
Appeal of: :
MASCO, INC., : HUDBCA No. 95-G-147-C16
Appellant :
Contract No. H02C95061000000 :
:

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DECISION BY ADMINISTRATIVE JUDGE DAVID T. ANDERSON

May 23, 1996

Statement of the Case

On July 11, 1995 MASCO, Inc. ("Appellant") filed a notice of appeal of a final decision of a contracting officer, dated April 17, 1995, denying payment for certain costs that Appellant claimed were due following the termination for convenience of HUD Contract No. H02C95061000000. Appellant claims reimbursement in the amounts of \$6,000 for a loan, and \$2,138 for the purchase of a computer. Appellant also claims interest pursuant to the Prompt Payment Act, 31 U.S.C. § 3901, et seq., for late payment of sums reflected in two invoices submitted to the HUD contracting officer.

On September 13, 1995, Appellant elected to proceed under Rule 12.1(b), which provides for an accelerated procedure in the issuance of a decision in this appeal. This rule requires decision of the appeal, whenever possible, within 180 days after the Board receives written notice of Appellant's election. The parties were advised at the hearing held in this case on February

28, 1996, that the 180-day period for the issuance of a decision would most likely not be met because of substantial delays in Board operations resulting from Departmental shutdowns due to inclement weather and the lack of appropriated funds. In addition, the Board did not receive the transcript on which this decision is based until March 12, 1996, one day before the 180-day period would expire.

Findings of Fact

Contract Award and Performance

Appellant is a computer services corporation, solely owned by its president, Alvins Waller. (Transcript ("Tr.") 122-123.) On November 25, 1994, Appellant submitted a bid for HUD Contract No. H02C95061000000 (the "Camden contract") to provide mortgage insurance endorsement processing for the HUD Camden, New Jersey, office. (Stipulation of Fact No. 1.) On January 5, 1995, HUD awarded Appellant the Camden contract. (Stipulation of Fact No. 2.) Appellant had already been awarded similar contracts for the Richmond, District of Columbia, Baltimore, Wilmington and Philadelphia HUD offices. (Tr. 124.)

Under this indefinite quantity service contract, HUD assigned closing packages, or cases, from the Camden, New Jersey, office to Appellant, and Appellant was to review those closing packages to determine if the mortgage was insurable and if a Mortgage Insurance Certificate ("MIC") could be issued. (Appeal File ("AF") 2.1.) The final product to be achieved as a result of the successful performance by Appellant under this contract was the issuance by the HUD Camden office of either a MIC or a Notice of Rejection ("NOR"). (Tr. 23.) The contract required HUD to assign a minimum of 800 cases to Appellant. (AF 2.1, at 3.)

Under the contract's Statement of Work, Appellant was to perform the following tasks:

1. Determine that all necessary closing documents have been submitted
2. Verify that both the mortgagee and mortgagor have signed the Form HUD-92900A. Review the Firm Commitment for mortgagee and mortgagor certification and to verify that commitment has not expired.
3. Check for underwriter's signature and the Computerized

Homes Underwriting Management System ["CHUMS"] identification number on the Form HUD-54113 and the Form HUD 92900-WS.

4. Verify that the property address on the Note and Mortgage or Deed of Trust is consistent with the address on the Firm Commitment.

5. Check Statement of Account to verify the mortgagee insurance premium (MIP) has been paid and that the mortgage can be endorsed.

6. verify that the mortgage amount is consistent with the Firm Commitment and does not exceed the amount of the Form HUD-27001, MIP Transmittal or the MIP Statement of Account, as applicable.

7. For cases involving escrow of funds for repair requirements, review Form HUD-92300 for date of issue and completeness. Note each file with an escrow stamp and enter dollar amount of escrow. Prepare the supplemental escrow binder.

8. Prepare completed files for routing to Headquarters for disposition. Includes original and one copy of completed shipping list and properly boxed cases for mailing; (include mailing list, ID markings, taping and labels). Date stamp each endorsed file.

9. Initiate the Form HUD-54118, Underwriter's Report, for those applications that require technical review.

10. Input information into the CHUMS automated system either by printing or storing the information, as necessary.

11. Acceptable contract performance: all reviews are completed and the information is entered into the CHUMS within 4 working days of assignment. The appropriate Direct Endorsement (DE) files have been identified for a detailed technical review in accordance with established review standards.

(AF 2.1 at 4-6; Stipulation of Fact Nos. 6 and 7.)

Appellant began work on the Camden contract in February, 1995. (Tr. 129.) Appellant had intended to pick up the assigned closing packages under all of the mortgage insurance endorsement processing contracts which it had with all of the HUD offices, process them at a central location, and then travel to the various field offices to print the MICs or the NORs in order to achieve a total cost savings, but it never implemented this centralized processing plan. (Tr. 124, 135, 138, 152, 163-4.)

Contract Termination and Appellant's Settlement Proposal

On March 24, 1995, the contracting officer notified Appellant that the Camden contract was terminated for the convenience of the Government, due to substantial changes to the Statement of Work. Appellant was instructed to stop work on the Camden contract on the same day. (Stipulation of Fact Nos. 3 and 4.) At the time that the termination notice was issued, HUD had assigned to Appellant the minimum quantity of cases stated in the contract, but Appellant had not completed all of them. (AF 2.1, 4.1, and 4.3; Tr. 68.)

In the March 24, 1995 notice of termination, the contracting officer offered Appellant a no-cost termination for convenience, and requested that Appellant sign Modification 001, agreeing to the no-cost termination. Modification 001 stated "[a]ll obligations under this contract are concluded except for the invoices for work COMPLETED through the termination date." (Emphasis in original.) (AF 2.2 and 3.1; Tr. 108.)

Appellant did not agree to the no-cost settlement offered in Modification 001, and submitted claims to the contracting officer for the repayment of a loan, for costs associated with the purchase of a truck, and for the purchase of a Compaq computer. (AF 3.2; Tr. 136.) The contracting officer initially denied Appellant's claims as unnecessary for the performance of the contract. (AF 3.3.) Appellant reiterated its claims in a letter dated April 10, 1995. (AF 3.4.) The contracting officer issued a final decision on April 17, 1995 denying Appellant's claims because she could not determine that the claimed items were "used in the direct performance of this contract," and also because Appellant had incurred a portion of the claimed costs prior to award of the contract. (AF 1.1; Tr. 112.) Appellant has withdrawn in this appeal its claim for costs associated with the purchase of the truck.

Appellant obtained a \$6,000 loan on January 31, 1995, using the Camden contract as security for the loan. (AF 3.2; Exhibit ("Exh.") A-4; Tr. 139, 171-2.) Appellant used most of the proceeds of the loan to hire an additional MIC processor, Luciana Tortacelli. (Tr. 143, 170.) Tortacelli performed work on all of Appellant's mortgage insurance contracts, not just the Camden contract. (Tr. 144, 172.) Appellant has provided no evidence of Tortacelli's wages, or what percentage of her time was spent on the Camden contract. (Tr. 170, 174.) Waller testified that some of the loan proceeds might have been used by him for two train

trips to Camden, but he was unable to determine the amount of the loan proceeds that was allocable to the Camden contract for either Tortacelli's wages or the Camden trips. (Tr. 171, 174.)

Appellant bought a Compaq personal computer for \$2,078.47 on December 10, 1994, approximately one month prior to award of the Camden contract. (Exhs. A-5, A-6, A-7; Tr. 148.) Appellant bought the computer with the intention of using it in the performance of all of the mortgage insurance endorsement processing contracts awarded to Appellant, including the Camden contract. (Tr. 151, 166.) Appellant intended to use the computer to input the required data into CHUMS, a data processing system, by first entering the data into a computerized lender access system ("CLAS") at a central location. (Tr. 24, 163.) Appellant did not use the new Compaq computer for this purpose in the performance of any of the HUD contracts, and only used it to perform some administrative tasks, such as recordkeeping. (Tr. 152-3, 162.)

Contractor access to CLAS was not a requirement of the contract, and was not necessary for the performance of the contract. (Tr. 24, 85.) Furthermore, it is not possible to print a MIC or NOR through CLAS, because MICs and NORs can only be printed on a CHUMS computer terminal in a MUD office. (Tr. 25, 35, 84, 96, 119-20.) CLAS was restricted to HUD approved lenders, which Appellant was not, and Appellant would not have had access to CLAS in any event. (Tr. 12, 24, 55, 84, 96, 110, 161.)

Appellant's Invoices

Appellant submitted to Richard Nodine, the Government Technical Monitor, an invoice, dated March 1, 1995, seeking payment for the first 400 cases assigned to Appellant during February, 1995. (Exh. G-8.) Waller knew at the time that the invoice was submitted that Appellant had not completed all 400 cases listed on the invoice. (Tr. 132-3.) Nodine was responsible for reviewing and accepting invoices. (Tr. 14.) The March 1 invoice was not date-stamped to show when it was received by Nodine. (Tr. 26.)

In early March, 1995, after receipt of the March 1 invoice, Nodine performed a "spot check" of the cases assigned to Appellant, and found that 15 to 20 percent of the cases included in the spot check were incomplete, meaning a MIC or a NOR had not been printed. (AF 3.6; Tr. 25-6, 75.) Based on the spot-check, Nodine considered the March 1 invoice to be in error, and Nodine

orally notified Appellant in early March, 1995 that a number of the cases listed on the March 1 invoice were not complete. (Tr. 32, 38, 132, 176, 177). At the direction of Nodine, Appellant completed the cases in the spot check that Nodine found were incomplete, but Appellant did not check the remaining cases, as instructed, to determine whether other cases included in the invoice had been included in error because they were not completed. Appellant did not complete any more of the cases than those that Nodine specifically identified through the spot check. (AF 3.6; Tr. 25.)

Appellant submitted a second invoice, dated March 31, 1995, requesting payment for processing the 400 cases assigned to Appellant in March, 1995. (Exh. G-8; Tr. 28.) The HUD Camden office date-stamped the March 31 invoice as received on April 17, 1995. (Exh. G-8; Tr. 28.) Again, Nodine found, after initially reviewing Appellant's case assignments, that some of the invoiced cases were not completed. (Tr. 28, 30, 32.) Appellant was orally notified of Nodine's findings some time in April, 1995. (Tr. 32, 38.) Nodine took no further action on either the March 1 or the March 31 invoices while waiting for Appellant to complete the cases which Appellant had included in the invoices before they were completed. (Tr. 54, 74.)

By letter dated June 2, 1995, the contracting officer informed Appellant that it would be paid only for completed cases, and directed Appellant to process the uncompleted cases immediately. (AF 3.6 and 4.4; Tr. 79.) Appellant did not process the uncompleted cases, and was never paid for those cases. (AF 3.7; Tr. 33, 81, 157.)

During June and July, 1995, Nodine did a complete casefile review of all 800 cases assigned to Appellant. (Tr. 28-9, 78.) Nodine's review of Appellant's invoices required inputting all 800 case numbers into the CHUMS, reviewing the case files, and checking the case status to determine if a MIC or NOR had been issued, essentially reperforming the contract. (Tr. 28-9, 78.) This review took approximately six weeks. (Tr. 78.) Nodine found that some cases for which Appellant had invoiced HUD had not been processed at all. He found that, for other cases, neither MICs nor NORs were issued, and that incomplete case binders were mailed by Appellant to HUD Headquarters in Washington, D.C. (AF 3.6; Tr. 16, 26-7, 32, 38, 74, 77.) In total, Nodine found that 42 cases were not completed at the time that they were included by Appellant in the March 1 invoice, and that 52 more cases were incomplete at the time that they were included on the March 31 invoice. (Tr. 28, 30, 32.) The staff of the HUD Camden, New

Jersey, office completed the processing of the cases left incomplete by Appellant. (Tr. 33, 82, 120.)

Nodine approved the March 1 invoice for payment on June 25, 1995, after deducting the amount for the uncompleted cases, and the voucher for payment was prepared and signed by Nodine on June 28, 1995. (AF 4.5; Tr. 34.) HUD paid Appellant \$680.20 on July 25, 1995, for work billed on the March 1 invoice. (Stipulation of Fact No. 5.) Nodine approved the March 31 invoice for payment on July 11, 1995, after deducting the amount billed for the incomplete cases. (AF 4.6; Tr. 34, 78.) HUD paid Appellant \$661.20 on August 7, 1995 for completed work billed on the March 31 invoice. (Stipulation of Fact No. 5.)

Discussion

Termination for Convenience Settlement Claims

As a preliminary matter, Appellant has denominated its claims under the Termination for Convenience clause as a request for an equitable adjustment. An equitable adjustment is appropriate for a partial termination for convenience. See FAR 49.208 and FAR 52.249-2(k). Since the Camden contract was completely terminated, Appellant's claim is more properly called a Termination for Convenience Settlement proposal.

Appellant has claimed entitlement to repayment of a loan, and the cost of a Compaq computer as direct costs of the Camden contract. The Federal Acquisition Regulations define, in 31.202(a), a direct cost as follows:

(a) A direct cost is any cost that can be identified specifically with a particular final cost objective. No final cost objective shall have allocated to it as a direct cost any cost, if other costs incurred for the same purpose in like circumstances have been included in any indirect cost pool to be allocated to that or any other final cost objective. Costs identified specifically with the contract are direct costs of the contract and are to be charged directly to the contract. All costs specifically identified with other final cost objectives of the contractor are direct costs of those cost objectives and are not to be charged to the contract directly or indirectly.

The amounts claimed by Appellant are not directly associated with the performance of the Camden contract. The evidence is

insufficient to find that any part of the loan proceeds were used for the two train trips to Camden. According to Appellant, the bulk of the proceeds of this loan was probably used to pay for the salary of Luciana Tortacelli, a MIC processor, among other items. Appellant indicated that Tortacelli performed work on all of Appellant's mortgage insurance processing contracts, and that Appellant was unable to allocate Tortacelli's wages or time among the various contracts. Appellant submitted no documentary evidence as to how the loan proceeds were spent, and was unable to even speculate as to the time that Tortacelli spent on the Camden contract. It is thus clear that whatever expenditures Appellant made from the loan proceeds toward Tortacelli's salary would necessarily fall under the category of an overhead expense, not directly associated with the Camden contract. The evidence also shows that the computer could not have been, and never was, used in the direct performance of the Camden contract. Appellant was not an authorized user of CLAS, and could not print the MICs or NORs using CLAS. There is no credible evidence in the record of this proceeding which would show that the computer ever provided a specific benefit in the performance of the Camden contract, and, thus, the cost of the computer is not directly allocable to the Camden contract.

The amounts claimed by Appellant for both the loan and the computer are in the nature of indirect expenses, and to the extent that they were indirect expenses, Appellant's compensation for work it performed already included overhead expenses allocable to the contract. To the extent that Appellant's claim is for unabsorbed overhead, Appellant is not entitled to such costs because unabsorbed overhead costs are normally not recoverable when the entire contract has been terminated for convenience. Such costs are considered costs of the contractor's ongoing business and not costs of the terminated contract. Hewitt Contracting Co., ENGBCA No. 4596, 83-2 BCA ¶ 16,816; Pioneer Recovery Systems, Inc., ASBCA No. 24658, 81-1 BOA ¶ 15,059. For the foregoing reasons, Appellant's claims must be denied.

Prompt Payment Act Claim

The Prompt Payment Act, 31 U.S.C. 3901, et seq., states that the Government shall pay the contractor within 30 days of receipt of a proper invoice, and, if the invoice is not paid within 30 days, the contractor is entitled to an interest penalty. 31 U.S.C. §§ 3902(a) and 3903(a)(1)(B). Appellant claims that HUD violated the Prompt Payment Act when it did not pay the two invoices submitted by Appellant within 30 days of the

date on the invoices, and, thus, Appellant is entitled to the interest penalty provided in the Prompt Payment Act. 31 U.S.C. § 3902 (a)

The Prompt Payment Act defines, at 31 U.S.C. § 3901(a) (4), receipt of a proper invoice as follows:

(4) for purposes of determining a payment due date and the date upon which any late payment interest penalty shall begin to accrue, the head of the agency is deemed to have received an invoice--

(A) on the later of--

(i) the date on which the place or person designated by the agency to first receive such invoice actually receives a proper invoice; or

(ii) on the 7th day after the date on which, in accordance with the terms and conditions of the contract, the property is actually delivered or performance of the services is actually completed, as the case may be, unless--

(I) the agency has actually accepted such property or services before such 7th day; or

(II) the contract . . . specifies a longer acceptance period, as determined by the contracting officer to be required to afford the agency a practicable opportunity to inspect and test the property furnished or evaluate the services performed

Although Appellant only invokes the Prompt Payment Act, the Federal Acquisition Regulations, and the Prompt Payment Clause of the Camden contract contain analogous, pertinent provisions. See FAR 32.905(a) (1), and FAR 52.232-25.

For purposes of the Prompt Payment Act, we find that HUD received a proper invoice on June 25, 1995, although it was submitted by Appellant to HUD on March 1, 1995. Similarly, we find that HUD received a proper invoice on July 11, 1995, although it was submitted by Appellant to HUD On March 31, 1995. The dates that Nodine accepted the invoices for payment are the dates on which Nodine, following an extensive review of Appellant's cases, was finally able to determine the number of cases that Appellant actually completed. We find that Nodine's acceptance of Appellant's invoices comports with 31 U.S.C. § 3901(a) (4) (A) (i) because that provision of the Act deems receipt of a "proper invoice" as determinative. The evidence in this case clearly shows that Appellant's invoices were improper since they were replete with substantial and deliberate

misrepresentations, requiring subsequent review and modification. Verified portions of the two invoices were paid within 30 days after the dates on which Nodine accepted the invoices for payment, in accordance with Section 3903(a) (1) (B) of the Prompt Payment Act.

Appellant also claims that Nodine did not notify Appellant that Nodine disagreed with the number of cases billed on both invoices within seven days, as required by Section 3903(a) (7) (B) of the Prompt Payment Act. Section 3903(a) (7) (B) of the Prompt Payment Act states that:

(B) any invoice determined not to be such a proper invoice suitable for payment shall be returned as soon as practicable, but not later than 7 days, after receipt, specifying the reasons that the invoice is not a proper invoice

The record demonstrates that Nodine orally advised Appellant in early March, 1995 that he would not accept the number of cases billed on the March 1 invoice, and that Nodine orally advised Appellant in April, 1995 that he would not accept the number of cases billed on the March 31 invoice. However, it cannot be established from this record whether those conversations in which Nodine rejected Appellant's invoices took place within the seven-day time frame required by the Prompt Payment Act. Because the record does not specify the dates on which these conversations took place, we cannot find that Nodine violated Section 3903(a) (7) (B) of the Prompt Payment Act, because there is no evidence that the rejection of Appellant's invoices did not timely occur.

In any event, Appellant knew that the invoices were defective when Appellant submitted them. Waller admitted that some cases for which Appellant invoiced HUD were not completed. Because Appellant knew that it had not completed all 800 cases, Appellant knew that the number of cases billed on the invoices was incorrect. This Board has previously held that where Appellant can be charged with knowledge of defective invoices, "any technical failure by HUD to provide notice of defects or impropriety in the invoices as required by 31 U.S.C. § [3903(a) (7) (B)] is insignificant, because such notice was not required under these peculiar circumstances." *Ross Plumbing and Heating Co.*, HUDBCA No. 85-932-07, 85-3 BCA ¶ 18,478, at 92,819. Because Appellant knew that it had submitted defective invoices, any "technical failure" by HUD to notify Appellant of its defective invoices is without significance with respect to the

Government's obligation to comply with this pertinent provision of the Prompt Payment Act. Id. Consequently, we find that Appellant is not entitled to the interest penalty provided in the Prompt Payment Act.

This appeal must be, and is, DENIED.

David T. Anderson
Administrative Judge

Concur:

Jean S. Cooper
Administrative Judge

Lynn J. Bush
Administrative Judge