BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of	)	
	)	
GEORGE I. CLINGERMAN	)	
	)	Docket No. MSBCA 2002
	)	
Under Dept. of Natural Resources	)	
(DNR) Contract No. 94-04-003	)	
	)	

March 24, 1998

Equitable Adjustment - Attorneys Fees - Recovery of attorneys fees in non-construction contracts is limited to fees for reasonably necessary services rendered in connection with the preparation of a termination claim in the context of a termination of a contract for convenience.

APPEARANCE FOR APPELLANT: Godson M. Nnaka, Esq.
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APPEARANCES FOR RESPONDENT: Joseph P. Gill
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OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the Final Decision of the Department of Natural Resources (DNR) Procurement Officer concerning Appellant's termination claim.

Findings of Fact *

1. On March 29, 1994, Appellant, who is a contract farmer, responded to an advertisement published in the March 12, 1994 edition of the Lancaster Farming Newspaper soliciting bids to provide agricultural services involving mowing, raking, baling hauling and storage of hay and cutting of grass at Fair Hill Natural Resources Management Area.
2. On or about April 6, 1994, Respondent accepted Appellant's bid and sent a fixed price contract for Appellant's review and signature.

* For purposes of this decision, numbers are sometimes rounded to the nearest dollar.

3. Appellant applied for a loan from the Farmers Home Administration, U.S. Dept. of Agriculture, to enable him to purchase necessary equipment, hire personnel and to undertake general preparation for the performance of the contract. Appellant was assured of loan approval on the basis of the contract to be performed.
4. On May 17, 1994, Appellant signed the fixed price contract with Respondent. The Contract was to run from August 1, 1994 through July 31, 1997. Under the Contract, Appellant was required to provide all personnel, equipment, fuel, materials and supplies to rotary mow and harvest orchard grass and hay crop at Fair Hill including raking, baling and storing of the crop in the buildings at Fair Hill. Appellant was to produce bales of a size equal to 4 feet x 4 feet x 8 feet (at 1,300 pounds each, approximately). Appellant was to be paid his $18.35 per bale bid price for an estimated annual hay harvest of 6,000 bales for each of the three years of the Contract.
5. After signing the Contract, Appellant executed two promissory notes in the amounts of $133,100.00 and $31,500.00 with the Farmers Home Administration. Appellant used the proceeds of these loans to purchase equipment, supplies, and to prepare and hire personnel for the performance of the contract. Appellant performed services under the Contract for two years.
6. On July 16, 1996, Respondent terminated the Contract with Appellant for the convenience of the State.
7. After termination of the contract, Appellant filed a contract termination claim for $337,438.00 on September 9, 1996.
8. Respondent issued the agency Final Decision on Appellant's claim on March 5, 1997 and awarded $12,466.00 on the contract termination claim.

Decision

Article XXII of the contract "Termination for the Convenience of the State",[1] provides in relevant part that the "performance of work under this contract may be terminated by the State in accordance with this clause in whole, or from time to time in part, whenever the State shall determine that such termination is in the best interest of the State." It further provides in paragraph (C) that "[a]fter receipt of a Notice of Termination, the contractor shall submit to the Procurement Officer its termination claim . . ."

In determining the amount of money that may be due a contractor whose contract has been terminated for the convenience of the State there are a number of cost items that must be considered. These items may include: the cost of all work performed, i.e. operational cost or production cost; cost related to closing down the job and leaving the site; cost associated with identifying expenditures that are to be paid to the contractor which may include professional services; reasonable profit, overhead or home office expenses if not previously included; and such other costs as can be demonstrated to have resulted from the termination for convenience.

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1 The termination for convenience clause of the contract incorporates the language of the mandatory (long form) termination for convenience clause as set forth at COMAR 21.07.01.12.

Appellant is entitled to an equitable adjustment for the expenditures he incurred to produce the bales of hay which the State has received, expenditures involved in closing down his operations and vacating the site, and a reasonable profit as provided by law. From the data provided at the hearing, it is impossible to determine which costs were associated with the production of accepted bales and which expenditures were associated with closing down and vacating the site. The most accurate and fair method of calculating money that may be due the contractor for these items is to use the "total cost approach"; i.e. total cost incurred by the contractor less any payments made by the State under the terms of the contract for this period.[2]

Appellant's claim submitted to the DNR Procurement Officer has eleven numbered items that fall into the following categories:

A. Work performed but not paid, or not invoiced and not paid, including showcase bales, excess bales, and claimed reimbursement for a 1994 payment to Mr. Kenney Miller who performed certain of the work under Appellant's Contract with Appellant's acquiescence;
B. Costs incurred in preparing for contract performance;
C. Lost profits, 1996-97; and
D. Termination settlement costs.

The Respondent and Appellant were not able to agree on the amount to be paid. Thus, resolution of the termination claim is to be guided by the provisions of Paragraph (E) of the aforementioned Article XXII of the contract, which states in relevant part that if a contractor and procurement officer are unable to agree on the "whole amount" to be paid to the contractor as a result of the contract termination, "the procurement officer shall pay . . . the amounts determined . . . as follows:

> (1) for completed supplies or services accepted by the State . . . and for which payment has not theretofore been made, a sum equivalent to the aggregate price for the . . . services computed in accordance with the price or prices specified in the Contract. . .;
>
> (2) the total of:
>
> (a) the costs incurred in the performance of work terminated, including initial costs and preparatory expense allocable thereto, but exclusive of any costs attributable to supplies or services paid or to be paid for under paragraph (E)(1). . .;
>
> (b) the cost of settling and paying claims arising out of the termination of work under subcontracts or orders . . .; and

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2 Use of the total cost approach in this appeal is based on the particular circumstances presented by this contract for farming services and is not intended as an endorsement of the total cost approach as the most appropriate methodology for determining quantum.

(c) a sum, as profit, on (a) above, determined by the procurement officer to be fair and reasonable. . .; and

(3) the reasonable cost of settlement accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims. . . .

The total sum to be paid to the Contractor under (1) and (2) of this paragraph shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the Contract price of work not terminated."

Under these provisions, Appellant

> *. . . can recover compensation (not to exceed the total contract price) for the cost of contract work performed but not paid for prior to the effective date of the termination. The State is entitled to a credit for work not performed by Appellant or stated another way, Appellant cannot be paid for work [he] did not do; and with respect to work [he] did perform, such work was required to be done in accordance with the terms of the contract.*

Decker Construction Co., MSBCA 1359, 2 MICPEL ¶228(1989) at pp. 16-17, citations omitted.

We turn now to the specifics of Appellant's termination claim.

A. Completed Supplies or Services

1. Services invoiced and not paid

Appellant claimed $7,651.95 for its invoice dated July 17, 1997. This invoice was for 417 hay bales. DNR did not pay the invoice as submitted asserting that 334 bales were 4'x 4' x 7' and that the contract requires bales to be 4' x 4' x 8'.

At the hearing of the appeal it was agreed by the parties that DNR will pay Appellant the $7,651.95 Appellant seeks.

2. Services rendered, not invoiced or paid

Appellant sought payment of $30,458.06 for 608 acres mowed in 1996 based upon a per acre estimated yield of 2.73 bales and a total of 1,659 bales, at $18.35/bale. DNR agreed with the 1,659 estimated number of bales, but not with the price calculation. The $18.35 contract unit price covered the cost of four operations: mowing, raking, baling, and hauling/storing. Appellant only mowed these acres, according to DNR. The DNR Procurement Officer determined that a reasonable cost for mowing was $2.12 a bale and agreed to pay Appellant $3,519.20 for this work. The Board will not disturb this determination.

3. Supplies and inventory

Appellant requested payment of $2,964.25 for payment of supplies and inventory (general use inventory) on hand at termination. The DNR Procurement Officer agreed to pay this amount if Appellant provided invoices supporting the payments and gave DNR the supplies and inventory. At the hearing of the appeal it was determined that Appellant would keep the supplies and inventory and thus DNR is entitled to a cost credit relative to this amount in connection with the determination of Appellant's 1996 net expenses related to the termination.

B. Contract Preparation Costs

Appellant claimed as "initial and preparatory expenses" the price of all equipment purchased for the Contract in 1994 ($114,015) and 1995 ($17,665). Appellant also claimed additional miscellaneous preparation costs for 1996 ($27,115), including motel and travel.

The contract termination for convenience clause (Article XXII) allows recovery of "initial costs and preparatory expense." Initial costs and preparatory expenses are non-recurring charges at the beginning of the contract. For this contract, any such costs were incurred at its inception, in 1994. It is true that the contract as implemented contemplates several mowing seasons. However, as the Procurement Officer observed this is no different than state or federal construction contracts that begin and end each construction season and for which initial, non-recurring costs are allowed only at the contract's outset. Accordingly, the Board denies Appellant's claims for any initial and preparatory expenses incurred after 1994.

The 1994 claimed charges are for the purchase of equipment to perform the contract. The appropriate charge for equipment in a termination claim is unrecovered depreciation, not its purchase price. Nothing in the invitation for bids or the Contract indicates that the State was to pay the contractor to purchase equipment. In fact, the opposite is true. The invitation for bids stated, "The Contractor shall provide all personnel, equipment, fuel, materials & supplies" to harvest the Fair Hill hay crop. The Contract states that all non-expendable equipment, including major equipment (costing $500 or more) purchased with funds from the contract "shall be Department property," and that each such purchase "shall require prior written approval" (Article V). No such approval from DNR was requested or obtained. Thus, DNR is not responsible for the cost of purchasing Appellant's equipment.

Finally, Article XXII(E) of the contract provides that any payment for "initial costs and preparatory expense allocable thereto" may not include costs "attributable to . . .services paid or to be paid. . . ." Costs attributable to services previously paid or to be paid by the State are not allowable. In 1994, DNR paid Appellant $71,074;[3] in 1995, $109,421; and in 1996, $21,249.00. Appellant's $114,015 claim for equipment purchases is a cost that is attributable to and therefore offset by amounts paid for services under the Contract.

C. Lost Profits, 1996-97

Appellant claims $61,886 in lost profit for 1996 and $31,452 in lost profit for 1997. In this regard the Procurement Officer's Final Decision from which Appellant appeals provided:[4]

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3 In 1994, DNR also paid a third party (Mr. Kenney Miller) $30,108 to perform work under the Contract using funds allocated to the Contract. While there was extensive discussion during the hearing concerning whether or not Appellant was entitled to reimbursement of Contract funds paid to a third party for performance of some of the Contract work, the record reflects that Appellant acquiesced in this expenditure. The Board notes, however, that the third party negotiated a fee for hay raking services that was disproportionately high relative to the bid price. For the purpose of this decision, the Board need not express an opinion on the propriety of the manner in which this apparent partial termination of Appellant's Contract was handled.

4 The Board has corrected obvious typographical errors in the text of the Final Decision.

> Article XXII(E)(2)(c) allows recovery of a "sum, as profit, on (a) above, determined by the procurement officer to be fair and reasonable. . . ." Subparagraph (a) calculates the costs incurred in the "performance of work terminated. . .exclusive of costs attributable to services paid or to be paid." The costs incurred in performance of this contract attributable to services for which payment is not made under the contract's unit price are the costs of the 608 acres [Appellant] mowed but did not harvest and for supplies/inventory. Those costs are $3,519.20 and $2,964.25, respectively, for a total cost of $6,483.45.
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> [Appellant] is entitled to a reasonable profit on these costs. However, he has not provided information regarding the profit percentage bid on this contract or similar contracts he has performed. The claimed 53% profit rate for 1996 and 46% for 1997 is based upon anticipated, not actual costs; is not supported by books and records provided; and is unreasonable. A reasonable profit is 10%. On total unpaid costs of $6,483.45, the profit allowed is $648.35.
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> The claim for unearned, anticipatory profits in 1997 is not allowed under the contract and is denied.

We agree with the Procurement Officer that anticipatory profit may not be allowed and we will defer to the Procurement Officer's determination that to the extent allowable a "reasonable profit is 10%." We note that pursuant to the Board's pre-hearing Order on Proof of Costs the State's auditors, Rubino & McGeehin Chartered (R&M), determined that a profit percentage for 1996 of 7.65% would have been appropriate based on a profit percentage of 7.07% for 1994 and 8.02% for 1995. At the hearing testimony was presented which would authorize an increase in the profit percentage. For instance, it appears that Appellant and Appellant's wife performed office services in 1996 in connection with the work terminated under the Contract. The profit percentage allowed in the R&M report does not reflect consideration of certain costs that may be related to the services of Appellant and Appellant's wife.

In any event, the record reflects that Appellant has total net expenses of $38,425 for the costs incurred in the performance of Contract work terminated in 1996 exclusive of costs attributable to supplies or services paid or to be paid under the Contract unit price for completed services or for supplies acquired.[5] We will therefore allow 10% profit on the net expenses of $38,425 for a total profit of $3,843. Appellant is also entitled to the balance of $9,524 left after subtracting the payments of $28,901 for Contract services performed in 1996 from the 1996 net expenditures (expenses) of $38,425.

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5 For 1996, the year of termination, Appellant has or will receive $28,901 ($21,249 paid prior to the hearing and an additional $7,652 which the State agreed to pay during the hearing) as payment for production. According to the R&M audit 1996 gross expenditures were $41,389. From this amount $2,964 representing general use inventory was removed leaving net expenses of $38,425. The Board will accept the figure of $38,425 developed by DNR's auditors as the net expenditures to which the 10% profit percentage will be applied.

D. Termination Settlement Costs

We turn again to the Procurement Officer's Final Decision. The Procurement Officer determined relative to that portion of Appellant's termination claim relating to accounting and legal services that:

> [Appellant] has submitted a $600 claim for accounting services and a $10,000 claim for legal fees as claimed costs in connection with the contract termination. Article XXII allows recovery of the "reasonable cost of settlement accounting, legal, clerical, and other expenses reasonably necessary for preparation of settlement claims and supporting data with respect to the terminated portion of the contract. . . ." DNR will pay the $600 claim for accounting services. DNR will also pay part of Appellant's legal costs, but only those costs incurred that were reasonably necessary to submit the termination claim.

Outside of the context of attorneys fees reasonably necessary for preparation of settlement claims, in the context of a termination of a contract for convenience, the General Procurement Law only authorizes attorneys fees in limited circumstances related to the cost of filing and pursuing a claim in connection with a contract for construction. See Section 15-221.2, State Finance and Procurement Article (1997 Supp.) and COMAR 21.10.06.32. The instant Contract is not a construction contract. Accordingly, Appellant is limited to a recovery of attorneys fees incurred that were reasonably necessary for preparation of his termination claim submitted to the State on September 9, 1996. At the hearing there was certain confusion concerning what legal services were performed that related to the filing of Appellants termination claim with DNR.

Following the hearing, Appellant's counsel submitted revised billing reflecting attorneys fees and related expenses in the amount of $3,840 for services rendered up to the filing of Appellant's termination claim on September 9, 1996. The State contested such revised billing based on discrepancies therein. The Board finds that Appellant is entitled to attorneys fees and expenses incurred in preparation of the termination claim and that such assistance that the record reflects was rendered in connection with preparation of the termination claim was reasonably necessary. Due to the discrepancies in the revised billing the Board is only able to confirm legal fees and expenses related to the termination claim in the amount of $3,665 and finds Appellant entitled to $3,665 for legal fees and expenses.

The Board concurs with the determination of the Procurement Officer that Appellant is entitled to $600.00 for accounting services, notwithstanding that Appellant has only paid $150.00 of such amount to date. Accordingly, the Board finds that Appellant is entitled to $600.00 for accounting fees.

Therefore the Board finds Appellant entitled to a total amount arising out of Appellant's termination settlement claim of $17,632 derived as follows:

1996 payments by DNR ($21,249 + 7,652) =	$28,901
Expenses:	
Meals	916
Motel	1,114

Travel	508
Gross Wages(Labor)	10,125
SS & Med. Taxes	774
Workers Comp.	860
Fuel	2,114
Parts & Supplies	6,516
Equipment and Liability Ins.	1,308
Baler Twine	1,895
Misc.	446
Fuel to Move Equipment	539
Subtotal	$27,115
Depreciation	11,395
Cost of Money	2,425
Other Adjustments	454
Total Expense	$41,389
Less: General Use Inventory	(2,964)
Net Expenses	$38,425
Profit @10%	3,843
Subtotal	$42,268
Legal Fees	3,665
Accounting Fees	600
Total Adjustment for Legal & Accounting Fees	$ 4,265
Subtotal	$46,533
Less: Amount Paid	(28,901)
1996 Balance, Legal & Accounting Fees	$17,632

Accordingly, Appellant is entitled to an equitable adjustment of $17,632. However, DNR is entitled to a credit of $422.00 representing payment to Appellant for work involving show case bales which Appellant did not actually perform.

Appellant requests pre-decision interest. The Board declines to award pre-decision interest. The record does not reflect that DNR should have known that Appellant was entitled to an equitable adjustment and the amount thereof prior to the issuance of this decision. See Section 15-222, State

Finance and Procurement Article.

The matter is remanded to DNR for appropriate action.

Wherefore, it is Ordered this 24th day of March, 1998 that Appellant is entitled to an equitable adjustment of $17,632 and the matter is remanded to Respondent for appropriate action.

Dated: March 24, 1998

Robert B. Harrison III
Chairman

I concur:

Candida S. Steel
Board Member

Randolph B. Rosencrantz
Board Member

Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

(1) the date of the order or action of which review is sought;
(2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
(3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2002, appeal of George I. Clingerman under Dept. of Natural Resources Contract No. 94-04-003.

Dated: March 24, 1998

Mary F. Priscilla
Recorder