

U.S. Department of Labor

Board of Contract Appeals
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September 27, 1999

Case Nos.: 1997-BCA-4, 1999-BCA-2

Appeal of

BRERO CONSTRUCTION, INC.

Contract No.: E-4098-3-00-82-20

**RULINGS ON APPELLANTS REQUESTS FOR SHOW CAUSE ORDER
FOR ISSUANCE OF SANCTIONS FOR FAILURE TO COMPLY
WITH BOARD ORDER DATED JUNE 18, 1999; FOR ISSUANCE OF SANCTIONS
FOR ALLEGED MISREPRESENTATION REGARDING AUDIT;
AND ON CONTRACTING OFFICER'S MOTION TO COMPEL ANSWERS
TO INTERROGATORIES**

1. Appellant filed a show cause motion on August 6, 1999, requesting that sanctions be applied for the alleged failure of the Contracting Officer to produce documents in accordance with the Board's order dated June 18, 1999. On August 16, 1999, the Contracting Officer filed a detailed response dated August 13, 1999, purporting to show compliance. The response was supported by detailed explanatory affidavits. Subsequently, by letter dated August 25, 1999, filed August 30, 1999, the Contracting Officer accounted for five documents in issue, and responded constructively regarding three other documents not located in the box of documents originally asserted to be privileged. The Contracting Officer also suggested that the issues raised in the motion for sanctions could have been dealt with more efficiently had counsel dealt informally with the perceived problems.

The Board concludes that the Contracting Officer's response is sufficient and reflects adequate diligence. The Board agrees that an effort should have been made informally to resolve this matter, and, in the absence of further complaint or objection by Appellant, concludes that the issues raised by the motion are moot. Under the circumstances, the Appellant's motion is denied.

2. By motion filed June 11, 1999, Appellant moved for an Order To Show Cause why sanctions should not be imposed against the Contracting Officer for "misrepresenting" that "an audit was being conducted and an audit report prepared when a consulting report entitled 'Consulting Services Report on Review of Additional Costs Claimed in a Request for Equitable Adjustment Dated December 22, 1998' was actually being prepared." Appellant contends that the Contracting Officer

represented that an “audit” would be conducted, and cites the disclaimer by the examiners, “We were not engaged to and did not perform an audit, the objective of which would have been the expression of an opinion on the total costs claimed by BCI and, accordingly, we do not express such an opinion.” Appellant asserts that “[t]his misrepresentation is an unconscionable deliberate act on the part of Respondent and Respondent’s counsel,” and requests that they be required to show cause why they made such a deliberate misrepresentation. No prejudice is alleged and no other relief requested.

The Contracting Officer contends that the reviewers were conducting an audit, or limited review which did not encompass a review of all costs claimed under the contract, but which encompassed the costs claimed by Appellant in its REA, and adhered to guidelines and professional standards appropriate to a government audit. The Contracting Officer contends that the parties agreed that a review of the supporting documentation for appellant’s claims would be conducted and that is what was done. The review was obviously essential to discovery and preparation for trial in this case. In support of his position the Contracting Officer submitted the affidavit of Jerome J. Subkow, Director, Office of Grant and Contract Audits, Office of Audit, Office of Inspector General, U.S. Department of Labor, who engaged the reviewers, Tichenor & Associates, to perform work within the broad definition of a government audit in accordance with the professional consulting services standards established by the AICPA and applicable professional standards in the *Government Auditing Standards*. As Subkow declares, “The review of additional costs performed by Tichenor & Associates was not called an “audit” because it did not include all of the formal elements of an “audit” as defined by the American Institute of Certified Public Accountants (AICPA), which involves the expression of a formal written opinion on an organization’s traditional financial statements,” and which requires an appropriate disclaimer in any reports on engagements less in scope than full scale “audits.” The Contracting Officer’s response, which contends, in substance, that the activity was within the reasonable compass of the word “audit” and that there was no surprise or other prejudice affecting Appellant, is supported by the record before the Board and by reason. Consequently, the Appellant’s motion is denied as frivolous.

3. On or about May 14, 1999, the Contracting Officer moved to compel Appellant to respond adequately to certain interrogatories earlier propounded. The Contracting Officer contends that Appellant should have specifically identified documents in response to the interrogatories, and has alleged that its failure to do so is disingenuous. Appellant contends that it has fully responded to the interrogatories by identifying the specific business documents and by providing a narrative discussion of the related issues which cites pertinent documentation and authorities. In so doing, Appellant contends that it has met and exceeded the requirement of F.R.Civ. P. 33(d), which allows response to discovery requests by identification of documents under specified circumstances. Appellant contends that its repetitive responses contain discrete citations to its several reports containing the requested information by reference to the particular tab under which the answer may be found. The references are to the voluminous submissions by Appellant consisting of its Request for Equitable Adjustment (“REA”), Time Impact Analysis (“TIA”), and Revised Quantum (“RQ”). Appellant contends that the organization and contents of these documents make the answers to the interrogatories readily accessible by reference to the pertinent tabs, and that greater identification would result only in an index of the contents of each tab.

The Contracting Officer contends that neither the Board's rules nor the Office of Administrative Law Judges rules of practice and procedures allow response to interrogatories simply by providing access to business records. The Contracting Officer contends that, in any event, Appellant has not properly invoked Rule 33(d), or demonstrated that it has satisfied the conditions of the rule, including its explicit invocation, and reliance thereon. The rule requires, in pertinent part, that "[a] specification [to the pertinent record] shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained." F.R. Civ. P 33(d) The gist of the Contracting Officer's argument is that turning over a mass of business records does not normally satisfy this requirement, and clearly does not do so in this case. The Board agrees.

Examination of the Appellant's Answers to Respondent's First Set of Interrogatories transmitted by Appellant in unsigned form by letter dated April 14, 1999, confirms the Contracting Officer's complaint that the responses do not satisfy the requirements of F.R.Civ.P. 33(d) as suggested by Appellant, and do not provide an adequate response to the propounded interrogatories. Treating Interrogatory No. 1 as an example of the patent deficiencies in Appellant's response, it is noted, first, that the Contracting Officer requests, in substance, that Appellant identify the differing site conditions upon which Appellant bases its claim for \$75,684 in lost time compensation. In its answer, Appellant states that it does not claim \$75,684 on COP #12 as alleged. It refers to "Appellant's Proposal," Tab COP 12; "Appellant's Request for Equitable Adjustment," Tab COP 12; Appellant's Time Impact Analysis; and Appellant's Revised Quantum. However, if the stated claim is repudiated, it is not apparent what is Appellant's pending claim under COP 12.

There is no reference to page or other particularization of the latter two references to documents in Appellant's answer to Interrogatory No. 1. Appellant's Proposal, which bears the reservation that it is to be used only for settlement discussions, contains a Tab COP 12 which contains a half inch of various documents, headed by a ten page narrative whose last sentence is "Based upon the foregoing, BCI is entitled to \$75,684 under COP #12." The Request for Equitable Adjustment contains apparently identical material under its Tab COP 12. There is no particularized reference to the inch and a half of assorted documentation contained in the Revised Quantum that identifies the basis for differing site condition claims, or relevant treatment of COP 12. Nor is there particularized reference to any relevant documentation in the ten volumes of Appellant's Time Impact Analysis. It is apparent, therefore, that Appellant's answer to Interrogatory No. 1 is nonresponsive, if not disingenuous, particularly since there is no apparent explanation for its repudiation of its claim for \$75,684 in lost time compensation which is expressly set forth in the documentation it cites as disclosing its answer. In addition, the inability readily to discern what differing site condition or conditions Appellant is specifically relying upon from the collected documents referred to establishes a failure to comply with the requirements of F.R. Civ. P 33(d)'s requirement that "A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained." The answer to the interrogatory is patently inadequate. The defective pattern is followed in the subsequent responses to the Respondent's other interrogatories.

A second example is provided by the deficiencies in the Appellant's answer to Interrogatory No. 2, which are obviously similar in character to those in Interrogatory No. 1 to which the answer to Interrogatory No. 2 expressly refers. Moreover, although the Certified Payrolls to which the Contracting Officer is referred for the answer are apparently not before the Board, it is apparent that no particularization of reference is provided, and it may be assumed that such Certified Payrolls would not reflect the particularized task specific allocations of time requested. As another example, Interrogatory No. 12 requests that Appellant explain the relationship between the Appellant's Time Impact Analysis and Support Documentation and particular Change Order Proposals submitted by Appellant. The second part of the interrogatory requests an explanation of the purpose of the Time Impact Analysis and Support Documentation in relation to particular Change Order proposals referred to. Appellant has responded that the interrogatory is vague and unintelligible. The Board does not agree. The relationships which are the subject of the Interrogatory No. 12 are not apparent from the amorphous documentary data to which the Contracting Officer is referred. An effort to understand those relationships is not unreasonable. Appellant's recorded answer does not appear to reflect a good faith effort to understand the questions and provide appropriate answers to them. The subject relationships would appear to be basic to the merits of Appellant's claim, which the Contracting Officer must prepare to meet.

It is not necessary to treat the defects of each answer to Respondent's interrogatories as the deficiencies of Appellant's answer follow a pattern, and many refer expressly to and depend upon the deficient answer to Interrogatory No. 1. Consequently, the Contracting Officer's motion to compel answers is granted. Appellant is directed to respond fully and appropriately to all of Respondent's interrogatories as soon as practicable, but in such manner as to be delivered to Respondent not later than Friday, October 8, 1999.

So ordered.

EDWARD TERHUNE MILLER
Member, Board of Contract Appeals