's alleged breach of the termination settlement agreement. GSA has moved for partial summary relief, contending that as a matter of law, Gildersleeve Electric cannot recover in this appeal the attorney fees it incurred in the district court lawsuit.

Summary relief is properly granted when there is no genuine issue of material fact and the moving party is clearly entitled to judgment as a matter of law. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *US Ecology, Inc. v. United States*, 245 F.3d 1352, 1355 (Fed. Cir. 2001); *Olympus Corp. v. United States*, 98 F.3d 1314, 1316 (Fed. Cir. 1996). As the moving party, GSA bears the burden of establishing the absence of any genuine issue of material fact. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987); *Armco, Inc. v. Cyclops Corp.*, 791 F.2d 147, 149 (Fed. Cir. 1986); *Corning Construction Corp. v.*

Department of the Treasury, GSBCA 16127-TD, 03-2 BCA ¶ 32,402. A fact is material if it will affect our decision, and an issue is genuine if sufficient evidence exists so the fact could reasonably be decided in favor of the non-moving party. *Shepherd Kingdom, Inc. v. General Services Administration*, GSBCA 16553 (Mar. 31, 2005). All reasonable inferences are drawn in favor of the non-moving party. *Prineville Sawmill Co. v. United States*, 859 F.2d 905, 911 (Fed. Cir. 1988); *Corning*.

GSA's argument boils down to this: The Government does not dispute the fact that Paragon Construction sued Gildersleeve Electric for amounts due under its subcontract or that Gildersleeve Electric incurred attorney fees in the defense of that suit. But even assuming these facts, and also assuming arguendo that Gildersleeve Electric might otherwise prevail in its claim against the Government, absent some specific statutory authority, litigation expenses, including attorney fees, are generally not compensable as breach damages.

GSA correctly argues that attorney fees incurred to defend against a collateral suit in another legal forum are not ordinarily compensable as breach of contract damages against the United States. The seminal case with respect to this issue is *Kania v. United States*, 650 F.2d 264 (Ct. Cl.), *cert. denied*, 454 U.S. 895 (1981). In that case the Court observed:

> Plaintiff Kania asserts that he is not seeking the costs of litigation or attorney's fees, as such, rather he seeks damages arising from the government's breach of contract. Since the attorney's fees and expenses that he was forced to pay were a result of the indictment returned against him "in breach of contract," plaintiff argues that they are properly compensable as contract damages. . . . [W]e must now add that jurisdiction to award counsel fees and other litigation expenses as an element of breach damages would be extremely dubious. It is the kind of consequential damages not normally awarded in contract breach cases. *William Green Construction Co. v. United States*, 477 F.2d 930, *cert. denied*, 417 U.S. 909 (1974). Courts do not, in awarding breach damages, follow through the remote indirect consequences of the breach as distinguished from those directly in contemplation when the contract was made. *Northern Helex Co. v. United States*, 524 F.2d 707 (1975), *cert. denied*, 429 U.S. 866 (1976). No matter whether characterized as litigation costs or contract damages, plaintiff's counsel fees are not recoverable in this court.

Id. at 269.

The rule has been succinctly summarized:

> Counsel fees and other litigation expenses are not recoverable as breach of contract damages absent a specific authorization. *See*, *e.g.*, *Kania v. United States*, 650 F.2d 264, 269 (Ct. Cl.), *cert. denied*, 454 U.S. 895 (1981) ("expenses in litigation, whether legal, accounting, secretarial, or other" were not recoverable); *Goolsby v. United States*, 21 Cl.Ct. 88, 90-91 (1990) (sums expended to defend a collection action, which was instituted as a result of defendant's alleged bad faith breach of a loan agreement, were not recoverable); *Mazama Timber Prods., Inc. v. United States*, 6 Cl. Ct. 87, 90 (1984) (litigation funds expended by plaintiff as a result of Government's collection efforts, where those efforts themselves were held to be a breach of contract, were not recoverable). The attorney's fees and internal costs sought by plaintiff . . . were not incurred in connection with the contract at bar. Plaintiff is therefore not entitled, as a matter of law, to recover the damages sought.

C.B.C. Enterprises, Inc. v. United States, 24 Cl. Ct. 1, 5 (1991); *see also Wm. T. Thompson Co. v. United States*, 26 Cl. Ct. 17, 27 (1992), *aff'd sub nom. Hercules Inc. v. United States*, 24 F.3d 188 (Fed. Cir. 1994), *aff'd,* 516 U.S. 417 (1996); *Triad, Inc.*, ENGBCA 5882, 95-1 BCA ¶ 27,290.

The rare exception to this rule occurs when there is a clear breach of the Government's contractual duties during performance of the contract, entitling the contractor to an equitable adjustment to fully compensate for the consequences of the Government's breach, including the expenses of litigation with third parties. *See Liles Construction Co. v. United States*, 455 F.2d 527 (Ct. Cl. 1972) (contracting officer wrongfully required the contractor to terminate for default its subcontractor, who successfully sued the contractor; entitlement to equitable adjustment included indemnification for the amount of the judgment and the legal expenses the contractor incurred in defending against the subcontractor's suit). The instant appeal is not covered by the *Liles* exception, however. Gildersleeve Electric alleges a breach of the termination settlement agreement, not of a contractual duty imposed on the Government during performance of the contract.

The rule enunciated in *C.B.C. Enterprises* applies squarely to the facts of this case. If appellant prevails, it may be entitled to breach damages under the termination settlement

agreement, but these would not include attorney fees -- such fees are not compensable as breach damages and there is no contractual provision applicable to this case that would entitle Gildersleeve Electric to the type of indemnification damages it seeks. Accordingly, as a matter of law, the counsel fees Gildersleeve Electric incurred to defend the Miller Act suit brought by Paragon Construction cannot be recovered in this action at the Board.

Decision

Respondent's motion for partial summary relief is **GRANTED**. Gildersleeve Electric's claim for recovery of the litigation expenses and attorney fees incurred in the District Court suit is denied.

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CATHERINE B. HYATT
Board Judge

We concur:

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STEPHEN M. DANIELS
Board Judge

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MARTHA H. DeGRAFF
Board Judge