Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

DENIED: April 5, 2006

GSBCA 16634

ABACUS TECHNOLOGY CORPORATION,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Donald M. Sherwin, Great Falls, VA, counsel for Appellant.

Robert T. Hoff, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

GOODMAN, Board Judge.

Appellant, Abacus Technology Corporation (Abacus or appellant), appeals a General Services Administration (GSA or respondent) contracting officer's final decision dated March 15, 2005, denying appellant's claim in the amount of $18,300.01. Appellant has elected to proceed pursuant to the Board's Small Claims Procedure, Rule 202[1], and the parties have elected to submit the appeal for a decision on the written record, Rule 111. Both parties have filed record submissions, and respondent has filed a reply to appellant's record submission.

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[1] Pursuant to this rule, this decision is issued by the panel chairman in summary form, is final and conclusive and shall not be set aside except in case of fraud, and shall have no value as precedent. 48 CFR 6102.2 (2005).

Factual Background

On October 1, 1997, GSA awarded Abacus contract no. GS-35F-4934G (the contract) for "General Purpose Commercial Information Technology Equipment, Software, and Services," for a ten-year period ending September 29, 2007. Appeal File, Exhibit 1.

On December 9, 2002, the United States Air Force (USAF) at Kirtland Air Force Base (Kirtland), New Mexico, placed task order T0703BG0512 (task order), on a time and materials basis, subject to a ceiling price of $55,769, for performance of technical support services on Kirtland's computer tracking "Golf Project" from December 9, 2002, to October 31, 2003. Appeal File, Exhibit 2. On April 25, 2003, by modification, the ceiling price of the task order was raised to $478,845.92. Appeal File, Exhibit 3.

The contract contained Federal Acquisition Regulation (FAR) Clause 52.232-7 "Payments under Time and Material and Labor Hour Contracts" (DEC 2002) (Alternate II - Feb 2002) (Deviation - May 2003) (payment clause), which states, in relevant part:

> The ordering activity will pay the Contractor as follows upon submission of invoices or vouchers approved by the Contracting Officer . . .
>
> (c) Total cost. It is estimated that the total cost to the ordering activity for the performance of this contract shall not exceed the ceiling price set forth in the Schedule and the Contractor agrees to use its best efforts to perform the work specified in the Schedule and all obligations under this contract within such ceiling price. If at any time the Contractor has reason to believe that the hourly rate payments and material costs that will accrue in performing this contract in the next succeeding 30 days, if added to all other payments and costs previously accrued will exceed 85 percent of the ceiling price in the Schedule, the Contractor shall notify the Contracting Officer giving a revised estimate of the total price to the ordering activity for performing this contract with supporting reasons and documentation. If at any time during performing this contract, the Contractor has reason to believe that the total price to the ordering activity for performing this contract will be substantially greater or less than the then stated ceiling price, the Contractor shall so notify the Contracting Officer, giving a revised estimate of the total price for performing this contract, with supporting documentation. . . .
>
> (d) Ceiling price. The ordering activity shall not be obligated to pay the Contractor any amount in excess of the ceiling price in the Schedule, and the Contractor shall not be obligated to continue performance if to do so would exceed the ceiling price set forth in the Schedule, unless and until the

> Contracting Officer shall have notified the Contractor in writing that the ceiling price has been increased and shall have specified in the notice a revised ceiling that shall constitute the ceiling price for performance under this contract. When and to the extent that the ceiling price set forth in the Schedule has been increased, any hours expended and material costs incurred by the Contractor in excess of the ceiling price before the increase shall be allowable to the same extent as if the hours expended and material costs had been incurred after the increase in the ceiling price.

Appeal File, Exhibit 1 at 39-40.

Appellant did not give the contracting officer any notices pursuant to subparagraph (c) above. At an undetermined time before October 7, 2003, appellant's costs equaled the ceiling price of the task order. This was acknowledged by appellant's contract manager by an electronic mail message dated October 21, 2003. Appeal File, Exhibit 43.

By letter dated September 20, 2004, appellant's contract administrator submitted an invoice dated September 15, 2004, to respondent's contracting officer in the amount of $18,300.01, allegedly for costs incurred in excess of the ceiling price during the performance period of the task order. This amount was derived by subtracting the ceiling price of the task order from the total billing for the entire period of the task order. Appeal File, Exhibit 4.

Respondent's contracting officer replied by letter dated September 24, 2004, requesting the contractor to submit a claim for the amount sought pursuant to the Disputes clause of the contract. Appeal File, Exhibit 5.

By letter dated September 30, 2004, appellant's president filed a claim in the amount of $18,300.01. Appeal File, Exhibit 6.

Thereafter, appellant and responded exchanged various communications. Respondent's contracting officer requested information with regard to the work for which payment was requested - the nature and time period of the work performed, justification for payment above the ceiling price, and whether there had been authorization for funding of any such payment. Appeal File, Exhibits 5, 8, 9, 10, 11, 14, 21, 23, 25, 27, 28. Appellant alleged that the work was performed on or about October 15 to October 31, 2003, submitted information that allegedly described the tasks performed (server upgrades, recovery of data after hard drive crashes, upgraded software, nightly and weekend data backups, installation of two computers, daily computer related work, and monitoring of network and servers), and asserted that various individuals employed by the Air Force and GSA had authorized funding. Appeal File, Exhibits 9, 10, 13, 16, 20, 22, 24, 26, 29, 31, 32.

The record does not support appellant's allegation that the amounts were incurred during the period October 15 to October 31, 2003. Appeal File, Exhibit 6. The initial invoice dated September 15, 2004, contains no indication when the work was performed. However, the cover letter states that "this funding covered 299 man hours worked by our subcontractor . . . in September and October of 2003." Appeal File, Exhibit 4. Subsequent documentation indicates the work was performed throughout the entire month of October 2003 (without specific dates), Appeal File, Exhibit 22, or various dates from October 1 through October 30, 2003, Appeal File, Exhibit 24 at 2-3.

Appellant acknowledges that there is no documentation to support its claim that additional funding above the ceiling price had been authorized, stating that direction received from government personnel was verbal and considered classified or sensitive. Appeal File, Exhibit 39. The individuals employed by the Air Force denied that they authorized funding for additional funds above the ceiling price. Appeal File, Exhibits 30, 48. They further stated that only the data that was supported in the Golf Project was classified or sensitive, and appellant's work was not. Appeal File, Exhibit 28. The contracting officer also denied authorization of any work performed to be paid by funds in excess of the ceiling price. Appeal File, Exhibit 17.

By final decision dated March 17, 2005, the contracting officer denied appellant's claim. Appeal File, Exhibit 42.

Discussion

The payment clause of the contract establishes a ceiling price, defined as an estimate of the total costs to be incurred for the specified work during the period of performance. We have held that this payment clause is similar in purpose to the limitation of cost clause[2] in cost reimbursement contracts which establishes a cost ceiling -- an estimate of total costs for the performance of the contract. *Michael Weller, Inc. v. Office of Navajo and Hopi Indian Relocation*, GSBCA 10627-NHI, 94-2 BCA 26,849 and cases cited therein. This payment clause and the limitation of cost clause are to be strictly construed, as their purpose is to limit the Government's legal obligation to the estimated costs for the performance of the contract work. *Weller*; *Automated Management Systems*, GSBCA 7394-COM, 85-1 BCA ¶ 17,891. See also *ITT Defense Communications Division*, ASBCA 14270, 70-2 BCA ¶ 8370.

Pursuant to the payment clause of the contract, the Government may increase the ceiling price when it receives notice from the contractor, or when it becomes aware without such notice, of an impending overrun of costs in excess of the ceiling price. The contractor has the contractual right to stop work if the Government has not increased the ceiling price

[2] See FAR 52.232-20 Limitation of Cost.

by the time its costs reach the ceiling price. It is the responsibility of the contractor pursuant to maintain adequate cost records to enable it to know when the ceiling price is reached. *Weller; see also Stanwick Corp*., ASBCA 14905, 71-2 BCA ¶ 9115; *United Shoe Machinery Corp*., ASBCA 11936, 68-2 BCA ¶ 7328 (similar responsibility under the limitation of cost clause).

We have held that a contracting officer may refuse to increase the cost ceiling of a cost-type contract if proper notice has not been given pursuant to a limitation of cost clause, but this discretion is not absolute. If the failure to give notice was not the contractor's fault, or if the contracting officer has directed a continuation that resulted in a cost overrun, the contracting officer must increase the cost ceiling and fund the overrun. *Nash Janitorial Service, Inc.*, GSBCA 6390, 84-1 BCA ¶ 17,135 at 85,370 (citing *General Electric Co. v. United States*, 440 F.2d 420 (Ct. Cl. 1971)); *American Standard, Inc*., ASBCA 15660, 71-2 BCA ¶ 9109, at 42,216. These same principles would apply to the contracting officer's discretion in administrating the payment clause of the instant contract. *Weller.*

Appellant asserts that it is entitled to be paid for its claim, which is the amount its total costs exceeded the ceiling price of its task order. It bases this assertion on its allegation that, with the Air Force's knowledge, appellant in good faith provided a continuum of support services in excess of the "estimated funding ceiling" within the scope and performance period of the task order. Appellant states further that it relied upon e-mail messages from the Air Force Program Office to avoid the risk of work stoppage and abandonment of the Golf network, and that appellant was induced by the Government to provide a two-week continuation of services. Appellant believes it is entitled to payment on the basis of quantum meruit, as it alleges that it performed with the knowledge of the Government, the Government received direct benefit, and the work was constructively acknowledged and ratified.

Appellant does not prevail in this appeal. The payment clause in the contract is clear that the ceiling price is not an estimated funding ceiling, as alleged by appellant, but an estimate of the total cost to the ordering activity for the performance of this contract. Thus, as in a limitation of cost clause, the ceiling price is the Government's method of limiting its total liability on a cost type contract, unless there are circumstances that justify an increase in the ceiling price. *Weller; Nash*; *CRC Systems Inc. v. General Services Administration*, GSBCA 11173, 93-2 BCA ¶ 25,842.

Appellant has not met its burden to justify an increase in the ceiling price. Appellant did not give notice of an impending overrun of the ceiling price as required by the clause,

with a revised estimate of its total costs.[3] Appellant cannot allege that its failure to give notice was beyond its control, as this was a time and materials contract which required appellant to keep detailed records and submit invoices for payment based upon actual costs incurred to date. When appellant did determine that its costs exceeded the ceiling, appellant's alleged continued performance[4] was at its own risk, without an increase in the ceiling price, even though it had a contractual right to discontinue performance.

While appellant asserts entitlement based upon quantum meruit, alleging in its record submission that the Government had knowledge of and induced and accepted its continued performance, there is no evidence in the record that the ordering activity (the Air Force) or the contracting officer directed a continuation of services after the appellant's costs exceeded the ceiling price or promised an increase in funding for the task order.

Pursuant to the payment clause, subparagraph (d), the ordering activity shall not be obligated to pay any amount of excess of the ceiling price, and the contractor shall not be obligated to continue performance if to do so would exceed the ceiling price, unless and until the contracting officer shall have notified the contractor in writing that the ceiling price has been increased and shall have specified in the notice a revised ceiling that shall constitute the ceiling price for performance under this contract.

Appellant did not discontinue performance when its costs exceeded the ceiling price, and the contracting officer did not increase the ceiling price. Appellant is therefore not entitled to reimbursement for the costs in excess of the ceiling price.

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[3] It is not clear when appellant's costs exceeded the ceiling price. The first documentation by appellant of its suspected overrun was its email dated October 21, 2003, but it appears that its costs had exceeded the ceiling price at some point before October 7, 2003. Appellant did not quantify the alleged overrun until it submitted an invoice almost eleven months later, on September 20, 2004.

[4] There is inconsistent evidence in the record as to the dates when the work in excess of the ceiling price was performed.

Decision

The appeal is **DENIED.**

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ALLAN H. GOODMAN
Board Judge