CBCA 2716, 2012 WL 2326165 (Civilian B.C.A.)

CBCA
Civilian Board of Contract Appeals

SINGLETON ENTERPRISES
, APPELLANT,
v.
DEPARTMENT OF TRANSPORTATION, RESPONDENT.

GRANTED IN PART: June 14, 2012

Wayne Singleton, Owner of **Singleton Enterprises**, Luthersville, GA, appearing for Appellant.

Grace Reidy, Office of Chief Counsel, Federal Highway Administration, Department of Transportation, Washington, DC, counsel for Respondent.

POLLACK, Board Judge.

This appeal arises out of a contract between **Singleton Enterprises** (Singleton or appellant) and the Eastern Lands Division, Federal Highway Administration (FHWA or Government) for construction work at Chickamauga and Chattanooga National Military Park, Georgia. The dispute involves a claim by FHWA for $22,538.17, which it says it is entitled to as repayment because of Singleton's alleged failure to perform 50% of the work itself, as specified in the contract. Additionally, both parties address in their briefs the FHWA assessment against Singleton of liquidated damages. That latter issue, however, was not specifically addressed in the contracting officer's decision nor are we aware of a specific claim for remission. Nevertheless, at the close of this decision, we will briefly provide guidance.

Appellant has elected to proceed under the Board's small claims procedure. Accordingly, the decision is not precedential nor is it appealable.

Background

On August 11, 2009, FHWA awarded a contract to Singleton for a base price of $634,241.40, plus an additional $50,000, identified as being for administrative costs for the project (costed at $500 per day multiplied by 100 days). The contract was for a firm fixed price, which was determined by the use of unit prices and estimated quantities. The contract contained a provision requiring Singleton to perform on the site, with its own organization, work equivalent to at least 50% of the project work. Notice to proceed was effective October 5, 2009, with the original contract completion date set at January 12, 2010. The contract provided that the maximum time for completion of the contract was 100 calendar days.

Notwithstanding the 50% requirement, Singleton initially subcontracted substantially all the work on the project to Talley Construction (Talley). In a letter of August 24, 2009, two days before the Government awarded it the contract, Singleton accepted a proposal from Talley for $569,251.15. Talley's proposal was based on a unit price basis for the estimated quantities set out in the contract between Singleton and FHWA. Singleton's award letter to Talley provided for Talley to “provide all labor, material, equipment and supervision necessary to complete ALL WORK required for the above-referenced project.”As pointed out by FHWA, the acceptance letter also required Talley to provide a performance and payment bond in the amount of 100% of Talley's contract amount. The cost of the bonds was to be added to Talley's contract amount.

After award, the contract between Singleton and Talley was revised. According to the affidavit of Bo Murphy, Talley's project manager, the revision excluded supervision and equipment rental cost, which became the responsibility of Singleton.

In February 2010, beyond the original completion date, but prior to final acceptance, Singleton submitted a form FHWA 1775, Notice of Subcontract Award - Supplemental Information to FHWA. On that form, Singleton specified that it was subcontracting $309,510, or 48.8% of the work, to Talley. FHWA has contended that the above information was false and overstated the value of work retained by Singleton. FHWA relied in large part for its conclusion upon the agreement set out in the August 24, 2009, letter, a document it had not seen during the contract performance. FHWA also relied upon observations of its officials at the site, who uniformly concluded that, at best, the only employees on the site being paid by Singleton were the superintendents, and all physical work was being done by Talley's forces.

Based on its determination that Singleton was not performing 50% of the on-site work, FHWA proceeded to adjust appellant's contract to recover damages due to the claimed breach of the 50% requirement and alleged falsifications. FHWA calculated its damages by taking the installed quantities placed on the contract and then, instead of applying Singleton's unit prices to those quantities, applying the unit prices that had been initially proposed by Talley (and which were set out in Talley's August 9, 2009, letter). Once FHWA multiplied Talley's unit prices by the installed quantities, it deducted that result from the installed quantities times Singleton's original unit prices. FHWA then determined that the difference represented the damages it incurred due to Singleton's breach of not performing 50% of the work with its own forces. The rationale was that since Singleton did not perform the required on-site work, it did not provide the services promised and should not be paid for a unit price based on meeting that obligation.

Based on final quantities and a separate liquidated damages downward adjustment of $8900, the final contract amount, at the original unit prices plus the $50,000, would have been $609,012.15. When the Talley unit prices were substituted for those of Singleton, the rest of the calculation being the same, the final contract amount recognized as appropriate by FHWA came to $546,580.34. At the time of the calculation by FHWA, Singleton had already been paid $569,118.51, based on Singleton's original unit pricing. The Government, in recalculating the price based on Talley's pricing, essentially removed from Singleton's contract the premium (beyond Talley's prices) that the Government was paying to have Singleton perform as a prime contractor. Thus, FHWA arrived at a reduction of $22,538.17 to account for the alleged overpayment. The above amount presumes that the $8900 assessed by FHWA for liquidated damages was valid. The liquidated damages were assessed at $100 a day, rather than the contractually specified $500 a day, and were assessed for eighty-nine days starting on or about January 14, 2010. If it is ultimately determined that the liquidated damages were not justified, then the $8900 should be added to the contract and paid to Singleton. To date, Singleton has paid Talley $260,000, against the revised Talley contract. The difference between that figure and what Singleton has been paid by FHWA covers compensation to Singleton for the work Singleton has performed on the project, work primarily consisting of providing equipment, paying for on-site supervisors, coordinating the job from its home office, and providing bonding.

Singleton responded to the FHWA demand for adjustment by e-mail message of July 5, 2011. It there indicated that it was willing to accept a recalculation, but requested that it be compensated for providing performance and payment bonds and for its cost of providing a superintendent during the performance of the contract. It pointed out that under the Government's formula, if compensation was to be at Talley's unit prices, then these costs would not be reimbursed since they were costs never contemplated by Talley. For the purposes of this appeal, the Board understands that Singleton is seeking more than just the above. Singleton seeks a finding that it is entitled to extended unit prices at the price it bid, along with a finding that it either

completed 50% of the work or should be relieved of that obligation.

At the time of Singleton's response and apparently up until the filing of its appeal, FHWA has taken the position that it did not have sufficient data from Singleton to determine how much Singleton had actually paid for the bonds or what costs Singleton had paid for a superintendent. While Singleton had submitted payroll records showing it was paying the superintendent, FHWA pointed out that there were issues as to possible falsifications of payrolls, and accordingly, FHWA was not willing to rely upon them.

Without going into detail, our review of the record shows that Singleton essentially borrowed the on-site supervisors from Talley. It, however, paid them directly as Singleton employees, as evidenced by checks in the record. While FHWA points to some discrepancies in work hours for the superintendents, we need not resolve that issue here.

The record also shows that Singleton paid for the payment and performance bonds, totalling $8368. Regarding payment for equipment, Singleton claims that it ultimately paid for rental equipment costs on the job and provides an estimated cost for that of $190,056. While we do not doubt that Singleton provided equipment, it supplied to us no specific pricing to verify actual incurred equipment costs, either as to the equipment used or the rates charged.

On October 19, 2011, the contracting officer issued a decision which set out the demand for $22,538.17. While it referenced liquidated damages, such damages were not the subject of the final decision. Appellant filed a timely appeal.

Discussion

This appeal is presented to the Board as a small claim. This decision has no precedential value. In keeping with the spirit of the small claims procedure, while we set out our rationale for our decision, we do not address each and every argument made by the parties. We have, however, fully considered the briefs of both parties and the arguments made therein.

The issue before us concerns whether the Government has a right to recoup $22,538.17 from funds already paid to Singleton. The Government reasons that because Singleton failed to perform 50% of the work, the Government is entitled to re-price the contract to the prices bid by the subcontractor, Talley (who at the time of its bid was slated to do substantially all of the work). The Government arrived at its damage figure by unilaterally reducing the contract price to reflect the difference (using actual quantities) between the price proposed by Talley and the price bid by Singleton.

Before analyzing the Government's calculation of damages, we first find that Singleton did not perform 50% of the work as required, and therefore Singleton breached that obligation. Unlike FHWA, we accept that the Singleton/Talley contract was revised to remove supervision and equipment. However, even with that, we find that Singleton did not perform 50% of the work and in fact performed substantially less. As pointed out by FHWA officials, but for the contested superintendents, Singleton had no employees at the site performing physical work. Moreover, and without ruling either way as to whether equipment can be counted toward satisfying the 50% threshold, we find that even if we counted the cost of equipment, the necessary percentage for on-site work would still not be met. That is because Singleton has not adequately established the dollars it claims to have expended for equipment and, therefore, has failed to show that even if the cost of equipment was included, it would yield the needed number. The parties were told in a conference, prior to the date for submission of evidence in this proceeding, that if they intended for the Board to find in their favor as to any claimed expenditure, then they needed to provide backup for any number claimed.

Given our conclusion that Singleton failed to meet

the 50% requirement, we now turn to whether the reduction taken by FHWA is allowed and appropriate. The imposition of damages for failure to meet the 50% threshold is a matter of first impression for this Board. No cases that have been brought to our attention are directly on point, either as to the propriety of assessing damages for this particular breach or how to calculate those damages. That said, after consideration, we find that the Government, as any contracting party, has a right to the benefit of its bargain and, thus, the right to recover damages due to a breach. There is no provision in this contract which prohibits the Government from seeking damages for the breach in issue or which provides a specific remedy for this type of breach.

While damages in principle are warranted, their amount has to be appropriate. Quantification in a case such as this must take into account the particular facts and circumstances. Thus, we can see instances where failure to meet the 50% standard might well result in minimal or no damages. In this case, however, we find the circumstances warrant an assessment of damages and further find that the method used by the Government to calculate the demanded sum is reasonable and appropriate under the circumstances. The Government entered a contract where it expected Singleton to perform at least 50% of the work. It did not get what it was promised. What it got instead was the efforts of Talley, which had priced the work at a lower figure. Singleton should not be paid a premium for work that was not performed by its own forces.

While we find the methodology of the Government appropriate, we do have one disagreement with its application in this case. The Government's method is only valid as to items that were covered in the Talley pricing. To the extent that the original Talley pricing did not cover a cost element later paid by Singleton, then Singleton should be credited with that item and it should not be deducted from the payments. In this instance, bonding of $8368 is such a cost element. We find that it was not a cost that was included in Talley's initial contract with Singleton. Accordingly, taking a credit for it is not proper. In contrast, while Singleton paid for equipment rental and for supervision, we find that those items were initially included in Talley's contract and, thus, when FHWA made its calculation and adopted Talley's unit prices plus the $50,000, those cost items were accounted for. As stated by Mr. Murphy in his affidavit, supervision and equipment were items removed from Talley's revised contract. That means to us that the items were in Talley's pricing.

The Government has argued that the bonding is not payable because Singleton required Talley to provide its own bond. That argument holds no water. Regardless of whether Talley provided its own bond, Singleton had an independent obligation to FHWA to provide a bond under its name on the contract. Accordingly, any bonding by Talley does not negate an adjustment to reflect Singleton's payment of bonding costs.

In summary, based on the final quantities at Talley's initial subcontract prices, plus the administrative costs in Talley's initial subcontract, the Government is entitled to reduce Singleton's contract by $14,170 and not the $22,538.17 set out in the final decision. The difference represents FHWA's failure to credit Singleton with the cost of bonding.

Finally, as noted at the outset of this decision, liquidated damages were not the subject of the final decision, nor have we seen a specific demand for a decision as to remission. Accordingly, we have no jurisdiction to decide that matter in this proceeding. Notwithstanding that, however, we note that both parties have made arguments as to the imposition of liquidated damages. So, recognizing that we cannot issue a binding decision, we nevertheless have chosen to provide the following guidance.

The Government has stated at page 23 of its brief, “Although the Government was entitled to $500 a day for liquidated damages, according to the schedule, since the Project was substantially complete, the Government allowed itself to recoup 20% of the

liquidated damages it was entitled to ....” The Government calculated the eighty-nine days of liquidated damages from January 14, 2010 (the parties at times refer to January 12; however, for purposes of guidance, the two day difference is not material). In making that statement, the Government appears to acknowledge that the project was substantially complete at the time it began the assessment of liquidated damages. The law is clear that liquidated damages cease at the time of substantial completion. *Northern Management Services, Inc. v. Department of Agriculture*, CBCA 1009, 09-2 BCA ¶ 34,160. The reduction in amount from $500 a day to $100 a day does not change that result. While Singleton could file an appeal so as to secure a binding decision, the Board suggests that the parties would be well served to resolve the matter of the $8900 without going through that exercise.

Decision

The appeal is **GRANTED IN PART**. The Government reduction in contract payments is sustained in the amount of $14,170.

HOWARD A. POLLACK
Board Judge

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