

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

APPELLANT'S MOTION FOR PARTIAL DISMISSAL OR SUMMARY RELIEF DENIED: June 4, 2001

GSBCA 15467

GE CAPITAL INFORMATION TECHNOLOGY
SOLUTIONS-FEDERAL SYSTEMS,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

David S. Cohen and John J. O'Brien of Cohen Mohr LLP, Washington, DC, counsel for Appellant.

Michael J. Noble, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **HYATT**, and **WILLIAMS**.

WILLIAMS, Board Judge.

In this appeal, GE Capital Information Technology Solutions-Federal Systems (GECITS-FS) challenges the General Services Administration's (GSA's) decision that it failed to pay portions of the Industrial Funding Fee (IFF) owed under its GSA schedule contract. This matter comes before the Board on appellant's motion for partial summary relief or in the alternative for partial dismissal. Appellant seeks summary relief or dismissal as to those portions of respondent's claim which seek unpaid IFF payments for the periods April 1, 1996, through December 31, 1998, and April 1, 1999, through and including the conclusion of appellant's contract on or before May 22, 2000.

As grounds for this motion, appellant states that respondent's claim for unpaid IFF has no support for most of the period that it purports to cover. According to the final decision and its supporting analysis, respondent examined appellant's sales records for the first quarter of 1999 and concluded that appellant owes IFF for that period. Based upon the extrapolation for this single quarter, respondent further concluded that appellant must owe unpaid IFF for

prior periods which go back to the commencement of appellant's schedule contract on April 1, 1996, and for subsequent sales under that contract. GECITS-FS argues that respondent has no basis for claiming that appellant failed to pay IFF other than for the first quarter of 1999.

Respondent contends that summary relief is not appropriate because there are genuine issues of material fact in dispute and that dismissal is not warranted because, for purposes of the motion, the allegations must be construed in its favor.

We understand that those portions of the Government's claim and the contracting officer's final decision which conclude that the IFF was underpaid are at present based upon extrapolation of the Government's findings for one other quarter, some samplings, and anecdotal evidence, rather than a fully informed factual predicate. While this basis would likely be insufficient for an ultimate ruling in the Government's favor, neither summary relief nor dismissal is warranted at this early juncture of these proceedings. There has been no discovery and there are genuine issues of material fact. The record is inadequate to support judgment for appellant as a matter of law. Dismissal for failure to state a claim is only warranted if it appears beyond doubt that the claimant can prove no set of facts which would entitle it to relief. Such is not the case here. The Government has alleged that appellant underpaid the IFF during periods when it was supposed to be paying the IFF on certain sales. If the Government proves such underpayment, it could prevail.

Background

On or about March 31, 1995, GSA awarded to Bohdan Associates, Inc. contract number GSOOK95AGS. Appeal File, Exhibit 1 at 1. The contract was a multiple award schedule (MAS) contract for general purpose commercial automatic data processing equipment, software, maintenance and repair of hardware, and training. *Id.*, Exhibits 1 at 35, 9 at 907-08, 12 at 958.

Originally, the contract was to run from April 1, 1995, through March 21, 1996. Appeal File, Exhibit 1 at 2. The contract was subsequently extended on three occasions, the last extending the contract period through March 31, 2002. *Id.*, Exhibits 5 at 301, 7 at 536, 29 at 1054. The contract number was subsequently renumbered to GS-34F-3013D and the contractor's name was changed from Bohdan Associates, Inc. to GECITS-FS. Appeal File, Exhibits 5 at 304, 11 at 949, 952-53.

On June 19, 1996, the contract was modified to include a requirement that GECITS-FS pay to GSA an IFF to cover GSA's costs in operating the Federal Supply Schedules Program by incorporating clause 552.238-77. This clause states in relevant part:

- (a) Contractors shall pay the Federal Supply Service, GSA, an industrial funding fee (IFF) at the end of each contract quarter. The IFF shall be remitted at the same time the GSA Form 72A, Contractor's Report of Sales, is submitted under clause 552.238-72. The IFF equals 1% of total sales reported on GSA Form 72A. The IFF reimburses the GSA Federal Supply Service for the costs of operating the Federal Supply Schedules Program and recoups its operating costs from ordering

activities. Offerors should include the IFF in the prices submitted with their offer. The fee will be included in award price(s) and reflected in the amount charged to ordering activities.

....

- (d) Failure to submit sales reports, falsification of sales reports, and/or failure to pay the IFF in a timely manner may result in termination or cancellation of this contract. Willful failure or refusal to furnish the required reports, falsification of sales reports, or failure to make timely payment of the IFF constitutes a cause for terminating the contractor for default under FAR [Federal Acquisition Regulation Clause] 52.249-8, Default (Fixed Priced Supply and Service).

Appeal File, Exhibit 7 at 655-56; see also id., Exhibit 29 at 1087-89.

With respect to GECITS-FS' reporting requirements vis-a-vis GSA Form 72A, the contract, as amended, stated:

- (a) Contractors shall furnish quarterly the dollar value (rounded to the nearest whole dollar) of all sales under the contract during the preceding 3-month period to include any partial month. A separate report for each National Stock Number (NSN), Special Item Number (SIN), or subitem shall be prepared and submitted, unless otherwise specified, on GSA Form 72A.

....

- (c) The Government reserves the right to inspect, without further notice, such records of the Contractor as pertain to sales under any contract resulting from this solicitation. Willful failure or refusal to furnish the required reports, or falsification thereof, shall constitute sufficient cause for terminating the contract for default under FAR 52.249-8, Default (Fixed Price Supply and Service).

Appeal File, Exhibit 5 at 332 (Contractor's Report of Sales); see also id., Exhibit 29 at 1080-81 (modifying clause).

The contract authorized GSA to examine the contractor's records regarding contract compliance, as follows:

The Contractor agrees that the Administrator of General Services or any of his duly authorized representatives shall . . . have access to and the right to examine any books, documents, papers, and records of the Contractor involving transactions that relate to this contract or compliance with any clauses thereunder.

Appeal File, Exhibit 1 at 70; see also id., Exhibits 7 at 635, 29 at 1084.

On September 15, 1998, the GSA Office of Inspector General (OIG) issued its findings from a preaward audit conducted pursuant to a proposal that the contract be extended to cover the period from April 1, 1999, through March 31, 2002. Appeal File, Exhibit 14. The OIG reviewed sales data from GECITS-FS database covering the period October 1, 1997, through March 31, 1998. Id. Of sixty-five transactions reviewed, nine (18.8%) were determined to be miscoded as non-schedule purchases, resulting in an underpayment of the IFF. Id. Additionally, the OIG reported that a GECITS-FS representative stated that if a Government customer did not reference the contract in placing an order, the order would not be recorded as a contract sale. Id. at 1010. The OIG recommended that the contracting officer direct GECITS-FS to calculate the IFF monies owed GSA and provide the supporting documentation. Id.

On November 17, 1999, the GSA Administrative Contracting Officer's (ACO's) Industrial Operations Analyst (IOA) performed an audit visit at GECITS-FS' Gaithersburg, Maryland, facility. Appeal File, Exhibit 16. He provided GECITS-FS with six Government purchase orders known to have been placed against the contract and then reviewed the orders, invoices, and data sheets to determine whether IFF monies were owed and had been paid. Id. The IOA determined that GECITS-FS owed and had not paid IFF monies on two of the six orders, a Federal Energy Regulatory Commission order dated February 2, 1999 (\$48,320), and a Department of Transportation order dated March 19, 1999 (\$32,928). Id. When asked to explain the errors, GECITS-FS' explanation was human error which resulted in orders being recorded as open market purchases rather than contract sales.

GECITS-FS also advised that it was conducting its own review of its records and data from the first quarter of 1999. Appeal File, Exhibit 16 at 1018.

On March 28, 2000, GECITS-FS notified GSA that pursuant to paragraph G.5 of the contract, GECITS-FS was exercising its cancellation rights and terminating the contract, effective in thirty days. Appeal File, Exhibit 13 at 1007.

Subsequently, GECITS-FS reported to GSA on its review of first quarter 1999 data. Its review found that sixty-four of 4057 orders, 1.08%, were miskeyed as open market items. Appeal File, Exhibit 19.

On August 8, 2000, the IOA and another GSA employee performed a site visit to review GECITS-FS' reconciliation of its sales data for the first quarter of 1999. Appeal File, Exhibit 23 at 1037, 1040. Based on this review, GSA determined that the total amount of underreported sales of this period was \$2,832,349, or an error rate of 32.9% on total sales. Id., Exhibit 26 at 1047. GSA determined that in its view GECITS-FS was mistakenly treating verbal Government credit card orders for contract items as open market sales and other sales as open market where there was no annotation of the contract number. Id. Five purchase orders which had been classified as items not on the contract were reviewed, and GECITS-FS subsequently conceded that two of the five orders were covered by the contract. Id., Exhibits 23 at 1038, 24 at 1043.

On September 28, 2000, the ACO issued a final decision finding that GECITS-FS owed an estimated amount of \$741,287.20 in unpaid IFF monies for the period from April 1,

1996, to June 30, 2000. Appeal File, Exhibit 28 at 1052. This estimate was based upon the following analysis of underreported sales by GSA's IOA:

The OIG Preaward Audit report # A80924/F/3/X98151 dated 9/15/98 indicated that 9 of 65 sales transactions reviewed were determined to be improperly identified by GE [CITS-FS] as GSA MAS sales. **These findings represent 13.8% of underreported sales based on a review of these 1999 sales records.**

The IOA visit report dated 3/2/00 indicated that GE [CITS-FS] had improperly identified 2 of 6 purchase orders. **These findings represent 33.3% of underreported sales based on a review of these 1999 sales records.**

GE [CITS-FS] performed an internal audit of sales for the period of 1/99 - 3/99 to evaluate the extent of their improper identification of sales. The results of this audit were reviewed by the IOA on 8/8/00.

GE [CITS-FS] "limited" its review to a query of sales that were classified as code "02" (Open Market) in their accounting database. **It is unknown if other classification codes that are utilized to track customer sales may also contain miscoded GSA items.** Example: GE [CITS-FS] utilizes code "03" to identify GSA sales and code "06" to identify NIH [National Institutes of Health] sales. GE [CITS-FS] did not evaluate the other customer codes for any possible errors.

The contractor provided data indicated that the total code "02" sales during this period [were] \$1,834,410.12. **[Its] review indicated that \$170,139 was determined to be improperly identified and should have been reported as a GSA sale.**

The adequacy of GE [CITS-FS'] review was evaluated by the IOA and the following discrepancies were noted. The contractor data indicated that \$209,367.70 of Government sales was considered non-GSA because the transactions were verbal and payment was made by credit card. The contractor data indicated that \$47,927.70 of Government sales was non-GSA because the purchase orders did not have a contract number annotated. The contractor data indicated that \$1,406,410.12 was non-GSA because the items were not on contract.

A sample of 5 orders pertaining to sales classified as non-GSA (Not contract Item) was reviewed. 4 of 5 [of] the orders selected had the GSA contract number GS-35F-3013D documented on the order. **This sample represented an 80% error with GE [CITS-FS'] classification of these type sales.**

A current sales query of all contract sales (Code 03) in the accounting database system for the period of 1/1/99 - 3/31/99 was conducted. This query reflected total contract sales of \$8,614,216. The original reported sales by the

contractor for this period was \$7,334,429. **A discrepancy of \$1,279,787 dollars in additional underreported sales was noted.**

Due to the limited access and availability to all sales documentation, the following underreporting and improper identification of open market sales for this reported period is determined to be the following estimate.

The contractor current database indicated that a total of \$8,614,216 dollars should have been reported for the period of 1/1/99 - 3/31/99. This represents an underreporting of **\$1,279,787**. The open market sales data reflected \$1,834,410.12. Of these sales, GE [CITS-FS] considered:

- (1) **\$209,368** open market based on verbal placement of order,
- (2) **\$47,927** as open market because of no annotation of contract number,
- (3) \$1,406,410 as open market non contract items (Findings reflect 80% to be GSA sales or **\$1,125,128**),
- (4) **\$170,139** was considered improperly classified.

The total underreported sales for this period is considered \$2,832,349 dollars ($1,279,787 + 209,368 + 47,927 + 1,125,128 + 170,139$). This estimate reflects a 32.9% error with underreporting of sales for this period ($\$2,832,349$ -underreported divided by $\$8,614,216$ -total sales). This number is . . . consistent with the original IOA findings that were noted in the 3/2/00 report.

The total sales reported under this contract for the period of 4/1/96 - 6/30/00 was \$224,632,485 Dollars. Based on an estimated underreporting error rate of 33%, it can be determined that **GE [CITS-FS] may have underreported sales by \$74,128,720 dollars with an additional IFF owed of \$741,287.20.**

Id.

Discussion

We first address appellant's motion to the extent it seeks partial dismissal of the claim. There is ample precedent to guide us. In the case of Conley v. Gibson, the United States Supreme Court stated: "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. 41, 45-46 (1957). Our appellate authority has ascribed to this guidance. In Bradley v. Chiron Corp., 136 F.3d 1317, 1322 (Fed. Cir. 1998), the Court of Appeals for the Federal Circuit recognized: "The dismissal of a claim under Rule 12(b)(6) is proper only when, on the complainant's version of the facts, the premises of a cognizable claim have not been stated."

Appellant argues that the Government's allegations of both entitlement and quantum are unsupported. Appellant points out that for the period of almost three years for which the Government is alleging an underpayment of the IFF, the Government has not performed an audit or a full review of appellant's records sufficient to ascertain whether or to what extent

the IFF has been underpaid. Rather, based on its audit of the first quarter in 1999, concluding that there was a 33% underpayment rate for that time frame, the Government concluded that this same rate of underpayment "may" apply to every other quarter between April 1, 1996, and January 30, 1999. The Government has pointed to an additional period between October 1, 1997, through March 31, 1998, in which it determined that nine out of sixty-five transactions were problematic.

The Government asserts that it has sufficient basis for its claim and notes that appellant's representative admitted that if a customer did not reference the contract in placing an order, the order would not have been recorded as a contract sale triggering the IFF. Further, appellant admitted that human error was responsible for recording some orders as open market purchases rather than contract sales.

Given the procedural posture in which claims under the Contract Disputes Act (CDA) arise, we look to the contracting officer's final decision and supporting analysis. We recognize that the CDA does not impose the same strictures on the Government as it does on contractors for submitting and certifying a claim. 41 U.S.C. § 605(a) (Supp. V 1999). The CDA provides little guidance as to what constitutes a valid Government claim. The CDA states only that "[a]ll claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. . . ." *Id.* The CDA further requires that "[t]he contracting officer . . . issue his decision in writing, and . . . furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided [under the CDA]. . . ." *Id.*

Our appellate authority has recognized that any contested claim should be evaluated in terms of the FAR definition of a claim, the relevant contract language, and the facts of the case. *James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1542 (Fed. Cir. 1996) (citing *Reflectone Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (in banc)). Section 33.201 of the Federal Acquisition Regulation, 48 CFR 33.201 (2000), defines "claim" as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. . . ."

Here, the Government's claim for unpaid IFF satisfies these fundamental requirements. Although the amount claimed is admittedly an estimate based on extrapolation, the Government has stated a claim for a sum certain. *Cf. Heritage Reporting Corp. v. General Services Administration*, GSBCA 10396, 92-1 BCA ¶ 24,740 (Board denied motion to dismiss for failure to certify claim based on estimate).

Summary relief, the Board's analogous procedure to summary judgment in court, is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. In considering motions for summary relief, the Board draws all reasonable inferences in favor of the non-movant. *Vehicular Technologies Corp. v. Titan Wheel International, Inc.* 212 F.3d 1377, 1380 (Fed. Cir. 2000); *McKay v. United States*, 199 F.3d 1376, 1380 (Fed. Cir. 1999); *Executive Construction, Inc. v. General Services Administration*, GSBCA 15224, 00-2 BCA ¶ 30,977.

The moving party bears the burden of establishing the absence of any genuine issue of material fact. Jo-Ja Construction, Ltd. v. General Services Administration, GSBCA 14786, 00-2 BCA ¶ 30,964. In the instant case, appellant's motion must be denied because the issue of whether it in fact underpaid the IFF for the claimed period remains in dispute. Appellant asks the Board to conclude that the Government's evidence will necessarily be insufficient to meet its burden of proving entitlement because of the flawed methodology of proving its claim which GSA articulated in its contracting officer's final decision and underlying analysis, i.e., extrapolation of underpaid IFF based upon the first quarter of 1999. While the methodology underlying the Government's claim may well be insufficient to warrant granting the claim, the use of this methodology to estimate GSA's claim does not warrant entering judgment against the Government prematurely. As we recognized in Jo-Ja:

Appellant has not shown that respondent cannot marshal sufficient competent evidence at the hearing to sustain its burden of proof; the Board has de novo review and the evidence on the motion is not fully developed. It is well established that a tribunal should deny summary judgment until the facts have sufficiently developed to enable it to reasonably apply the law. E.g., NLRB v. Smith Industries, Inc., 403 F. Supp. 580 (S.D.N.Y. 1980) (final decision should be postponed until it can be founded on a more complete factual record).

00-2 BCA at 152,793.

Furthermore, a dispute concerning the sufficiency of the evidence is itself a genuine issue of material fact precluding the award of summary judgment. Jo-Ja, 00-2 BCA at 152,793 (citing, cf., Johnson v. Weinberger, 388 F. Supp. 628 (D.C. Colo. 1974) (presence or absence of substantial evidence is genuine issue of material fact)); see H. G. Properties v. General Services Administration, GSBCA 15219 (Mar. 30, 2001) (summary relief is properly denied when it appears that further development of the record is needed); Griffin Services, GSBCA 11171, 91-3 BCA ¶ 24,156, at 120,873; cf. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) ("Nor do we suggest that the trial courts should act with other than caution in granting summary judgment, or that the trial court may not deny summary judgment where there is reason to believe that the better course would be to proceed to a full trial."); Weight Watchers of Quebec, Ltd. v. Weight Watchers International, Inc., 398 F. Supp 1047 (E.D.N.Y. 1975) ("However fragile plaintiff's claim may appear, summary judgment is not designed to weed out dubious claims, but only those with no basis in material fact.")).

Here, the Government's claim has some basis in material fact, i.e., the Government's determination that for one quarter appellant did underpay the IFF and its belief based upon spot checks and the statements of a representative of appellant that appellant failed to designate certain transactions as schedule buys subject to the IFF.

Decision

Appellant's motion for partial dismissal or summary relief is **DENIED**.

MARY ELLEN COSTER WILLIAMS
Board Judge

We concur:

ANTHONY A. BORWICK
Board Judge

CATHERINE B. HYATT
Board Judge