

Office of Dispute Resolution for Acquisition
Federal Aviation Administration
Washington, D.C.

Contract Disputes of)	
)	
L&N / MKB Joint Venture)	Docket No. 12-ODRA-00625
)	
Under Contract DTFANM-10-C-00131)	

DECISION DENYING MOTION
FOR SUMMARY JUDGMENT

The Office of Dispute Resolution for Acquisition (“ODRA”) received a two-page “Motion for Summary Judgment” (“Motion”) from L&N / MKB, Joint Venture (the “JV”) on January 15, 2013. The JV bases the Motion on procedural grounds and on the merits. For the reasons stated below, the ODRA denies the Motion.

I. The Contract Dispute

The contract in question (“Contract”) obligated the JV to prepare a site, to erect an Air Traffic Control Beacon Interrogator tower, and to provide other construction related work for the Federal Aviation Administration’s (“FAA”) Alaskan Region (“Region”). *Dispute File (“DF”)* Tab A-2, Specification § 1.2. The JV asserts that the Region owes it \$137,116.12, for two “Proposed Contract Change Requests” (“PCC”), one “Contractor Change Order Request” (“COR”), an additional remobilization, and an amount described as a “unilateral deduction” relating to Modification 0002 to the Contract. *Amended Contract Dispute* at Attachment 9. The Amended Contract Dispute seeks payment for legal fees and interest. *Id.* The Region challenges entitlement to some aspects of the COR and the remobilization. *Substantive Response (“SR”)* at 9 and 10. The Region also disputes the value of the equitable adjustment(s) due to the JV for the remaining items. *Id.* at 4, 7-11.

II. Standard for Summary Decision

The ODRA's Procedural Regulation permits the ODRA to "recommend or direct" a summary decision on the entire contract dispute or a portion thereof "if there are not material facts in dispute and a party is entitled to a summary decision as a matter of law." 14 C.F.R. § 17.31(b) (2012). In connection with a summary decision, "the ODRA will consider any material facts in dispute in a light most favorable to the party against whom the ... summary decision would be entered, and draw all factual inferences in favor of that party." *Id.* at (c). Further, as the proponent of an order requiring the Region to pay its monetary claim, the JV has the burden of persuasion in this matter,¹ and therefore, also has the initial burden on its Motion to produce evidence that supports its factual allegations and shows it is entitled to summary relief as a matter of law. 14 C.F.R. § 17.31(b) (2012); *Consolidated Contract Disputes of Huntleigh USA Corporation and the Transportation Security Administration*, Docket No. 04-TSA-008 and 025 (Decision Denying Cross Motions for Summary Judgment, dated March 30, 2009, at 9).

III. Discussion

A. The Procedural Grounds of the Motion

The JV requests summary judgment based on the defective manner in which the Region filed its Substantive Response and the Dispute File. *Motion* at 1. Recognizing that the ODRA has previously addressed this matter in its letter dated January 14, 2013 ("ODRA Letter"), the ODRA denies the motion in this regard.

As explained in the ODRA's Letter, the Region's Substantive Response and Dispute File were due on January 7, 2013. The Region did not meet this deadline, as the ODRA's Letter describes:

Rather than providing one timely, definitive filing of the Response, the Region faxed its Response to the ODRA on January 7, 2013, after the ODRA closed at 5:00 PM EDT. Counsel for the Region did not sign either the Response or the Certificate of Service, and the attachments were not included.

¹ 5 U.S.C.A. § 556(d) (West 2013).

The ODRA received a signed version via fax on January 8, 2013, and the attachments arrived at the ODRA on January 9, 2013.

ODRA Letter at 1. The ODRA, on its own initiative, took necessary steps to alleviate prejudice to the JV by extending the discovery deadline for two days to account for the two-day filing delay. *Id.* at 2.

The ODRA procedural regulations do not contain a default judgment provision. *See* 14 C.F.R. pt. 17 (2012). The ODRA has discretion, however, to either adjust the schedule as necessary or to impose sanctions if appropriate. *Id.* at §§ 17.27(e) and 17.49. The ODRA exercises this discretion in a manner “conducive to justice and the proper dispatch of business.” 49 U.S.C.A. 46102(a) (West 2013).

The JV has not shown why the ODRA’s *sua sponte* extension of the discovery period has not alleviated any prejudice caused by the Region’s marginally late, piecemeal filing, nor has it shown that justice would be served by granting its motion. Accordingly, this aspect of the Motion is denied.

B. The Motion on the Merits of the Contract Dispute

The overall theme of the JV’s Amended Contract Dispute and motion is that the JV provided “forward pricing” of change order work, and then performed the work under the watchful eye of FAA officials. More specifically, according to the Motion, “the JV’s claim asserts and provides documented evidence that the FAA ordered, approved and directed all change order work based on hard dollar quotes [from the JV].” *Motion* at 1. The JV quantifies the amounts owed based on the alleged “fact that the claimed changes [sic] orders were forward priced and accepted as such by the FAA.” *Id.* The evidence in the current record before the ODRA, however, does not establish the *undisputed facts* that would support the JV’s Motion. Moreover, the Motion relies on erroneous legal theories of recovery. The ODRA, therefore, denies the Motion on all remaining grounds, as discussed below.

1. Forward Pricing of PCC's 7 and 16 Does Not Support Summary Decision

The JV's Amended Contract Dispute contains letters from the Resident Engineer that request the JV to provide proposals for PCCs 7 (as revised) and 16. *Amended Contract Dispute* at Attachments 1, 2 and 3. The same attachments also include the JV's responses, which by the JV's own description, are "forward priced" proposals containing the anticipated prices of the changes before the work was performed. *Id.*; *Amended Contract Dispute* at 2; *Motion* at 1 and 2. Regardless of whether the JV provided its forward priced proposals to the Region, the JV does not provide any form of evidence showing that a Contracting Officer accepted the forward prices in writing or even orally. Instead, the JV merely asserts that "by omission[,] the FAA provides proof there is no record of the FAA disputing [the] PCC pricing," and again asserts, "by omission[,] the FAA provides proof, and concurs with the JV, that acceptance and direction of change order work was by way of oral agreement." *Motion* at 2.

The JV's allegations, evidence, and legal theory do not support a summary decision. The clauses authorizing changes to the work require a *written order* from the Contracting Officer,² and the JV has submitted no evidence of a written modification incorporating the price into a change order. Acceptance also is not demonstrated by merely establishing that the JV performed the work after submitting a forward priced proposal because the Disputes Clause in the contract expressly requires performance to continue even when the parties *disagree* over the value of an equitable adjustment to the contract. *DF* Tab 1C at § I. Construing these facts in favor of the non-moving party – as required when ruling on summary decision motions – the ODRA necessarily concludes that the parties did not agree on an equitable adjustment amount relating to these PCCs.

Additionally, in the absence of undisputed evidence that a contracting officer accepted the JV's forward priced proposals, the ODRA finds no basis in law to grant summary decision in the JV's favor based solely on the forward priced proposals. It is well established in the field of Federal Government contracts that in the absence of an enforceable agreement, equitable adjustments for

² The contract in question contains AMS Clause 3.10.1-15, "Changes-Construction, Dismantling, Demolition, or Removal of Improvements (July 1996)," and 3.10.1 "Changes and Changed Conditions (April 1996)." *DF* Tab 1C at § I.

changes are based on retrospective pricing even when the parties had some preliminary understanding about the expected cost. As the Armed Services Board of Contract Appeals³ has explained:

Inasmuch as the Board's earlier opinion held that the "negotiated price" of \$672,067.86 was not the result of an enforceable agreement, there is no basis for its [i.e., the "negotiated price"] acceptance by the Board in its de novo proceeding as a "fair and reasonable" price.

...

The Board has followed or adopted the "retrospective" pricing approach in a number of instances. For example, in Dewey Electronics Corporation, ASBCA No. 17696, 76-2 BCA ¶ 12,146, the Board declined to adopt a "forward" pricing method and the parties' "handshake" agreement on the price which apparently had been acceptable to the ACO, and used retrospective pricing in arriving at a fair and reasonable price on the basis of actual costs and reasonable profit (at 58,419).

Appeal of Texas Instruments Inc., ASBCA No. 27113, 90-1 BCA ¶ 22,537 at 113,095-96, *rev'd on other grounds*, 922 F.2d 810 (Fed. Cir. 1990). The ODRA finds this reasoning persuasive and holds that absent a contractual agreement on a forward priced proposal, retrospective examination of costs with reasonable profit is the correct approach to determining an equitable adjustment in a fixed price contract situation. Given that the JV's forward pricing proposals do not support retrospective pricing, the ODRA denies the motion for summary decision for PCCs 7 and 16.

2. CCR 8

The Amended Contract Dispute includes CCR 8, described as follows:

COR-No. 8: On February 1, 2011 the JV submitted a cost proposal for extra and eliminated [work]. These changes were by way of oral direction by the FAA. (See Attachment No. 4) This work was performed in conjunction with the above referenced FAA change orders and was identified by the FAA as necessary for completion but not captured in the above formal requests. The agreed to cost was \$3,154.40.

Amended Contract Dispute, at 2. Attachment No. 4, referenced in the quote above, contains a spreadsheet totaling to \$3,154.40 preceding a collection of ten letters from Badger Electric.

³ The ODRA is not bound by the decisions of the boards of contract appeals, but may treat such decisions as persuasive when consistent with applicable policy, guidance, clauses, and case law under the FAA's Acquisition Management System.

Each Badger letter forwards a simple spreadsheet followed by a collection of invoices. The JV does not explain how each letter relates to a change to the contract work, i.e., by comparing the stated contract requirements with a change ordered expressly or constructively by the Contracting Officer. The ODRA also notes that the JV does not explain why some of Badger's costs contribute to the claim of \$3,154.40, while other Badger costs (that total to \$8,109) are omitted. While the ODRA could identify other controverted or omitted facts relevant to COR 8 (e.g., basis for the indirect loads, labor rates, etc.), it is clear that the JV has failed to meet its burden on the Motion to demonstrate that the undisputed facts and the law support granting a summary decision in its favor.

3. Remobilization and Credit for Truss Engineering

Like the COR 8 claim, the JV's description of its next ground of recovery is sparse. The Amended Contract Dispute states in full:

Credit for Truss Engineering: As requested by the FAA the JV provided a credit for the engineering of the building roof wood truss. (See Attachment No. 5) The credit is for -1,950.00.

Additional Mobilization: Resulting from the change order work directed by the FAA the project completion date was extended from December 2010 until March 2011 when considering punch list work activities and demobilization. The required additional mobilization efforts for men and materials (See Attachment No. 6) was agreed to by the FAA. The cost to the JV and its Subcontractor is \$6,058.50.

Amended Contract Dispute at 2-3. The record before the ODRA for each of these items – Truss Engineering and Additional Mobilization – does not explain the nature of the change(s) in question so that the ODRA can consider the estimated equitable adjustments in context. Moreover, the record contains competing estimates from the parties for the Truss Engineering, neither of which has been explained by a competent estimator or otherwise. *Compare DF Tab 15 with Amended Contract Dispute Attachment 5*. Finally, the parties do not agree that any change order work forced an additional mobilization (*see SR* at 10), and the JV has not produced or cited any evidence linking the remobilization with a change. Accordingly, material facts are in dispute, and the ODRA denies summary decision on this ground.

4. Unilateral Deduction

DF Tab 4 contains Contract Modification 0002, a bilateral modification adding \$93,718.00 to the contract value. Modification 0002 does not include a release, and to the contrary, states, “Contractor may submit a Request for Equitable Adjustment as he sees fit.” DF Tab 4. The JV now seeks \$10,263.30 in additional payments relating to this modification. *Amended Contract Dispute* at 3.

Nothing in the record before the ODRA explains bases used by either party for the estimates contained in the record. See DF Tabs A-7, and A-16 to A21; *Amended Contract Dispute* Attachment 7. Recognizing that the JV has the burden to support its motion with probative, undisputed evidence, the ODRA denies the motion for summary decision on this ground of the Amended Contract Dispute.

5. Legal Fees and Interest

Having denied summary decision with regard to every ground above, interest calculations are premature. Similarly, it is premature to consider the award of legal fees. Legal costs have been held recoverable only pursuant to the Equal Access to Justice Act, 5 U.S.C.A. §504 (West 2013). *Equal Access to Justice Act Application of Weather Experts, Inc. Pursuant to FAA Order ODR 97-25, 96-ODRA-00013 EAJA*; see also 14 C.F.R. pt. 14 (2012). If the JV prevails in the adjudication and satisfies the application requirements set forth in 14 C.F.R. Part 14, the ODRA consider the award of legal expenses.

IV. Conclusion

For the foregoing reasons, the ODRA denies the Motion for Summary Judgment in its entirety.

-S-

John A. Dietrich
Dispute Resolution Officer and Administrative Judge
FAA Office of Dispute Resolution for Acquisition

January 25, 2013
Modified April 9, 2013.