

**Board of Contract Appeals**  
General Services Administration  
Washington, D.C. 20405

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MOTION FOR SUMMARY RELIEF GRANTED IN PART  
AS TO ENTITLEMENT: December 13, 2002

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GSBCA 15588

CACI, INC. - FEDERAL,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Judith B. Kassel, Deputy General Counsel of CACI International, Inc., Chantilly, VA,  
counsel for Appellant.

Robert T. Hoff, Office of General Counsel, General Services Administration,  
Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman) **BORWICK**, and **HYATT**.

**HYATT**, Board Judge.

CACI, INC. - FEDERAL (CACI) has appealed the deemed denial of its claim for \$141,589.50 under Federal Supply Service (FSS) information technology contract number GS-35F-4483G. CACI has filed a motion for summary relief, asserting that it is entitled to prevail as a matter of law. Respondent opposes the motion. For the reasons explained below, we find that, as a matter of law, CACI is entitled to be paid for services and materials provided under this time and materials contract, but that GSA is also entitled to discovery to probe the validity of its position that CACI may have billed for services that were not provided.

Background

1. In March 1997, GSA and CACI entered into FSS contract number GS-35F-4483G. The contract was for general purpose commercial information technology software and services. Appeal File, Exhibit 11. In an amendment 4 to the contract, covering the period from March 19, 1997, through March 31, 1999, special terms and conditions applicable to information technology professional services were added. Among them was a modified payments clause providing in pertinent part that "[f]or time-and-materials orders, the Payments under Time-and-Materials and Labor-Hour Contracts (Alternate I (Apr 1984)) at FAR 52.232-7 applies to time-and-materials orders placed under this contract." *Id.*, Exhibit 6 at 78.

2. On August 11, 1998, the Government of the Virgin Islands (VI) of the United States issued purchase order number 2-1654-PP-98 under CACI's FSS contract for information technology services to be provided on a time and materials basis. The total amount of the order was not to exceed \$359,171. Pursuant to the order, CACI was to analyze and implement software which had been developed by the State of New Mexico Women, Infant, and Children (WIC) Program.<sup>1</sup> The project duration was estimated to be three months. Appeal File, Exhibit 1.

3. The purpose of the order issued to CACI was to replace the current stand-alone data tracking administrative system with a personal computer (PC)-based, client-focused system running on local area networks at multiple clinic sites connected to the existing WIC wide area network. In explaining the nature of the anticipated contract effort, the statement of work advised that the VI Government had reviewed the WIC system implemented by the State of New Mexico and had determined that that system met all the key functionality requirements in some ten areas including clinic operations, vendor management, and caseload management. As such, the VI Government had decided to replace the existing system with an adaptation of the New Mexico WIC system.<sup>2</sup> To accomplish this, the VI Government sought a vendor with a GSA FSS contract to:

- (1) Provide orientation and review sessions to all WIC personnel on the State of New Mexico WIC software.
- (2) Finalize the requirements for the new Virgin Islands WIC system and map the functionality and data of the New Mexico system to the Virgin Islands WIC requirement.
- (3) Review current WIC processes in all the clinics and identify process reengineering opportunities that can be achieved through the implementation of the new system.

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<sup>1</sup> According to the statement of work issued with the order, the VI WIC Program is a one hundred percent federally funded program administered by the United States Department of Agriculture and locally administered by the VI Department of Health. The program provides nutritional food benefits (checks) and nutrition education to eligible participants. Supplemental Appeal File, Exhibit 26 at 36.

<sup>2</sup> The New Mexico software had been developed with federal funds, was in the public domain, and available to the VI free of charge.

- (4) Complete the setup of Windows NT local area networks (LAN) at all clinic sites and implement the CISCO Routers for the wide area network (WAN) solution.
- (5) Install, develop minor modifications and set-up the New Mexico WIC software at all WIC sites in the Virgin Islands.
- (6) Develop a plan to convert existing WIC data to the new system.
- (7) Develop user and procedure manuals based on the new system and the re-engineered streamlined operations.
- (8) Assist WIC in conducting acceptance testing of the software and prepare the resulting test report.
- (9) Provide technical assistance in relational database management, PC support, Network essentials, Windows NT, and Cisco routers.

Supplemental Appeal File, Exhibit 26 at 38.

The statement of work also listed nine key deliverables that were required to support the nine tasks listed above:

- (1) New Mexico WIC system implementation plan for the Virgin Islands.
- (2) Comparative analysis report on Virgin Islands WIC requirements and the New Mexico WIC system.
- (3) Detail[ed] design of WIC Wide area network.
- (4) WAN and LANs installation report.
- (5) Quality Assurance Review reports on the installation of LANs and WANs.
- (6) Module and/or database specifications for software modifications.
- (7) Data conversion plan to convert existing WIC data to new system.
- (8) Acceptance test plan and test results report.
- (9) New system user and procedure manuals.

Supplemental Appeal File, Exhibit 26 at 39.

Following award of the purchase order, CACI performed various services in preparation for implementation of the New Mexico WIC software, and submitted monthly project reports to the VI Government advising as to its progress with contract performance, beginning in September 1998. In November 1998, a letter was issued by the VI Government to CACI, extending the period of performance under the purchase order to March 1, 1999. The December 1998 report noted that CACI had "focused on trouble-shooting hardware and communications problems, testing and modifying the New Mexico WIC software modules, start[ing] user documentation for VI WIC users, and prepar[ing] the training modules for basic Windows 95 operational training." During the month of January "the project focused on modifying and testing the New Mexico WIC software modules, training of pilot users,

piloting the user documentation during training and continuing to test and troubleshoot communications problems." In February, in anticipation of the release of a new version of the New Mexico WIC software, which CACI expected would be licensed to the VI WIC, CACI reported that it focused mainly on training of pilot users, modification of user documentation, and troubleshooting of communications lines. Supplemental Appeal File, Exhibit 26, Attachments 4-6.

Beginning in January 1999, CACI submitted the five invoices for which it seeks payment in this appeal. The invoices are as follows:

<u>Invoice Number</u>	<u>Date of Invoice</u>	<u>Amount Billed</u>
000003	1/08/99	\$ 73,231.71
000004	2/02/99	\$ 19,826.91
000005	3/02/99	\$ 36,120.98

000006	4/12/99	\$ 9,805.90
000007	5/06/99	\$ 2,604.00

Appeal File, Exhibit 23. Supporting documentation for these invoices is provided in Exhibit 23.

The VI Department of Health did not pay these invoices. Correspondence authored by the Director of the VI WIC Program, in reply to CACI's inquiries concerning when payment would be forthcoming, essentially stated the position of the VI Government to be that CACI did not deliver the required services in accordance with mandatory deadlines and that no payment on those invoices would be made. Supplemental Appeal File, Exhibit 26.

When payment of its invoices was not forthcoming, CACI sent a certified claim to the Acting Commissioner of Health, Department of Health, St. Thomas, VI, with a copy to the GSA contracting officer. After attempting for some months to obtain a response to its claim, CACI filed an appeal of the deemed denial of its claim at the Board. CACI, INC. - FEDERAL v. General Services Administration, GSBCA 15588, 02-1 BCA ¶ 31,712.

### Discussion

Appellant has filed a motion for summary relief, contending that under the undisputed facts, it is entitled to relief as a matter of law. CACI maintains that it is undisputed that the contract between the two parties was a time and materials type contract and that CACI submitted invoices for services of its employees, rendered pursuant to this contract, for which it has not been paid. Appellant maintains that it is, therefore, entitled to summary relief because, as a matter of law, under a time and materials type contract, the Government is required to pay for services rendered and materials purchased and delivered, so long as the amount billed for does not exceed the ceiling set under the order.

The Government, in its response, concedes that this was indeed a time and materials contract but contends that there are material facts in dispute that would bar granting the motion, and maintains that it should not have to pay the invoices because appellant did not perform properly under the order. Principally, respondent maintains that appellant was obligated, and failed, to obtain the necessary software and updates from the New Mexico WIC Program.<sup>3</sup> In its opposition to the motion, respondent also states that appellant's personnel "were unwilling to or incapable of performing the Contract requirements, at which time all Contract activity ceased and Appellant was not paid for failure to deliver a usable product." Counsel for respondent also questions whether all of the contract activities described in CACI's monthly reports and billed for in the subject invoices were or could have been performed given respondent's understanding that at least certain of the activities listed could not have been undertaken until the New Mexico software had been acquired and installed. Finally, according to respondent, while "bills for time and materials were

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<sup>3</sup> Respondent states in its opposition to the motion for summary relief that all parties understood that the software could be acquired free of charge, and that the understanding held by all parties to the contract, as demonstrated by their conduct, was that CACI would undertake to obtain the software.

submitted . . . there was very little to show for it and a reprocurement was required to effect the tasks that Appellant has alleged it had done." In addition to arguing that there are material facts in dispute, respondent asserts that it needs further discovery, principally in the form of depositions, to fully develop all of these contentions.

Summary relief is properly granted when there is no genuine issue of material fact and the movant is clearly entitled to judgment as a matter of law; the moving party bears the burden of establishing the absence of any genuine issue of material fact. Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390 (Fed. Cir. 1987); Armco, Inc. v. Cyclops Corp., 791 F.2d 147, 149 (Fed. Cir. 1986); Jo-Ja Construction, Ltd. v. General Services Administration, GSBCA 14786, 00-2 BCA ¶ 30,964. In considering motions for summary relief, all reasonable inferences are drawn in favor of the non-moving party. Parcel 49C Limited Partnership v. General Services Administration, GSBCA 15222, 00-2 BCA ¶ 31,073; Executive Construction, Inc. v. General Services Administration, GSBCA 15224, 00-2 BCA ¶ 30,977.

Notwithstanding the factual disputes raised by respondent's counsel in opposition to the motion, this appeal is, in large part, susceptible to summary resolution. Central to this appeal is the fact that appellant maintains that it performed certain services, pursuant to a time and materials contract, for which it submitted invoices and supporting documentation. The invoices and supporting documentation are contained in the record.<sup>4</sup> Respondent's chief defenses are that 1) appellant failed to obtain a copy of the WIC software which it maintains appellant was required to do under the contract, and 2) appellant did not complete the work required under the contract. These arguments, which must be considered in the context of the nature of the time and materials contract vehicle selected by the Government, do not suffice to defeat appellant's motion. 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

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<sup>4</sup> Respondent alleges that at least some of the supporting documentation provided in appellant's supplemental appeal file, which was submitted shortly before appellant filed its motion for summary relief, had not previously been seen by respondent. CACI maintains that the supporting documentation was submitted with the invoices when they were presented in 1999. Regardless, the information is now in the record and available to respondent for review.

performance risk on the contractor.<sup>5</sup> 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) (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., GSBCA 6228-REIN, et al., 85-1 BCA ¶ 17,716, at 88,433.<sup>6</sup>

To support its position that the Government is obligated as a matter of law to pay the subject invoices, appellant relies largely on the Board's decision in E.I.L. Instruments, GSBCA 4459, 76-1 BCA ¶ 11,909. E.I.L. Instruments involved a time and materials requirements contract for the service and repair of precision instruments. The contractor was to provide supervision, labor, and materials (excluding parts) needed for the repairing, cleaning, adjusting, and calibration of Government-owned metrology instruments in response to repair orders listing the services to be performed, the time of delivery, and the maximum price for repairs. The appeal involved the Government's refusal to pay for services in connection with an order initiated by the Food and Drug Administration (FDA) for the repair of, among other items, a spectrophotometer. For eleven days, spread out over a five week period, technicians visited the facility and attempted to repair the spectrophotometer, without success. The FDA ultimately hired another contractor to fix the spectrophotometer. E.I.L., however, billed the Government for the labor spent attempting to repair the item. The Government refused to pay because the equipment had not been fixed by E.I.L.

The Board disagreed with the Government's position, pointing out that while appellant did not completely fix the machine, it did make certain repairs, and calibrated and cleaned the instrument. Thus, value was received by the Government. The Board further observed:

This was after all a time and materials contract, not a fixed price one. See Appeal of Rocky Mountain Machinery Co., ASBCA No. 3719, 56-2 BCA ¶ 1138. The Appellant was to be paid an hourly rate not to exceed a ceiling contained in a repair order for services rendered. Services were in fact rendered, and under the contract terms Appellant is entitled to payment. The

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<sup>5</sup> See FAR 15.404-4(d)(1)(ii)(B) (noting significantly lower degree of cost risk assumed by contractor under cost-reimbursable type contracts compared to risks inherent in fixed price contracts).

<sup>6</sup> FAR 16.601(b)(1) notes that such contracts "provide no positive profit incentive to the contractor for cost control or labor efficiency." See generally, John Cibinic, Jr. & Ralph C. Nash, Jr., Formation of Government Contracts 1174-75 (3d ed. 1998).

record does not indicate that Appellant exceeded the estimated 'price' of the repair order.

76-1 BCA at 57,106. In the case cited by the Board, Rocky Mountain Machinery Co., it was held that under a time and materials contract the contracting officer may not reduce payments for hours actually worked when, in his opinion, the work was performed inefficiently.

Appellant argues, persuasively, that E.I.L. is directly on point and supports its recovery of the invoiced amounts. Appellant is correct that it was not required to deliver a usable program, and that it is entitled to be paid for services performed and goods purchased and delivered under the contract even if the contract requirements were not fully met by CACI. Respondent's allegations concerning CACI's failure to acquire the New Mexico software and complete the project are simply not germane, given the legal standard governing recovery in the context of a time and materials endeavor. In essence, these disputed facts are not material to appellant's entitlement to recover. See Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd., 731 F.2d 831, 836 (Fed. Cir. 1984). The outcome is clear -- respondent would not prevail even if we were to find these facts in its favor. See Grunley Construction Co. v. General Services Administration, GSBCA 13476, 98-2 BCA ¶29,950, aff'd, 194 F.3d 1335 (Fed. Cir. 1999) (table); accord HBS National Corp. v. General Services Administration, GSBCA 14302, 98-2 BCA ¶ 29,935.

If these were the only issues raised by respondent, the motion would be granted in its entirety and the matter would end here. Respondent also maintains, however, that summary relief is premature because it requires discovery -- in particular, depositions -- to, inter alia, probe the validity of the invoices submitted by appellant for payment. Certainly, summary relief should be denied if the nonmoving party has not had an adequate opportunity to obtain discovery that is essential to its ability to oppose the motion. See, e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n.5 (1986); Celotex Corp. v. Catrett 417 U.S. 317, 326 (1986). At the same time, summary relief, when appropriate, may serve as a salutary measure to avoid unnecessary litigation expenses. Adelaide Blomfield Management Co. v. General Services Administration, GSBCA 12851, 95-1 BCA ¶ 27,514. In ruling on appellant's motion, we must balance these competing considerations.

Respondent urges that further discovery is needed to develop its position that CACI's claim is unfounded because, in the opinion of the contract administrators, at least some of the services billed for could not have been performed before obtaining the New Mexico WIC software. Appellant points out that respondent has not proffered any affidavits or identified any other evidence of record suggesting the existence of disputes as to the nature of services performed are provided to support this contention, however. Further, vague assertions of counsel that discovery is needed are generally not enough to defeat summary judgment. To avoid entry of summary judgment, the party must state with specificity why discovery is required and is expected to lead to information that would defeat the motion. See Opryland USA Inc. v. Great American Music Show, Inc., 970 F.2d 847, 852 (Fed. Cir. 1992)

(discussing Fed. R. Civ. P. 56(f)).<sup>7</sup> The Government "may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts. The . . . moving party . . . is required to state with some precision the materials he hope[s] to obtain with further discovery, and exactly how he expect[s] those materials would help him in opposing summary judgment." Simmons Oil Corp. v. Tesoro Petroleum Corp., 86 F.3d 1138, 1144 (Fed. Cir. 1996) ("It is not enough simply to assert . . . that 'something will turn up.'"); see also New America Shipbuilders, Inc. v. United States, 871 F.2d 1077, 1081 (Fed. Cir. 1989) ("A party may not simply assert that discovery is necessary and thereby overturn summary judgment when it failed to comply with the requirement of Rule 56(f) to set out reasons for the need for discovery in an affidavit.") (citations omitted).

In ruling on a motion for summary relief, or summary judgment, a tribunal should evaluate the reasonableness of the nonmoving party's position that further discovery is needed. For a request to complete discovery to be reasonable, the party should have identified, preferably in an affidavit or declaration, specific facts and information that might be determined through discovery and that would, if found, create a genuine material issue of fact to be resolved through further litigation. It is not enough to make generalized and speculative assertions through counsel that discovery might uncover something that would defeat the moving party's motion.

Again, respondent asserts, mainly through counsel, that it appears that CACI could not have performed some of the contract work it billed for. Specifically, respondent believes that certain activities billed for could not have been performed without first obtaining the New Mexico WIC software. In other circumstances, respondent's assertion, without further, more detailed support for its claim that discovery is needed to develop this aspect of its planned defense, might not have sufficed to avoid a full grant of summary relief. Again, however, this issue must be decided in the context of the time and materials contract vehicle. This type of contract is one in which the Government has a particular interest in reviewing contractor records and verifying the validity of labor hours charged. See American Business

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<sup>7</sup> The Board's Rule 108(g) is similar to the requirement enunciated under the Federal Rules of Civil Procedure:

(4) When a motion for summary relief is made and supported as provided in this rule, an opposing party may not rest upon the mere allegations or denials of its pleadings, but the opposing party's response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing that there is a genuine issue of material fact. If the opposing party does not so respond, summary relief, if appropriate, shall be entered against that party. For good cause shown, if an opposing party cannot present facts essential to justify its opposition, the Board may defer ruling on the motion to permit affidavits to be obtained or depositions to be taken or other discovery to be conducted, or may make such other order as is just.

Rule 108(g)(4) (48 CFR 6101.8(g)(4) (2002)).

Systems, GSBCA 5141, et al., 80-2 BCA ¶ 14,461. Certainly, the Government is not obligated to pay in full all invoices submitted under a time and materials contract if it has valid reason to believe that it has been overcharged. See JANA, Inc. v. United States, 936 F.2d 1265, 1270 (Fed. Cir. 1991), cert.denied, 502 U.S. 1030 (1992). Although respondent's explanation of and support for its need for discovery is minimal, it meets the threshold to avoid having the appeal granted in full. Respondent may conduct discovery to determine if there are individual items of quantum, concerning the services and materials billed for in the subject invoices, for which it was improperly charged.<sup>8</sup>

To summarize, CACI is correct that it is entitled, as a matter of law, to payment for services rendered in connection with its efforts to perform this time and materials contract. Thus, the motion is granted as to entitlement. Respondent's defense to this appeal is now limited to showing what, if any, items on these invoices do not properly reflect actual services performed in connection with the contract such that the amount of quantum should be reduced.

#### Decision

Appellant's motion for summary relief is **GRANTED IN PART**. The appeal is granted as to entitlement.

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CATHERINE B. HYATT  
Board Judge

We concur:

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STEPHEN M. DANIELS  
Board Judge

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ANTHONY S. BORWICK  
Board Judge

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<sup>8</sup> We note that further discovery concerning issues raised about who bore responsibility for obtaining the software, and on the subject of contract work that was not performed and not charged for in the subject invoices, is irrelevant.

