



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

APPELLANT'S MOTION FOR SUMMARY RELIEF GRANTED IN PART;
RESPONDENT'S MOTION FOR SUMMARY RELIEF DENIED: October 31, 2013

CBCA 2878

JANE MOBLEY ASSOCIATES, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Ralph C. Thomas III of Barton Baker Thomas & Tolle LLP, McLean, VA, counsel for Appellant.

Catherine Crow and John S. Tobey, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **McCANN**, **SHERIDAN**, and **KULLBERG**.

McCANN, Board Judge.

Appellant, Jane Mobley Associates, Inc. (JMA), has appealed the final decision of the contracting officer that found that appellant was indebted to the Government because it had over-billed for hours worked and because it owed prompt payment discounts on invoices it had submitted. Appellant contends that the contract was a firm fixed-price contract, that it satisfactorily performed and was paid the contract price, and, therefore, it did not over-bill. It further contends that it does not owe the Government prompt payment discounts. The Government's position on over-billing lacks merit. We deny both motions regarding the

CBCA 2878

2

prompt payment discount, as material facts are in dispute.

Facts

1. JMA is a Federal Supply Schedule (FSS) holder under General Services Administration (GSA, respondent, or Government) contract number GS-23F-0354P. The contract period for this contract is from May 14, 2009, to May 13, 2014. Appeal File, Exhibit 1.

2. On February 5, 2010, GSA awarded task order GS-P-06-10-GX-0012 to JMA under JMA's FSS contract for the firm fixed price of \$99,940.25. The period of performance was from February 5 to March 8, 2010. Appeal File, Exhibit 3. JMA performed this task order and was paid \$99,940.25.

3. The task order's statement of work provided:

The contractor shall provide expertise and technical support, equipment materials and supplies necessary to support the government in responding to complaints against government officials about handling of notice by current and former government employees indicating health concerns caused by toxic substances at the site of the Bannister Federal Complex.

Appeal File, Exhibit 3 at 4.

4. In an email message to JMA dated March 4, 2010, the GSA contracting officer indicated:

As discussed the Government would like to extend the current services provided by Jane Mobley Associates under task order GSP0610GX0012 for two additional months (9 March 2010 through 10 May 2010). The additional tasks the Government are [sic] requesting for Jane Mobley to perform during this time-frame are as follows.

Task 1. Organizational Crises Communication Management

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Task 2. Crisis Communication Executive Coaching

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CBCA 2878

3

Please provide a quote for these additional services. All pricing shall be in accordance with your Federal Supply Schedule contract GS-23F-0354P.

Appeal File, Exhibit 17 at 13.

5. On the same day Dr. Jane Mobley, president of JMA, responded with an email message indicating that the statement of work was enclosed and stating, "As requested, we are providing a cost for each of two months, based on the LOE [level of effort] expended in FEB 2010 and anticipated requirements. We project that March will require the LOE (hours and personnel) that equals \$76,800 under our GSA schedule rates and April the LOE that equals \$57,600." Appeal File, Exhibit 4.

6. On March 8, 2010, at 9:57 a.m., the contracting officer sent an email message to Dr. Mobley indicating that the modification to extend the period of performance for task order GSP0610GX-12 for two additional months was attached. The proposed modification increased the price for the work in the amount of \$134,400 (\$76,800 + \$57,600 = \$134,400). Appeal File, Exhibit 46.

7. The attached task order (under "Item 14. DESCRIPTION OF AMENDMENT/MODIFICATION") provided:

1. The task order period of performance is extended two additional months from March 9, 2010 to May 10, 2010.
2. Services to be performed during this extension period shall be in accordance with the attached statement of work and pricing submitted on March 4, 2010.
3. The contract price is increased by \$134,400.00 from \$99,940.25 to \$234,340.25.

8. At 11:11 a.m. that same day the contracting officer sent an email message to JMA instructing JMA to disregard the modification, stating, "I need to make a few updates and will forward you the updated copy for review and signature at that time. In addition, I need to discuss a few items with you also." Appeal File, Exhibit 47.

9. At 12:54 p.m. the contracting officer sent JMA the revised modification, PS01, by email. Appeal File, Exhibit 49. The revised modification added the following language to Item 14:

CBCA 2878

4

4. Jane Mobley shall provide documentation upon invoicing showing the hours invoiced for during that monthly period. Jane Mobley will be paid based on the hours documented and verified for such labor category and task during that month. Monthly payment shall not exceed documented hours. If at any time services are no longer needed, the Government reserves the right to cancel services and reimburse Jane Mobley for any direct labor costs incurred prior to the cancellation. Any over-committed funds shall be de-obligated from the task order.

Appeal File, Exhibit 5 at 1. This modification was signed by both parties on March 8, 2010.

10. Page two of the modification contained the following:

SCHEDULE Continued

Item No.	Supplies/services	Quantity	Unit	Unit Price	Amount
	Accounting and Appropriation Data: PJ0F003182010.192X.06.PG1.P0820001.516.PG901.66020803. . . Cost Applied: \$134,400.00				
	(New Line Item)				
0002	Extend Period of Performance for Environmental Communications Consultant Services issued under task order GSP0610GX0012 for two additional months (March 9, 2010 through May 10, 2010). The pricing for month 1 is proposed at \$76,800; pricing for month 2 is proposed at \$57,600. . . .	1.00	EA	134,400.00	134,400.00

Pricing Option: Firm-Fixed-Price.

Appeal File, Exhibit 5 at 2 (emphasis added).

11. JMA performed the modification task satisfactorily, and during performance submitted invoices for hours it stated it worked and received payment in the amount of \$134,397.83. Appeal File, Exhibits 37, 38, 43.

12. In the contractor performance assessment report for the contract, JMA was rated excellent in the four areas of quality of product/service, schedule, cost control, and business relations. Appeal File, Exhibit 17 at 21.

CBCA 2878

5

13. Almost two years after the completion of performance, GSA's Office of Inspector General (OIG) conducted an audit of modification PS01. The report dated January 10, 2012, stated that JMA had overcharged GSA in the amount of \$32,835.77 because it had billed for more hours than it had worked. Appeal File, Exhibit 16 at 7-8.

14. In her final decision dated June 1, 2012, the contracting officer adopted the conclusions of the OIG and found that "Jane Mobley Associates is indebted to the United States of America in the amount of \$37,235.60."¹ Appeal File, Exhibit 20 at 18. She wrote:

The Contracting Officer did advise JMA that the contract type remained unchanged as firm fixed price; however, contract payment was still limited by the contract terms. . . . Jane Mobley should not have purposefully falsified the invoices of a firm fixed-price task order to reflect hours not worked during the March 9, 2010 - May 10, 2010 period in order to bill for any extra hours previously expended. In accordance with FAR 16.202-1, "A firm-fixed price contract provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract."

Id. at 16. She further noted:

[T]he task order was officially closed out in the Government's Contract Writing System on June 15, 2010. The closeout of the task order was based on the fact of physical completion and that the contractor had performed all services, and the Government had accepted these services (FAR 4.804-4 "Physically Completed Contracts"). In addition, it was based on Jane Mobley Associates' representation that submitted invoices and documentation were factual, accurate, complete, and in accordance to the terms and conditions of the task order, any task order modifications and JMA Federal Supply Schedule contract.

Id. at 14.

15. The facts relating to any applicable prompt payment discount and the reasons why such a discount was not taken at the time and whether such a discount can properly be assessed subsequently have not been established.

¹ The contracting officer's calculation of damages differs from the auditor's calculation for reasons that have not been made clear by the parties.

CBCA 2878

6

16. In a letter dated July 2, 2012, JMA timely filed its appeal to this Board.

Discussion

The parties have cross-moved for summary relief. JMA contends that the contract was for a firm fixed price, it performed satisfactorily, and it was properly paid the contract price. The Government contends that the contract was a time and materials contract and that JMA over-billed for hours it did not work.

Summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justiciable inferences must be drawn in favor of the non-movant. *Government Marketing Group v. Department of Justice*, CBCA 964, 08-2 BCA ¶ 33,955, at 167,990-91 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)).

When, as here, both parties have moved for summary relief, each party's motion must be evaluated on its own merits and all reasonable inferences must be resolved against the party whose motion is under consideration. *First Commerce Corp. v. United States*, 335 F.3d 1373, 1379 (Fed. Cir. 2003); *DeMarini Sports, Inc. v. Worth, Inc.*, 239 F.3d 1314, 1322 (Fed. Cir. 2001); *Metlakatla Indian Community v. Department of Health and Human Services*, CBCA 181-ISDA, et al., 09-2 BCA ¶ 34,307, at 169,466; *Government Marketing Group*, 08-2 BCA at 167,991 (citing *California v. United States*, 271 F.3d 1377, 1380 (Fed. Cir. 2001)). The mere fact that both parties have moved for summary relief does not impel a grant of one of the motions. *California*, 271 F.3d 1377, 1380; see also *Electronic Data Systems, LLC v. General Services Administration*, CBCA 1552, 10-1 BCA ¶ 34,316, at 169,505 (2009).

Pure contract interpretation, however, is a question of law that may be resolved on summary relief. *Electronic Data Systems*, 10-1 BCA at 169,505 (citing *P.J. Maffei Building Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed. Cir. 1984)).

Dick/Morganti, A Joint Venture v. General Services Administration, CBCA 420, et al., 10-2 BCA ¶ 34,528, at 170,274.

CBCA 2878

7

Appellant avers that there are no material facts in dispute and contends that summary relief should be granted in its favor. Respondent opposes appellant's motion on the ground that there are material facts in dispute preventing the granting of summary relief to appellant. Respondent, however, has not identified the disputed material facts that would prevent the granting of summary relief in appellant's favor. Instead, respondent has referred the Board to the parties' statements of facts and left it to the Board to identify the material facts in dispute. Respondent also cross-moves for summary relief, alleging that there are no material facts in dispute that would prevent the granting of summary relief in its favor. After reviewing the parties' statements of undisputed facts, we find that there are no material facts in dispute and that the case is ready for a decision on the merits.

The issue to be resolved here is whether the contract is a firm fixed-price contract as alleged by appellant, a form of cost-type contract as alleged by respondent, or some combination thereof as held by the contracting officer in her final decision. If the contract is a firm fixed-price contract, appellant could not have over-billed for the work, as it billed the contract price. If the contract was cost-type, then appellant could have over-billed if it billed for hours for which it did not perform. If it was some kind of combination contract, whether appellant over-billed is unclear.

The first question to be considered is whether a contract can be a combination contract, both fixed-price and cost-type. In addressing this question, we look to the concepts behind such contracts. Professors Nash and Cibinic address these concepts in their treatise *Cost-Reimbursement Contracting*:

The cost-type contract is distinctive in that the Government does not contract for the performance of a specified amount of work for a predetermined price but instead agrees to pay the contractor's reasonable costs of performance whether or not the work is completed. As a result, the cost-type contract imposes on the contractor a low risk of suffering financial losses and, on the Government, a high risk of incurring cost overruns. In other words, in a cost-type contract the Government bears most of the risk since, if contract work cannot be completed at the cost level originally estimated by the parties, the Government has to provide additional funds to complete the work. And the contractor's primary financial risk is that it is required, if the Government provides additional funding to complete performance at no additional fee.

....

CBCA 2878

8

The cost-type contract also permits the Government a great deal of flexibility in writing a broad work statement and in administering the contract to achieve the desired results. Since the contractor is reimbursed only for its expenditures and negotiated fee, the filling in of details during performance does not have the same significance it does in firm-fixed-price contracts. In firm-fixed-price contracts, each extra dollar spent comes out of the contractor's profit, while each dollar saved means an extra dollar of profit to the contractor. This places the parties in more of an adversarial role, with each seeking to preserve the profit potential of the contract. In contrast, in cost reimbursement contracting the parties have great latitude in working out and finalizing details of performance as work progresses.

John Cibinic, Jr. & Ralph C. Nash, Jr., *Cost Reimbursement Contracting* 1-2 (2d ed. 1993).

Thus, the two types of contracts are very different. The incentives are different, the risks are different, and the purposes are different. They are opposite sides of a coin. A contract cannot both maximize the risk and minimize it at the same time. It cannot both maximize profit incentive and minimize it. The Government cannot both strictly hold a contractor to the specification and also work with it to finalize the details simultaneously. Accordingly, when the Government chooses the type of contract it wishes to enter into, it can have it one way or the other, but it cannot have it both ways. The contract must be either fixed-price or cost-type.

Originally the contract was fixed-price. When modification PS01 was issued, the parties still agreed that the contract was firm fixed-price. The contract states that it is fixed-price, and the contracting officer reassured appellant that it was. Appellant performed the enumerated tasks and was paid the fixed contract price. Both parties were content until approximately two years after acceptance and close out. At that point GSA's OIG audited the contract and found that appellant had over-billed for hours worked. Only then did the contracting officer agree with the OIG and decide that appellant had over-billed. Even then, the contracting officer continued to maintain that the contract was fixed-price. After appellant appealed, the Government finally arrived at its current position that the contract was not fixed-price at all, but was a cost-type, time and materials contract, and that the parties had negotiated and agreed to such a contract type prior to signing modification PS01.²

Ordinarily, to interpret ambiguous language we look to the behavior of the parties prior to the dispute arising to see how they interpreted it. The doctrine of concurrent

² It is not known whether the contracting officer agrees with this interpretation.

CBCA 2878

9

interpretation, or contemporaneous construction, holds that great, if not controlling, weight should be given to the parties' actions before a dispute arises in order to interpret a contract. *Saul Subsidiary II Ltd. Partnership v. General Services Administration*, GSBCA 13544, et al., 98-2 BCA ¶ 29,871.

Such an examination in this case, however, is not helpful. The parties here proceeded in both ways. The contracting officer represented that the contract was firm-fixed price. Appellant performed the task at the fixed price, but also submitted invoices based on hours worked.³ Accordingly, we cannot find that the parties' actions, during performance and before the dispute arose, are determinative.

We look then to the requirements of fixed-price and time and materials contracts. In *CACI, Inc. - Federal v. General Services Administration*, GSBCA 15588, 03-1 BCA ¶ 32,106, at 158,754 (2002), we discussed the parameters of time and materials contracts:

Under the Federal Acquisition Regulation (FAR), a time and materials contract is defined as "provid[ing] for acquiring supplies or services on the basis of (1) direct labor hours at specified fixed hourly rates that include wages, overhead, general and administrative expenses, and profit, and (2) materials at cost, including, if appropriate, material handling costs." 48 CFR 16.601(a) (1997) (FAR 16.601(a)). The FAR recognizes that such a contract "provides no positive profit incentive to the contractor for cost control or labor efficiency," and states that "appropriate Government surveillance of contractor performance" is necessary to give reasonable assurance that efficient methods and effective cost controls are employed by the contractor. *Id.* at (b)(1). The FAR also requires the Government to include a ceiling price in the contract that the contractor exceeds at its own risk. *Id.* at (c).

In essence, the time and materials order falls within the broad genre of cost-reimbursement type contracts. This type of contract places relatively little cost or performance risk on the contractor. In contrast to a fixed-price contract, such a contract requires only that the contractor use its best efforts to provide the goods or services at the stated price. The contractor is entitled to be paid for its costs of performance, up to the contract ceiling, whether it succeeds in fully performing the contract requirements or not. *General Dynamics Corp. v. United States*, 671 F.2d 474, 480-81 (Ct. Cl. 1982); *McDonnell Douglas Corp. v. United States*, 37 Fed. Cl. 295, 299 (1997)

³ JMA actually billed \$2.17 less than the \$134,400 contract modification price.

CBCA 2878

10

(further observing that “the focus of a cost-reimbursement contract is contractor input, not output”). If the contractor performs work pursuant to the contract, it is entitled to be reimbursed for labor at the agreed upon rates and for materials purchased at cost. The Board has previously observed that, in certain circumstances, particularly when the appropriate level of Government surveillance is lacking, the time and materials contract format may not be best-suited to the Government’s needs. See *Midwest Maintenance & Construction Co.*, GSBICA 6228-REIN, et al., 85-1 BCA ¶ 17,716, at 88,433.

In the circumstances at hand, the modification did state that payment would be based on the hours invoiced and billed. However, virtually none of the requirements set forth in the FAR for time and materials contracts were followed. There is no evidence that the contracting officer prepared a determination and findings that no other contract type was suitable, nor did she sign it and get it approved by the head of the contracting activity as required by FAR 16.601(d)(1).⁴ In addition, the contract did not include a ceiling price as required by FAR 16.601(d)(2). Furthermore, although item 13c on the front page of modification PS01 specifically references FAR 52.212-4, which explains the consequences of exceeding a ceiling price in a time and materials contract, a ceiling price that did not exist

⁴ FAR 16.601(d) states:

(d) *Limitations.* A time-and-materials contract may be used only if—

(1) The contracting officer prepares a determination and findings that no other contract type is suitable. The determination and finding shall be—

- (i) Signed by the contracting officer prior to the execution of the base period or any option periods of the contracts; and
- (ii) Approved by the head of the contracting activity prior to the execution of the base period when the base period plus any option periods exceeds three years; and

(2) The contract includes a ceiling price that the contractor exceeds at its own risk. The contracting officer shall document the contract file to justify the reasons for and amount of any subsequent change in the ceiling price. Also see 12.207(b) for further limitations on use of Time-and-Materials or Labor Hour contracts for acquisition of commercial items.

CBCA 2878

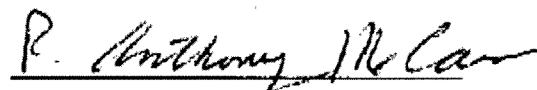
11

in this contract.⁵ Moreover, the contract modification itself states that it is firm fixed-price, and the contacting officer assured appellant that the contract modification was firm fixed-price prior to signing. She maintained this position throughout performance and through the issuance of her final decision. Accordingly, based on the overwhelming weight of the evidence in favor of a firm fixed-price contract and against a time and materials contract, we find that the contract was firm fixed-price. Thus, we find that appellant did not over-bill the Government.

Since the facts relating to the prompt payment discount have not been established we deny both motions regarding this issue.

Decision

Appellant's motion for summary relief regarding over-billing is granted; respondent's motion for summary relief regarding over-billing is denied. Both motions, as they relate to the issue of the entitlement to a prompt payment discount are denied. The appeal is **GRANTED** to the extent indicated.


R. ANTHONY McCANN
Board Judge

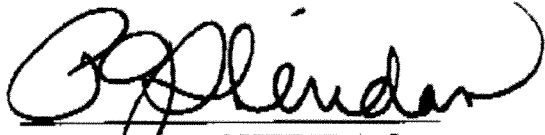
⁵ FAR 52-212.4(i)(3) (*Alternate I* (OCT 2008)) states:

(3) *Ceiling price.* The Government will 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 notifies the contractor in writing that the ceiling price has been increased and specifies 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.

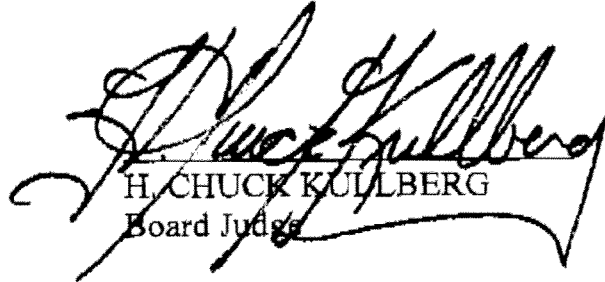
CBCA 2878

12

We concur:



PATRICIA J. SHERIDAN
Board Judge



H. CHUCK KULLBERG
Board Judge