Crescent Contracting Corp. v. Dep't of Citywide Admin. Services

OATH Index No. 1030/12, mem. dec. (Apr. 13, 2012)

In CDRB dispute, Board dismisses petition as time-barred.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

CONTRACT DISPUTE RESOLUTION BOARD

In the Matter of
CRESCENT CONTRACTING CORP.
Petitioner
- against -
DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES
Respondent

MEMORANDUM DECISION

JOHN B. SPOONER, *Administrative Law Judge/Chair*

KEVIN HANRATTY, *Deputy General Counsel, Mayor's Office of Contract Services*

FREDRIC S. BERMAN, *Prequalified Panel Member*

Presently pending before the Contract Dispute Resolution Board ("CDRB" or "Board") is the petition of Crescent Contracting Corp. ("Crescent"). The petition arises from contract number 20020007796 ("the contract") between Crescent and the Department of Citywide Administrative Services ("DCAS") for mechanical and related work. Crescent seeks an additional $184,781 in compensation for allegedly improper deductions taken by DCAS's Resident Engineer and by DCAS's Engineering Audit Officer ("EAO").

DCAS moves to dismiss the petition, arguing that Crescent's challenge to deductions taken by an EAO is outside the scope of the dispute resolution process, and that all of the claims are time-barred.

BACKGROUND

The dispute arises out of various deductions taken between 2002 and 2006 on a requirements contract between Crescent and DCAS, for the furnishing of mechanical work in various buildings in Brooklyn and Staten Island. The contract was awarded in November 2001 for three years, beginning January 29, 2002, ending on or about January 28, 2005, at a total price of $4,250,000 (Contract; Pet. ¶ 2; Resp. Ex. 1). The contract was extended for one year and all work was completed prior to the extended expiration date of January 2006 (Pet. Ex. B, Letter from Langan to Carla, undated).

The deductions disputed by Crescent fall into three categories: (i) deductions taken by the EAO, totaling $73,790; (ii) deductions taken by the project manager relating to the installation of a steam station at 209 Joralemon Street in Brooklyn, totaling $48,735; and (iii) various other deductions taken by the project manager. Crescent contends that DCAS had agreed, at a meeting held in February 2007, to pay Crescent $62,305 in settlement of this third category of deductions.

The documentary proof offered by Crescent to support the three categories of deductions was inconsistent and difficult to understand. Many of the records were undated. Other records consisted of requests for further payment by Crescent years after the actual deductions were taken by DCAS, with no explanation as to the reasons for the deductions or the reasons Crescent was entitled to further compensation.

The EAO deductions, unlike the other two categories of deductions, were documented by invoice and payment records (Pet. Ex. B). Seven EAO deductions are in dispute, totaling $73,790:

EAO Deduction Reports	Amount	Date Report Rec'd by Crescent
Payment No. 1	$13,826.67	Aug. 8, 2002
Payment No. 2	$14,088.76	Sept. 23, 2002
Payment No. 3	$770.60	May 20, 2003 (date prepared)
Payment No. 4	$11,830	Aug. 25, 2003
Payment No. 6	$17,696.40	May 2004
Payment No. 7	$4,163.59	Aug. 8, 2005
Payment No. 8	$11,364.21	Nov. 6, 2006

The proof of the second category of $48,735 in deductions, relating to the steam station work at 209 Joralemon Street, was much harder to decipher. These records consisted of requisitions and cost breakdown sheets, with handwritten notations, presumably by a DCAS manager. Although the notations and edits suggest rationales for these deductions, the reasons

were not fully explained. The records submitted by Crescent show that, after the work was begun, Crescent submitted an initial requisition, on April 10, 2003, for $72,777 (Pet. Ex. B). DCAS declined to pay a portion of the amount requested by means of handwritten notations on the requisition form. Crescent discontinued the work in protest and sent a letter to DCAS requesting "immediate review" of the "payment process" (Pet. Ex. E, Letter from Rickman to Rendina, of June 11, 2003). On July 18, 2003, Crescent wrote to former DCAS Commissioner Martha Hirst, again requesting reimbursement for all costs incurred and a meeting (Pet. Ex. E, Letter from Rickman to Hirst, of July 18, 2003). A meeting was held a few days later at which DCAS allegedly agreed to pay a "fair and reasonable" portion of the amount requested, conditioned upon Crescent immediately returning to work. On August 5, 2003, the Commissioner sent a letter directing Crescent to perform the work and indicating that "the requisition in question is being processed" (Pet. Ex. C, Letter from Hirst to Rickman, of Aug. 5, 2003).

Crescent sent a second requisition on February 19, 2004, for $94,143. On this requisition, Crescent acknowledged receipt of $32,225. DCAS notations on this requisition seem to indicate that another $9,879 was deducted due to "non working foreman and caution tape" (Pet. Ex. B, Payment Requisition Registration No. 20020007796, Part B, Line 2). Neither the petition nor the records submitted are clear as to how much of the steam station work was completed or the total amounts paid by DCAS for this work.

The documents submitted in support of the third claim, consisting of undated cost breakdowns also created by Crescent, were, at best, questionable. For this portion of its claim, Crescent argues that it is entitled to additional compensation not based upon records of what work was performed but rather upon an alleged verbal commitment by a deputy commissioner during a February 12, 2007 meeting to pay Crescent $62,305.80. The records supplied in support of this claim are a February 21, 2007 memo by a Crescent manager summarizing the outcome of the meeting and a number of other bills apparently created by Crescent on or about May 2007. The 2007 memo lists some 12 items which were discussed at the meeting. One of these items was the claim concerning the steam station, leaving 11 items, totaling approximately $87,000, which purportedly go to the third category of project manager deductions. Notably there is no indication who this memo was addressed to, suggesting that it may have been an internal Crescent memo which was never sent to DCAS.

Crescent offered a two-page fax, dated November 14, 2006. In this fax, Crescent requested payment for the project manager deductions, as well as the EAO deductions, totaling approximately $70,944 (Pet. Ex. E, Fax from Langan to Sieberg, of Nov. 14, 2006). The reasons for the deductions and the basis of the Crescent's right to further compensation were not mentioned.

The other records submitted by Crescent indicate that in 2006 and 2007 Crescent repeatedly requested meetings with DCAS to discuss all of the deductions at issue here. DCAS and Crescent ultimately met on February 12, 2007 to discuss the deductions (Pet. Ex. B, Memo from Rickman, of Feb. 21, 2007). The parties disagree on the outcome of this meeting. Crescent contends that DCAS agreed to pay Crescent $62,305.80 in settlement of all of the project manager deductions (Pet. Ex. B, Letter from Rickman to Comptroller, of Dec. 14, 2010). According to Crescent, the parties agreed to schedule subsequent meetings to resolve the remaining deductions (Pet. Ex. B, Memo from Rickman, of Feb. 21, 2007). DCAS insists that no agreements were reached at the meeting (Pet. Ex. A, Handy Determination, of Feb. 24, 2011). Although Crescent continued to demand further meetings to discuss the deductions, none were apparently held.

The next action taken by Crescent, according to the records submitted, was on December 14, 2010, when it filed a notice of claim with the Comptroller (Pet. Ex. B). On December 21, 2010, the Comptroller's Office notified Crescent that its claim would not be reviewed because there had been no prior determination by the DCAS Commissioner, as required by the contract and Procurement Policy Board ("PPB") rules (Resp. Ex. 2).

By letter dated January 11, 2011, Crescent requested a written determination from DCAS (Pet. Ex. A; Resp. Ex. 3). In a letter dated February 24, 2011, DCAS Commissioner Edna Handy denied all of Crescent's claims as time-barred (Pet. Ex. A; Resp. Ex. 3). Commissioner Handy noted that all the deductions Crescent disputed occurred between 2002 and 2006 and that, under section 27.4 of the contract, a contractor is obliged to present a notice of dispute to the agency head within 30 days of the determination being challenged.

Crescent filed its notice of claim with the Comptroller on March 21, 2011 (Pet. Ex. D). On May 31, 2011, the Comptroller requested additional documentation from Crescent, including copies of any other correspondence between Crescent and DCAS prior to 2010 (Pet. Ex. E, Letter from Taylor to Kalish, of May 31, 2010). On July 1, 2010, Crescent provided 11

additional documents (Pet. Ex. E). Crescent then consented to two requests to extend the time to resolve the matter, made by the Comptroller on July 20, 2011, and August 23, 2011. Crescent declined to consent to a third request for another extension (Pet. Ex. G).

Crescent then filed its petition to the CDRB on December 23, 2011. In lieu of an answer, on January 19, 2012, DCAS filed an application to dismiss Crescent's claims as outside the jurisdiction of the CDRB and time-barred. On February 27, 2012, Crescent filed its reply to DCAS's request to dismiss.

ANALYSIS

DCAS contends that all of the deductions included in Crescent's claim were taken by DCAS at least six years ago, between 2003 and 2006, while Crescent's notice of dispute was not filed until January 2011. Because the contract and the PPB rules mandate that claims under the alternative dispute resolution process be submitted to the agency head within 30 days of the action which is the subject of the dispute, DCAS argues that all of these claims must be dismissed as untimely. The Board finds ample support for DCAS's position in both the contract and the applicable case law.

It is clear that to invoke the conflict dispute resolution procedure under a City contract the contractor, and to a certain degree the agency, are obliged to act promptly. Article 21.4 of the contract (Resp. Ex. 1 at C21) and section 4-09(d)(1) of the PPB Rules require Crescent to submit its notice of dispute to the agency head "within thirty days of receiving written notice of the determination or action that is the subject of the dispute." 9 RCNY § 4-09(d)(1) (Lexis 2012). The rules require the agency head to issue its decision "within thirty days of receipt of all materials and information, or such longer time as may be agreed to by the parties." 9 RCNY § 4-09(d)(3). If the agency head does not make a determination within the timeframe required by the rules, its failure "shall be deemed a non-determination without prejudice that will allow application to the next level." 9 RCNY § 4-09(b).

The time frames for dispute resolution established by the contract and the PPB Rules may not be disregarded without good cause. *Start Elevator, Inc. v. Dep't of Correction*, OATH Index No. 1160/11, mem. dec. at 3 (Feb. 28, 2011), *aff'd*, Index No. 104620/11 (Sup. Ct. N.Y. Co. Jan. 9, 2012); *Delcor Assoc. v. Dep't of Housing Preservation & Development*, OATH Index No. 1872/10, mem. dec. at 2 (Apr. 13, 2010); *Kreisler Borg Florman v. Dep't of Design &*

Construction, OATH Index Nos. 338/07, 339/07 & 340/07, mem. dec. at 4 (Jan. 26, 2007); *Alta Indelman, Architect/Builders Group, LLC v. Dep't of Sanitation*, OATH Index No. 1092/05, mem. dec. at 7 (June 16, 2005).

It is undisputed that all of the challenged deductions included in Crescent's claim were taken prior to 2007, when Crescent met with DCAS to discuss the deductions. Crescent then waited some four years before filing its notice of dispute in January 2011 (Pet. ¶ 10). A four-year delay in filing a notice of dispute precludes a contractor from proceeding under the alternative dispute resolution rules.

Crescent raises three arguments in an attempt to escape the time bar. First, Crescent contends that the July 28, 2003 letter to then-Commissioner Hirst constituted a timely notice of dispute. Crescent's characterization of this letter as a notice of dispute under the contract and the PPB rules is entirely unpersuasive. First, the letter is not labeled a notice of dispute and nowhere in the letter does Crescent mention the dispute resolution provision of the contract, Article 21 (Pet. Ex. E). The letter does not request the Commissioner to review a determination made by the project manager relating to the requisition mentioned. Instead, the letter closes with a request only for a meeting with the Commissioner. Finally, the letter is dated July 28, 2003, and obviously cannot constitute a notice of dispute as to the majority of the claims, most of which are based on deductions taken after that date.

In a second effort to avoid the time bar, Crescent argues that, in an August 2003 letter, the Commissioner delegated her authority to Deputy Commissioner Wagner to handle all of Crescent's disputes and that this delegation somehow stayed the running of the 30-day deadline. This argument is a mischaracterization of the actual text of the Commissioner's August 5, 2003 letter to Mr. Rickman (Pet. Ex. C). The letter states that the Commissioner is "advised by Deputy Commissioner Joseph Wagner that he has personally reviewed this matter with you and that the requisition in question is being processed in accordance with the contract and the City's payment rules and procedures" (Pet. Ex. C). To suggest that this reference to a past review and discussion with a deputy commissioner constituted a delegation of the Commissioner's authority to resolve all outstanding disputes and permitted Crescent to wait indefinitely to file a notice of dispute, as argued by Crescent, is not rational. Indeed, the Commissioner's letter placed Crescent on notice of the need to comply with the provisions of the contract as well as with the City's procedural rules on procurement.

Crescent's contention that the August 5, 2003 letter constituted an agreement to extend the 30-day time frame for the Commissioner to resolve all disputes between the parties is no more convincing. The contractual dispute resolution process is never mentioned in the August 2003 letter; nor does the letter refer to extending the time for the Commissioner to issue her determination, since no notice of dispute had ever been filed. The letter therefore fails to establish an agreement of any kind regarding Crescent's deadline to file a notice of dispute within 30 days, as provided by the contract. Finally, the August 5 letter, which references only DCAS's failure to process Crescent's April 2003 requisition, could not be applied to other disputes, most of which had not arisen.

Crescent produced only two documents which were dated after the February 2007 meeting: an August 9, 2007 fax to Deputy Commissioner Wagner, which referred to "outstanding payment issues" and requested a meeting, and a July 20, 2010 e-mail to Deputy Commissioner Wagner, requesting his assistance to resolve the EAO deductions, and asking for a meeting (Pet. Ex. E). Other than these two letters, Crescent offered no explanation for its failure to timely pursue these claims from 2007 until 2010.

This record indicates that Crescent made a conscious decision in 2007 not to file a formal notice of dispute and instead to attempt to persuade DCAS, through letters and additional meetings, to pay the disputed amounts. This decision seems not to have yielded any further compensation for Crescent. The fact that this strategy proved to be unsuccessful does not warrant permitting Crescent to ignore the 30-day deadline in the contract and in the PPB rules for submitting a notice of dispute to the agency. *See Manuel Elken Co., P.C. v. Dep't of Design & Construction*, OATH Index No. 1010/07, mem. dec. at 4 (Feb. 22, 2007) (ongoing settlement discussions do not suspend a contractor's obligation to file a notice of dispute); *see also Gilbert Frank Corp. v. Federal Insurance Co.*, 70 N.Y.2d 966, 968 (1988) ("Evidence of communications or settlement negotiations . . . either before or after expiration of a limitations period . . . is not, without more, sufficient to prove waiver or estoppel").

In sum, the records submitted, while failing to clarify the basis for many of Crescent's claims, do make clear that all of the deductions for which Crescent now seeks payment were taken sometime before 2007. Thus, Crescent's time to avail itself of the alternative dispute resolution process expired long before it filed its notice of claim with the Comptroller in December 2010, or its notice of dispute with DCAS in January 2011.

Although we do not reach the merits of any of Crescent's claims due to their untimeliness, we note that Crescent's claim for further compensation based upon oral representations made by a DCAS executive is conspicuously baseless. In the absence of a written designation from the Commissioner, DCAS would not be bound by an oral statement made by a deputy commissioner at a meeting. Resp. Ex. 1 at c28, Contract Art. 23 : "Neither the City nor any Agency, officer, agent or employee thereof, shall be bound, precluded or estopped by any determination, decision approval, order, letter, payment or certificate given under or in connection with this Contract by the City, the Commissioner, the Resident Engineer, or any other officer, agent or employee of the City. . . ."; Resp. Ex. 1 at c52-c53, Contract Art. 55: "[T]he written agreement contains all the terms and conditions agreed upon the parties hereto, and no other agreement, oral or otherwise, regarding the subject matter of this agreement shall be deemed to exist or to bind any of the parties hereto, or to vary any of the terms contained therein."); *Samson Construction Co. v. Dep't of Parks & Recreation*, OATH Index No. 1327/06, mem. dec. at 5 (Aug. 7, 2006) (where contract required that all changes be in writing, oral modifications held to be prohibited). Further, insofar as this claim attempts to enforce a settlement agreement, it is outside the jurisdiction of the CDRB. *See* 9 RCNY § 4-09(a)(2); Contract § 21.1.2.

Given our finding that Crescent's claims are time-barred due to its failure to file a timely notice of dispute, the Board will not reach the other grounds for dismissal urged by DCAS.

All concur.

John B. Spooner
Administrative Law Judge/Chair

April 13, 2012

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