UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION FOR SUMMARY RELIEF
GRANTED IN PART: March 7, 2008

CBCA 145

SOUTHERN OREGON ECOLOGICAL,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Scott Matthew Hoover, President of Southern Oregon Ecological, Grants Pass, OR, appearing for Appellant.

Richard A. De Clerck, Office of the Solicitor, Department of the Interior, Portland, OR, counsel for Respondent.

Before Board Judges **GILMORE**, **HYATT**, and **POLLACK**.

GILMORE, Board Judge.

This appeal involves a dispute between Southern Oregon Ecological (SOE or appellant) and the Department of the Interior's Bureau of Land Management (BLM or respondent), under a contract for appellant to conduct surveys of fungi species in the states of Oregon, Washington, and California. SOE is a small business appearing *pro se* through its president and owner, Scott Matthew Hoover. Appellant alleges essentially that maps of the survey areas were not provided to it as required under the contract; that this was a breach

of the contract and caused unreasonable delays; and that the contracting officer (CO) failed to assist it in resolving the resulting problems. Appellant additionally contends that respondent lost specimens it sent to the laboratory, causing a delay in the payment of one of its vouchers. Appellant also alleges that the CO improperly stopped work on the project before SOE's fall 2003 surveys had been completed. Appellant filed five claims, totaling $121,000. Respondent has filed a motion for summary relief as to the five claims, contending that the material facts are not in dispute and that respondent is entitled to judgment as a matter of law. For reasons below, we deny respondent's motion for summary relief on the first four claims and grant the motion on claim five.

Background

On September 25, 2002, BLM awarded contract number HAC027Y00 to SOE. The contract was a three-year indefinite delivery/indefinite quantity contract under which respondent could issue task orders to appellant to conduct surveys of fungi under bid items 1, 3, 6, and 8, in designated areas of land in the states of Oregon, Washington, and California managed by BLM and the Department of Agriculture's U.S. Forest Service.[1] Appeal File, Exhibit 2 at 10-14. The performance time was to be identified on each task order. The minimum order required under the contract was $5000.

On September 26, 2002, BLM issued its first task order, HAD027Y01, under which appellant was to survey fungi species under the four items awarded to SOE in the states of Washington, Oregon, and California. The number of acres to be surveyed under the task order was 8681, at the cost of $18 per acre; thus, a task order price of $156,258. Appeal File, Exhibit 2 at 1-2. There was a task order modification which reduced the number of acres required to be surveyed to 7749 acres, at the reduced price of $9 per acre. With the contract requirement to survey each of the 7749 acres twice, once in the fall and once in the spring, this meant that the total acres to be surveyed under the task order was modified to 15,498, and the task order price reduced to $139,482. Appeal File, Exhibit 5 at 10. The notice to proceed under the task order was issued on October 7, 2002.

The contract required respondent to provide maps of the land areas to be surveyed. Appeal File, Exhibit 2 at 22. The contract contained maps of the areas to be surveyed. *Id*. at 62-222. There was a legend that accompanied the maps that listed the areas in each state where the fungi surveys were to be conducted and provided a corresponding map number for each area. Section C, paragraph C.5.4.9 of the contract stated:

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[1] Appellant bid on all ten items listed in the solicitation and was awarded four of the items.

> Each survey area shall receive one visit in the fall and one visit in the spring. Surveys shall occur after the fall rains and occur until permanent snow cover or freezing temperatures occur. Typically the surveys shall occur between September to mid-December, depending on elevation, latitude, and other environmental variables.
>
> In the spring, surveys shall begin around the middle of April at lower elevations and soon after snowmelt and occur into the summer depending on the local conditions and elevation.

Id. at 25.

Appellant estimated that it would be working approximately three months per season (fall and spring). Appeal File, Exhibit 5 at 9. It is not clear from the record when appellant started to conduct the fungi surveys after receiving the notice to proceed on October 7, 2002. Mr. Hoover stated in SOE's Response to the Motion for Summary Relief that the contracting officer's representative (COR), Bruce Rittenhouse, directed him at the pre-work conference not to use any of the maps provided in the contract except those for the Olympic, Six Rivers, Salem, and Coos Bay districts, because the employees who put the other maps together had no mycological experience or knowledge of fungal habitat. Also, Mr. Hoover stated that many of the maps had incorrect or missing information as to locations and elevations and some were too blurry to read. He also stated that two of the four areas that were supposed to send maps to him in the fall of 2002 took six months to send the maps. Mr. Hoover stated that the maps now in the record are a combination of old maps and the new maps received by him in the spring of 2004.

By the spring of 2004, SOE had all of the maps it needed to conduct the surveys. Complaint ¶ 6. SOE, allegedly because of the frustration encountered during performance, did not complete all of the surveys required under task order HAD027Y01. The contract provided that the "[c]ontractor shall not be required to make any deliveries under this contract after November 30, 2005." The CO, by letter dated October 26, 2005, allowed SOE until mid-December of 2005 to complete the original task order. Respondent's Motion for Summary Relief, Declaration of Madeline Small (September 13, 2007), Attachment 1.

During the three years of the contract's existence, SOE's records showed that it surveyed 9075 acres under task order HAD027Y01 and was paid a total of $82,575 for fungi

surveys.[2] Appeal File, Exhibit 5 at 11. SOE used subcontractors to perform the surveys. The Inspector General of the Department of the Interior (Inspector General) reviewed BLM's payments to SOE and determined that appellant performed throughout the entire contract period, completing at least 418 acres in fall 2002; 1482 acres in spring 2003; another 1604 acres in both spring and fall 2003; 4033 acres in spring 2004; and 1538 acres in fall 2004 and spring 2005. In fall 2003, SOE also surveyed 537 acres of fungi at historical sites at a price of $15 per acre and was paid a total of $8055. These fungi surveys were not a part of the original contract requirements. They were added under contract modification number 8. The date of this modification is not clear from the record. The task order for the work was issued on April 30, 2004, after the surveys had been conducted. *Id*. at 10.

Claim One

On November 3, 2003, appellant filed a claim with the CO alleging that it had not been provided the maps it needed to perform the surveys, and that because of this, SOE was only able to perform about 10% of the work. According to the claim, during periods of delay, SOE was still obligated to BLM, could not secure other work, and thus lost profits under this contract and potentially under other contracts SOE could have secured but for it being "on the hook" to BLM. Appellant contended that it lost $50,000 in profits and earnings because of BLM's delays in providing the required maps. This claim has been designated as "claim one." Appeal File, Exhibit 1 at 6. Appellant's claim amount is based on 180 days of delay at $300 per day of lost earnings. Although the total amount for 180 days of delay equals $54,000, SOE rounded off the claim amount to $50,000. Appeal File, Exhibit 5 at 9.

From October 2002 through November 2003, SOE was paid under vouchers submitted by SOE for work performed under the subject contract and also under two other BLM contracts, one for vascular and non-vascular plant surveys awarded on March 20, 2003, and one for noxious weed surveys awarded on June 12, 2003. Appeal File, Exhibit 5 at 6; Respondent's Motion for Summary Relief, Small Declaration, Attachments 6 and 7.

Claim Two

On December 17, 2003, appellant filed a second claim, alleging that SOE was prevented from performing the contract because of BLM's breach, and asked that the CO be

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[2] The Inspector General's Report states that in addition to SOE's receipt of $9 per acre for surveying 9075 acres, SOE's records show that it received a lump sump payment of $900 for fungi surveys it conducted in the fall of 2002. Appeal File, Exhibit 5 at 11.

removed from the contract for failing to oversee BLM's performance. Appeal File, Exhibit 1 at 5. No monetary amount was cited in this claim. On July 10, 2005, appellant asserted that this second claim was in the amount of $9000 based on thirty days of delay at $300 per day.

Claim Three

On December 18, 2003, the CO issued a stop-work order under the Suspension of Work clause of the contract. Appeal File, Exhibit 2 at 50-51. The stop-work order is not in the record. Thus, we do not know how long BLM ordered the work to be suspended. It appears, however, that in April 2004, SOE proceeded with the surveys. On February 2, 2004, SOE filed claim three for lost profits arising from the stop-work order. The claim document is not in the appeal file, but the Inspector General's report states that the February 2, 2004, claim was amended on April 16, 2004, and indicated appellant was claiming that there were forty days of delay at the rate of $300 per day of lost profits, or a total claim of $12,000. Appellant contends that the weather was conducive to performing work past December 18 and that the contract gave appellant, not the CO, the discretion to decide when to begin and stop work. Respondent contends that the stop-work order was proper under the Suspension of Work clause, the contract states that work sites would generally be accessible until around mid-December, and the CO had the discretion to issue a stop-work order if it believed such an order to be in the best interests of the Government. Section I, Paragraph 52.242-14 of the contract, entitled Suspension of Work, provides:

> (a) The Contracting Officer may order the Contractor, in writing, to suspend, delay, or interrupt all or any part of the work of this contract for the period of time that the Contracting Officer determines appropriate for the convenience of the Government.
>
> (b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted (1) by an act of the Contracting Officer in the administration of this contract, or (2) by the Contracting Officer's failure to act within the time specified in this contract (or within a reasonable time if not specified), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption, and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent that performance would have been so suspended, delayed, or interrupted by any other cause including the fault or negligence of the Contractor, or for

> which an equitable adjustment is provided for or excluded under any other term or condition of this contract.

Appeal File, Exhibit 2 at 50.

Claim Four

On July 11, 2005, appellant filed claim four for interest under the prompt payment provisions of the contract, allegedly stemming from a six-month delay in BLM's making payments on an invoice received by respondent on April 30, 2004. In its claim, SOE asked BLM to calculate the interest because it did not know the formula BLM used to calculate interest. Respondent's Motion for Summary Relief, Small Declaration Attachment 4. The delay in payment allegedly stemmed from the fungi laboratory's misplacement of the specimens Mr. Hoover sent to the laboratory for testing. Respondent sent Mr. Hoover's initial invoice back to him, stating that the contract work to which the invoice applied had not yet been approved or priced and that appellant had been told by the CO on February 13, 2004, and in contract modification number 4 dated April 13, 2004, that documentation should be sent to the CO at P.O. Box 2965, Portland, Oregon. The work to which the invoices applied was added to the contract by modification number 8, the date of which is unclear in the record. The task order (HAD027Y02) ordering the work was dated April 30, 2004, and issued after the work was performed. The laboratory eventually found the specimens on June 17, 2004. Respondent's Motion for Summary Relief, Small Declaration, Attachment 5. It was not until August 18, 2004, that SOE was told that it could submit an invoice for the work. The CO advised appellant by letter dated September 13, 2004, that appellant was solely responsible for the delay in processing the invoices because it had not properly marked the specimens and had not sent information according to instructions given earlier by the CO. *Id*. Respondent, in its motion for summary relief regarding claim four, does not argue that the facts are undisputed and that it is entitled to judgment as a matter of law. Respondent argues instead that this claim is not properly before the Board because appellant did not state a "sum certain" in its claim to the CO. Respondent's motion with regard to claim 4 is more in the nature of a motion to dismiss for failure to present a proper claim to the CO. We will, thus, treat it as a jurisdictional motion rather than a motion for summary relief.

Claim Five

It appears that at some point near the end of the spring 2003 season, the COR discussed with Mr. Hoover deleting work under the original contract and adding fungi surveys at certain historical sites to start in the fall 2003. The original work was never deleted from the contract by the CO. The proposed survey work at historical sites was never added to the contract by the CO. The CO had issued neither a task order for the work nor a

notice to proceed with the work. Also, there had been no agreement on the number of acres to be surveyed or the price of the work. It appears that Mr. Hoover proceeded with the proposed work in the fall of 2003 on verbal authorization from the COR. Section G, paragraph G.3.1. of the contract provides that:

> The COR's authorities and responsibilities are defined in the COR's Designation Letter. The COR is authorized to clarify technical requirements, and to review and approve work which is clearly within the scope of work. The COR is NOT authorized to issue changes pursuant to the changes clause or to in any other way modify the scope of work.

Appeal File, Exhibit 2 at 34.

SOE had conducted 537 acres of fungi surveys at historical sites when the CO stopped the work and told SOE to survey the work required under the original task order. The CO, however, agreed to pay Mr. Hoover for the surveys already conducted. SOE was paid $8055 on September 7, 2004, at the rate of $15 per acre under a modification to the contract issued after the 537 acres had been surveyed. Mr. Hoover, by letter to the CO dated July 11, 2005, which has been designated as claim five, stated as follows:

> The purpose of this letter is to assert a "claim" within the meaning of the contract HAC027Y00. Southern Oregon Ecological alleges that the BLM's past breach of the contract as stated in claim one dated October 29th, 2003 and further negligence due to the illicit/inappropriate modification to the contract in the spring of 2003 by the C.O.R. Bruce Rittenhouse that reduced the number of acres from the original 8,800 acres for spring and fall surveys to 537 acres total survey has resulted in further damages for the spring 2004 through fall 2004 survey seasons. The value of the claim has been conservatively figured at $50,000 for lost profits and earnings, caused directly by the failure of your office to live up to its half of our agreement and by the contracting officer's failure to properly enforce the contract requirements to monitor the contract as laid out in memorandum (1510(951)) dated October 7th, 2003.[3]

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[3] This is one of the three claim letters SOE submitted to the Department of Interior Board of Contract Appeals (IBCA) on April 27, 2006. It is not included in the appeal file. This case was originally docketed at IBCA. On January 6, 2007, pursuant to section 847 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3391, the IBCA was terminated and its cases, personnel, and other resources were transferred to the newly-established Civilian Board of Contract Appeals

Under this fifth claim, SOE computed its lost profits and earnings based on 180 days at $300 per day. Appeal File, Exhibit 5 at 9.

Discussion

Summary relief is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). "Only disputes over facts that might affect the outcome of the case under governing law will properly preclude the entry of summary judgment." *Id.* at 248. The moving party has the initial burden of informing the court of the basis for its motion and identifying those portions of the pleadings, depositions, affidavits, admissions, and answers to interrogatories, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The non-moving party is required to point to "specific facts showing that there is a genuine issue for trial." *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)). In considering summary relief, the court will not make credibility determinations or weigh conflicting evidence. *Anderson*, 477 U.S. at 249. "All reasonable inferences and presumptions are resolved in favor of the non-moving party." *Id.* at 255.

Claims One and Two

In claim one, SOE alleges, in essence, that (1) the contract required respondent to provide the maps needed to conduct the surveys; (2) the maps provided in the contract documents were not adequate for conducting the surveys; (3) the COR told SOE not to use certain maps and that corrected maps would be forthcoming; (4) Mr. Hoover, SOE's president, was given the names and numbers of various persons to contact to get the maps, and that the response times to his requests were slow; and (5) the CO would not assist him in resolving the problems and told him just to file a claim. Respondent contends that the maps appellant needed for the surveys were provided with the contract documents, that they were adequate, and, if there were any problems, that they occurred because Mr. Hoover did not organize his work in a timely fashion and when Mr. Hoover requested maps, he gave the Government little or no lead time to gather the information and furnish it to him. Respondent contends that, even if there were issues with the maps, Mr. Hoover himself contributed to the problems and delays and, therefore, SOE cannot recover. Respondent also argues that Mr. Hoover has not produced any evidence supporting his claim of lost profits and that appellant was able to perform work under other BLM contracts during the periods when he claimed

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(CBCA). This case was then docketed by the CBCA.

that he could not perform other work. Appellant counters that the fungi survey work was being performed by subcontractors different from those working on the other BLM contracts.

On claim one, there are material facts in dispute that prevent the Board from granting respondent summary relief. The contract clearly required respondent to provide the maps for the survey work. It did not require appellant to provide the maps or contact persons to obtain the maps. Appellant has produced enough evidence to show that there were some problems with identifying and obtaining the maps appellant was to use to conduct the surveys. Also, there is some evidence showing that in the early stages of performance, appellant was not conducting surveys at the same rate as in the later stages of performance. The present record reveals a genuine dispute between the parties as to the material facts relating to claim one. We are required at this stage not to weigh the evidence and judge credibility. Thus, respondent's motion for summary relief on claim one is denied. Because the facts underlying claim two appear to be intertwined with the facts relating to claim one, with the addition of SOE's contention that the CO failed to provide assistance to it, especially after the COR left the agency, we also deny respondent's motion for summary relief on claim two.

Respondent further contends that, in any event, summary relief is appropriate, since SOE has failed to establish any damages relating to claims one and two. Respondent contends that (1) SOE was performing other work for BLM at the time it argues that it could not get other work and (2) the methodology used by SOE to calculate damages is not supported by any evidence in the record, and appellant has never provided any such evidence to respondent after numerous requests for such documentation. Even if the methodology used by appellant to calculate its claim of damages is somewhat flawed, this does not provide enough reason to grant respondent's motion for summary relief. SOE is appearing *pro se*, through its president, Mr. Hoover, and is a small business concern, which appears to be essentially a one-man operation that hires subcontractors to perform the work. SOE is not expected to have the accounting system that a large company would have. SOE, on the other hand, even as a small business and *pro se* litigant, has the burden to provide evidence to support its claimed costs. *McZeal v. Sprint Nextel Corp*., 501 F.3d 1354, 1356 (Fed. Cir. 2007); *Greenlee Construction, Inc. v. General Services Administration*, CBCA 416, 07-1 BCA ¶ 33,514, at 166,062-63. However, we find it to be premature to address the quantum evidence when the material facts bearing on entitlement have not been established.

Respondent's motion for summary relief on claims one and two is denied.

Claim Three

Appellant claims that when BLM issued a stop-work order on December 18, 2003, it was performing surveys in areas that were accessible and was prepared to continue

working in those areas further into the winter months. Appellant claims that SOE, not the CO, had the discretion to determine when to begin and stop work each season and that the contract terms only put the contractor on notice that it may not be able to perform at certain times of the year because of weather, elevations, and other variables. SOE alleges that the order to stop work was not proper and was another instance where the CO chose to stop work rather than assist SOE in its work, and that it lost forty days of work because of the suspension of work.

The facts surrounding the suspension of work are in dispute. The contract allows the CO to suspend work for a period of time that the CO determines appropriate for the convenience of the Government. However, the reason for the stop-work order here is not clear from the present record. Respondent contends that it made the judgment to suspend work on December 18, 2003, after receiving input from the Pacific Northwest Laboratory that the window for fall surveys had ended. Respondent's Motion for Summary Relief, Small Declaration at 3. Mr. Hoover, on the other hand, has some evidence that the fungal fruiting season was still going strong during this time period, and that respondent had no valid reason to stop SOE from conducting its surveys in mid-December. Again, we will not weigh the evidence at this stage, since we find there is a dispute regarding the facts leading up to the stop-work order. The stop-work order is not in the record and, thus, we do not know the exact time period of the suspension. With regard to appellant's allegation that it was delayed for forty days because of the stop-work order, there is simply no evidence in the record to support a forty-day delay given that the contract itself advised bidders that the fall season typically ended in mid-December. However, whether the stop-work order was properly exercised by respondent and whether the suspension was for an unreasonable time are in dispute and, thus, we deny respondent's motion for summary relief on claim three.

Claim Four

Under claim four, appellant is claiming interest due on payments that allegedly should have been made to it six months earlier than the date of actual payment. It claims that respondent misplaced the specimens SOE provided to the laboratory, and that when SOE submitted its invoice for the work, which was received by respondent on April 30, 2004, respondent sent the invoice back because it could not locate the specimens. Not until approximately four months later did respondent ask SOE to submit another invoice for the work after it located the specimens. Respondent, although it styled its motion as one for summary relief, has, in effect, asked the Board to dismiss this claim for lack of jurisdiction. Respondent argues that the claim does not contain a "sum certain" as required under the Contract Disputes Act and the implementing Federal Acquisition Regulation at 48 CFR 52.233-1(c), which define a claim cognizable under Contract Disputes Act as seeking the payment of money in a sum certain. Respondent's Motion for Summary Relief at 6-7.

However, appellant's claim is for interest under the prompt payment provision of the contract, Section I, paragraph 52.232-25, which requires the Government to determine the amount of interest due under that provision, if it is found that a contractor is entitled to such interest. Appellant in its claim asked respondent to calculate the interest because it did not know what interest rates applied. Although appellant's claim did not state the amount claimed in a "sum certain," respondent could easily calculate the amount from the information provided by appellant and information set forth in the prompt payment provisions of the contract. The demand for an amount which can be easily calculated meets the requirement for a claim submission containing a "sum certain." *Allstate Products Co*., ASBCA 52014, 00-1 BCA ¶ 30,783, at 152,020. Respondent's motion to dismiss claim four for lack of jurisdiction is denied.

Claim Five

Under claim five, appellant contends that SOE and the COR discussed terminating the original work under the contract and modifying the contract to require SOE to conduct different fungi survey work at historical sites. Although it appears that the COR discussed this added work, the undisputed facts show that the CO did not stop the original work under the contract; the CO did not issue a contract modification adding the surveys at historical sites; and the CO did not issue a notice to proceed with this additional work. Also, there was no agreement between the CO and appellant as to any specific amount of work to be performed or any specific price for the work. Under Section G, paragraph G.3.1., the contract clearly provides that the "COR is NOT authorized to issue changes pursuant to the changes clause or to in any other way modify the scope of work." Appellant thus proceeded with this work at its own risk, and has no basis to seek money for this work since the work was not contractually authorized. Once the CO became aware of this work, she stopped appellant from performing any further surveys, but agreed to pay appellant for the surveys of acreage it had actually performed. It paid appellant for the survey of 537 acres at $15 per acre, for a total of $8055. Appellant has been fully reimbursed for this work and is not entitled to any further monetary relief for performing surveys at historical sites. Respondent's motion for summary relief on claim five is granted.

Decision

Respondent's **MOTION FOR SUMMARY RELIEF** is **GRANTED IN PART**.

BERYL S. GILMORE
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

HOWARD A. POLLACK
Board Judge