UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

APPELLANT'S FIRST MOTION FOR PARTIAL SUMMARY RELIEF GRANTED;
APPELLANT'S SECOND MOTION FOR PARTIAL SUMMARY RELIEF DENIED:
April 16, 2009

CBCA 1093

DSS SERVICES, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Ronald J. Shaw, The Shaw Law Firm, P.C., San Antonio, TX, counsel for Appellant.

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

Before Board Judges **SOMERS**, **POLLACK**, and **GOODMAN**.

SOMERS, Board Judge.

This case involves a contract between DSS Services, Inc. (DSS Services or DSS) and the General Services Administration (GSA) for the provision of nonpersonal services support of various information technology (IT) systems for the United States Army Medical Information Technology Command (USAMITC). In the first motion for partial summary relief, DSS seeks payment for outstanding invoices for services rendered and equipment purchased under the contract. In the second motion, appellant seeks payment for an outstanding invoice for equipment ordered for which the Government has made a partial payment. For the reasons set forth below, we grant appellant's first motion and deny the second.

Background

On September 29, 2003, GSA awarded DSS Services a contract to provide worldwide support services for various video conference, telecommunication, infrastructure, and tri-service information technology systems for the USAMITC, headquartered in San Antonio, Texas. The contract called for DSS to acquire hardware and software in support of these services or at the request of the Government. The initial contract ran from October 1, 2003, to September 30, 2004, and included one option year. The Government obligated $821,015.39 for the contract. Appeal File, Exhibit 1.

The Government modified the contract several times, first by adding a fourth contract line item (CLIN) to cover travel and training. The second modification revised the statement of work to require the contractor to provide equipment "listed on the IGCE or as requested by the Government in support of various IT projects worldwide." Respondent's Opposition to Appellant's Two Motions for Partial Summary Relief.[1] This modification, however, did not add a CLIN against which to charge the costs of equipment ordered. The other contract modifications increased funding for the various CLINs, exercised the one-year option, and redefined some of the labor skill categories. In addition, the USAMITC would transfer funds to GSA through Military Interdepartmental Purchase Requests (MIPRs) when it ordered equipment, and these funds would be applied to the contract. Ultimately, the contract modifications and additional funds increased the total funding authorized for the performance of the contract to $2,963,133. As noted, however, at no time did the Government add a CLIN for equipment; rather, it simply increased funding at various times in response to requests for equipment. Appeal File, Exhibit 1.

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[1] The Government avers in its answer that the contract did not cover the acquisition of equipment. *See* Respondent's Answer, ¶ 2 ("GSA affirmatively avers that the award documents only made awards vis-a-vis CLIN 0001, Labor Services per DSS's September 23, 2003 proposal; CLIN 0002, AMX Programming; and CLIN 0003, CODEC Maintenance. There was not award [sic] for the acquisition of equipment. DSS's Proposal contained no proposal costs for equipment acquisition. Finally, Modification P00010 only increased prices for the three CLINs noted above. Acquisition of equipment was not authorized.") Apparently, however, the Government's position on this issue has changed. In its opposition to the motion for summary relief, the Government asserts that "equipment was within the scope of the Contract." *See* Respondent's Opposition to Appellant's Two Motions for Partial Summary Judgment at 3. Based upon our reading of the contract, we conclude that the contract does include the acquisition of equipment.

The contract included a provision entitled "Incremental Funding/Limitation of Liability" clause. This clause required the contractor to notify the Government at least ninety days prior to the date when, "in the Contractor's best judgment, the work will reach the point at which the total amount payable by the Government, including cost for termination, will approximate 85 percent of the total amount then allocated to the contract. . . ." Appeal File, Exhibit 1.

During the period October 1, 2003, through April 1, 2005, DSS performed the contract services as identified by CLIN, submitted invoices, and received payment for services rendered. In addition, from January 2004 through March 2005, in response to orders from the contracting officer's representative (COR), DSS provided IT equipment and materials. The record indicates that the contracting officer's representative (COR) instructed DSS to provide equipment first and invoice for it later without waiting for a separate contract modification. Supplemental Appeal File, Exhibit 17. The COR acted with the project manager's and the contracting officer's knowledge and approval. *Id*.; Supplemental Appeal File, Exhibit 24. The final invoice for equipment, invoice no. 4088, is signed by the COR and includes a typed statement on the invoices that indicated "per approval by: Jerry Johnson - GSA- Denver." Appeal File, Exhibit 41. Jerry Johnson was the GSA program manager for the contract. *Id*., Exhibit 1.

Using the four CLINs, DSS invoiced $2,648.865 for services rendered under the contract. Ultimately, the Government paid appellant $1,957,817 for these services. The remaining amount invoiced for services but not paid under CLINs 001-004 is $691,048.

As noted previously, the invoices for equipment did not identify the charges by CLINs. The Government simply increased funding at various times, without tying the funding to a CLIN, and paid the amount charged on these invoices. Of the invoices for equipment, the Government paid the amount charged for all of those invoices with the exception of the invoice no. 4088, which sought $267,339. Appeal File, Exhibits 4, 41. The contracting officer approved partial payment in the amount of $133,311. The amount remaining due was $134,028. At that time, the Government informed DSS that the amounts sought for services and equipment exceeded the funds obligated under the contract, and that the contracting officer would not or could not issue a contract modification to obligate additional funds to pay the remaining amount. The Government suggested DSS file a claim to obtain payment. *Id*., Exhibit 42.

At the same time, once the Government realized that the funding obligated to the contract had been exhausted, but outstanding invoices remained, it began to investigate the reason for the shortfall. Mr. Gilbert Olivas, the contracting officer at the end of the contract, questioned both government employees and the contractor about the services provided and

the equipment purchased under the contract. In an electronic mail message dated July 28, 2005, Mr. Olivas asked Frank Cruz of DSS to

> . . . provide a detailed statement in writing as to what occurred from the first instance when your firm purchased equipment. Dates, names, and interchanges that occurred and information that led DSS to believe that the Government Representatives during this period had the authority to make requests for IT hardware and related services. I [sic] should be noted that only a Warranted Contracting Officer has the authority to obligate the Government. . . . These are only a few items that have to be addressed. I may have additional questions for you. If the information from your firm regarding all hardware purchase [sic] is complete, clear, and concise I will be able to move forward a lot more efficiently.

Supplemental Appendix, Exhibit 22. The contractor responded to the contracting officer's inquiry by electronic mail on that same date. *Id*., Exhibit 23.

During the investigation, Wilton W. Webb, a retired contracting officer who had overseen the contract, confirmed by electronic mail message dated July 30, 2005, that he had authorized all of the actions taken by the GSA program manager. Specifically, Mr. Johnson, the project manager, contacted Mr. Webb by electronic mail and asked him to confirm that Mr. Webb had reviewed and approved "all actions pertaining to project 45001294 [this contract]." Supplemental Appendix, Exhibit 24. Mr. Webb responded, stating that "[y]ou are correct regarding the statement that all of your actions were reviewed by me and properly documented as to the required course of action . . . [Y]our actions were proper and you did consult with me on all aspects of the contract order." *Id*.

After the investigation, Mr. Olivas concluded that the program manager did authorize the purchase of equipment and related labor, and that the contractor had provided equipment in performing the contract, but determined that the program manager had acted without proper authority, despite the contracting officer's statement to the contrary. Mr. Olivas would not recommend ratification of the actions because he believed that the contractor had failed to provide sufficient information for him to resolve all of the unanswered questions. Supplemental Appeal File, Exhibit 29. He noted that:

> The contract has several problems and can only be fully investigated by an auditing office authorized by the Comptroller General, or the Office of the Inspector General. The problems

> apply to the actual labor performed and supplies provided, and an unauthorized commitment. The ratification requirements at Federal Acquisition Regulation (FAR) 1.603 and General Services Acquisition Manual (GSAM) 501.602-3(f) were not able to be addressed in full. Many questions remain unanswered, and as the Contracting Officer, it is my opinion that all activities under the subject contract be reviewed carefully as this contract is fatally flawed for a number of reasons . . . .

Id. By letter dated September 13, 2005, Mr. Olivas advised DSS:

> The purpose of this letter is to inform DSS Services, Inc., that the General Services Administration (GSA) has attempted to investigate the matter of the unauthorized commitment relating to the subject contract for the acquisition of IT Hardware and related services. . . . [S]everal attempts have been made to obtain the necessary information to support the ratification of the unauthorized commitment. As of the date of this letter, GSA has not received responses from your company in full.
>
> As a result, GSA is unable to ratify the unauthorized commitment and you are hereby directed to submit a claim to the Government Accountability Office pursuant to Federal Acquisition Regulation 1.602-3(d). . . .

Id., Exhibit 30.

DSS submitted a certified claim with the contracting officer, seeking $824,846.07 plus Prompt Payment Act interest pursuant to 31 U.S.C. § 3902 (2006). The amount sought included the unpaid costs for both services and equipment. When the contracting officer failed to issue a final decision within sixty days, DSS appealed to the Board.

Discussion

Appellant has asked the Board to resolve this appeal in part by granting its motions for partial summary relief. Resolving a dispute on a motion for summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242

(1986). The non-moving party must set forth specific facts showing the existence of a genuine factual dispute: conclusory statements and bare assertions are insufficient. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). The Board may neither make credibility determinations nor weigh evidence and seek to determine the truth of the matter. *Anderson*, 477 U.S. at 255. Nonetheless, while we are to draw all reasonable inferences in favor of the Government, the party opposing summary relief, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party," summary relief in favor of the moving party is appropriate. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Mingus*, 812 F.2d at 1390. With these standards in mind, we address the two motions below.

a. First Motion for Partial Summary Relief

As noted above, the first motion for partial summary relief seeks payment for outstanding amounts due on vouchers for services rendered under the contract. In response to this motion, the Government asserts DSS violated the contract's Incremental Funding/Limitation of Liability clause. In essence, the Government claims that DSS should have stopped work once the total amount payable by the Government reached the funding allocated to the contract. Thus, under the Government's theory, once DSS provided work in excess of the dollar ceiling, DSS performed the work at its own risk and expense, without any contractual liability on the part of the Government.

The amount invoiced for services under the four CLINs was $2,648,865, which is less than the total amount of funding under the contract, specifically $2,963,133. The Government has thus far paid $1,957,817 of the amount charged for services. The invoices for services never exceeded the total amount of funding under the contract.

The Government contends that at that time DSS sought payment for the disputed invoices for labor, DSS had already been paid up to the contract ceiling. However, if the Government had not used contract funds to pay for equipment that had not been allocated to a specific CLIN, the total funding under the contract would have been sufficient to cover all of the invoices for services rendered under the CLINs. The fact that the Government failed to properly charge equipment against a CLIN cannot be the basis for refusing to pay DSS for services properly rendered under the contract. Accordingly, we reject the Government's argument on this point and find that the Incremental Funding/Limitation of Liability clause has not been invoked. On this basis, we grant the first motion for partial summary relief. DSS is entitled to payment of the difference between the amount invoiced for services and the amount paid for services, i.e., $691,048, as well as interest pursuant to the Prompt Payment Act and the Contract Disputes Act, 41 U.S.C. §§ 601-613, the precise amount to be determined at trial.

b. Second Motion for Partial Summary Relief

In its second motion for partial summary relief, DSS seeks payment of the remaining amount due under invoice no. 4088. DSS asserts that the record shows that the project manager, Jerry Johnson, and the COR knew about and authorized the purchase, delivery, and installation of the equipment identified on invoice no. 4088. The Government disagrees that the project manager authorized the purchase of equipment, and has submitted a declaration from Mr. Johnson asserting that he did not authorize DSS to provide the equipment listed in the invoice because he did not have the authority to do so. *See* Respondent's Opposition to Appellant's Motions for Partial Summary Relief, Exhibit 2 (Declaration of Jerry E. Johnson (Oct. 10, 2008)). Because the Government is the party opposing the motion for partial summary relief, we must at this stage in the proceedings accept its allegations as true. Thus, we must assume that the government official ordering the supplies, whether the project manager or the COR, did not have the authority to order the equipment.

The Government does not dispute, however, that it received the equipment identified in invoice no. 4088, and, indeed, the Government paid for a portion of the amount charged on the invoice. Arguing that the Government received the equipment and has used the equipment, DSS asserts that, even if the project manager or COR did not have authority to order the equipment, and even if the order violated the terms of the contract, it is entitled to recovery on a quantum meruit basis.

To recover under the equitable doctrine of quantum meruit (or, more likely, a quantum valebant recovery for the reasonable value of goods received[2]), DSS must establish that an implied-in-fact contract existed. *International Data Products Corp. v. United States*, 492 F.3d 1317, 1325-26 (Fed. Cir. 2007); *United Pacific Insurance Co. v. United States*, 464 F.3d 1325, 1329-30 (Fed. Cir. 2006); *United States v. Amdahl Corp.*, 786 F.2d 387 (Fed. Cir. 1986). DSS must prove (1) mutuality of intent to contract; (2) consideration; (3) lack of ambiguity in offer and acceptance; and (4) the government representative whose conduct is relied upon had actual authority to bind the Government in contract. *Lewis v. United States*, 70 F.3d 597, 600 (Fed. Cir. 1995); *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990). Based upon the record before us, we find that a genuine issue of material fact exists which precludes the granting of this motion for partial summary relief.

[2] The Federal Circuit has noted the difference between quantum meruit and quantum valebant. "The former is said to apply to services and the latter to goods." *Urban Data Systems, Inc. v. United States*, 699 F.2d 1147, 1154 n.8 (Fed. Cir. 1983); *see also* Black's Law Dictionary 1243-44 (6th ed. 1990).

Decision

For the reasons stated above, appellant's first motion for partial summary relief is **GRANTED** and we find DSS is entitled to payment of the difference between the amount invoiced for services and the amount paid for services, i.e., $691,048, as well as interest pursuant to the Prompt Payment Act and the Contract Disputes Act, the precise amount to be determined at trial. Appellant's second motion for partial summary relief is **DENIED**.

JERI KAYLENE SOMERS
Board Judge

We concur:

HOWARD A. POLLACK
Board Judge

ALLAN H. GOODMAN
Board Judge