



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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MOTION FOR SUMMARY RELIEF DENIED: March 24, 2017

CBCA 5078

ABSOLUTE COMPUTER TECHNOLOGIES, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Veronica A. Williams, President of Absolute Computer Technologies, Inc., South Orange, NJ, appearing for Appellant.

Jaron E. Chriss, Office of Regional Counsel, General Services Administration, Atlanta, GA, counsel for Respondent.

Before Board Judges **KULLBERG**, **LESTER**, and **O'ROURKE**.

**O'ROURKE**, Board Judge.

The General Services Administration (GSA or respondent) moves the Board to grant its motion for summary relief and therefore deny an appeal filed by Absolute Computer Technologies, Inc. (ACT or appellant) regarding payment of a "guaranteed minimum" amount under a Federal Supply Schedule (FSS) contract. We deny the motion.

Background

GSA awarded ACT an FSS contract on March 17, 2005. The contract was awarded under schedule 70, GSA's information technology (IT) schedule, which offers federal, state and local agencies access to IT supplies and services from schedule 70 vendors. Companies interested in becoming GSA schedule contractors and competing for task orders from

agencies go through a multi-step selection process. According to the solicitation documents, not all vendors who seek GSA schedule contracts receive them. Vendors are cautioned that “[t]he award of an FSS contract does NOT guarantee future sales and it is up to you to market your company.”

What the contract *does* guarantee, however, is a minimum order by the Government in the amount of \$2500. The Guaranteed Minimum clause states:

The minimum that the Government agrees to order during the period of this contract is \$2500. If the Contractor receives total orders for less than \$2500 during the term of the contract, the Government will pay the difference between the amount ordered and \$2500.

(a) Payment of any amount due under this clause shall be contingent upon the Contractor’s timely submission of GSA Form 72A reports (see GSAR 552.238-74 Industrial Funding Fee and Sales Reporting) during the period of the contract and receipt of the close-out sales report pursuant to GSAR 552.238-74.

(b) The guaranteed minimum applies only if the contract expires or contract cancellation is initiated by the Government. The guaranteed minimum does not apply if the contract is terminated for cause or if the contract is canceled at the request of the Contractor.

The Industrial Funding Fee and Sales Reporting clause provides schedule contractors with detailed instructions for reporting all sales earned under the contract, as well as remittance of any fee owed to the agency. Deadlines for sales reporting are included in this clause. “Contract sales shall be reported . . . within 30 calendar days following the completion of each reporting quarter. The Contractor shall continue to furnish quarterly reports, including ‘zero’ sales, through physical completion of the last outstanding task order or delivery order of the contract.” The clause also permits GSA to terminate the contract for cause if the contractor fails to submit the reports, submits false reports, or fails to remit the required fee.

In accordance with the terms of ACT’s schedule contract, ACT was required to submit a quarterly sales report even if it earned zero sales for the preceding quarter. Despite its marketing efforts, ACT received no sales during the five-year term of the contract. Nevertheless, ACT was required to submit quarterly reports specifying zero sales for each quarter. The contract expired in 2010. ACT never received the contract’s minimum guarantee of \$2500.

Three years later, GSA contacted ACT by electronic mail (email) message about its eligibility for receiving the guaranteed minimum on a separate schedule contract it held. GSA paid ACT the guaranteed minimum for that contract, but did not address ACT's schedule 70 contract. Sometime later, ACT inquired about payment of the minimum guarantee (\$2500) for the schedule 70 contract. On September 24, 2015, GSA denied the request, finding that ACT had failed to submit all of its sales reports in a timely manner. GSA identified five late reports: May 2008, August 2008, November 2009, May 2010, and August 2010. ACT responded to this information on September 24, 2015, stating, "The dates you provided are incorrect. These are the dates the reports were RECORDED, not RECEIVED." On September 28, 2015, GSA replied, notifying ACT that the minimum guarantee was being processed on the other contract, but not on its schedule 70 contract due to late sales reporting. ACT responded by email message the same day, arguing, "We always reported our sales on time. Despite a long, expensive effort, we reported zero sales on time for every period. GSA often reported our sales after the numbers had been received. This happened with [both contracts]."

The record contains email message exchanges between GSA employees acknowledging that ACT was disputing GSA's position that the sales reports were late. For example, in one email message, dated September 28, 2015, a GSA employee wrote:

I can only go by the data in our system and it indicated sales were reported late. There are no circumstances that I am aware of, under which the guaranteed minimum could be paid on this contract. I have no other way to explain that except what I've already said to the contractor. Our system indicates late reporting for multiple quarters . . . and I know of no way GSA would have reported sales for this contractor as they are indicating.

Another email message exchange between GSA employees was prompted by ACT's inquiry on October 6, 2015, following up on the lack of a guaranteed minimum payment for the schedule 70 contract. It says:

As far as I know, there are no further recourse or appeals on this particular issue. I did check again this morning just to be triple sure . . . and the sales reports were late.

An email message dated September 28, 2015, contains the following statement about the sales reporting system that GSA uses for its schedule contractors: "Since Oct. 1998, all sales reporting has been done electronically at our Vendor Support Center website." Attached to the contracting officer's final decision is a computer print-out, dated October 28, 2015, entitled, "Sales Report." The report identifies Absolute Computer Technologies as the contract name and contains hand-written annotations in the margin, indicating which sales

reports were “late.” No other details were provided about the system or the process used to submit reports.

ACT made several attempts to collect the guaranteed minimum of \$2500 through email messages to various agency officials, including the GSA Administrator. Eventually, the GSA contracting officer for the FSS contract was added to the email chain, at which point he reached out to ACT, acknowledged the claim, and informed ACT that he would issue a final decision soon. ACT expressed appreciation for the forthcoming final decision, directed her GMR<sup>1</sup> request to the contracting officer, and provided him with additional information to support its claim. ACT also requested information on the appeals process in the event the claim was denied.

The contracting officer issued a final decision on November 18, 2015, denying payment on the basis that ACT failed to meet the timeliness requirements of the Guaranteed Minimum clause (I-FSS-106) and the Industrial Funding Fee and Sales Reporting clause (552.238-74). ACT appealed the contracting officer’s decision to this Board, which docketed the appeal on December 3, 2015. In its appeal, ACT explained, “We began inputting [zeros] to report our lack of sales into the GSA Advantage System in 2003. When we experienced problems with GSA’s system . . . , we emailed our reports to the Contracting Officers or GSA Vendor Support Center.” ACT further stated, “ACT, Inc. did everything possible to comply with I-FSS-106 and all other terms and conditions of our GSA contracts.” ACT added, “GSA did not deliver on the level of support nor did it meet the expectations that it set by GSA collateral. . . . \$2500 is a mere pittance compared to the hundreds of thousands spent pursuing leads from GSA and other Federal Agencies. . . . GSA should either pay the GMR or stop offering it.”

On August 31, 2016, GSA filed a motion for summary relief, claiming that no material facts were in dispute and it was entitled to relief as a matter of law. The basis of its motion is that ACT failed to comply with the terms and conditions of its schedule contract, namely the timeliness requirements for sales reporting. On October 24, 2016, ACT filed a response to GSA’s motion. In its response, ACT acknowledged that “all ‘0’ reports were not submitted,” but argued that GSA was not harmed by this omission, as it did not impact any fee owed to the agency. Appellant reasoned that

One of the, if not THE, primary reasons for this regulation was to ensure that GSA was paid the Industrial Funding Fee and to maintain a track record for these fees . . . . When the reported fee is ‘0,’ it does not detract from GSA’s

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<sup>1</sup> GMR stands for Guaranteed Minimum Requirement. This is the amount specified in clause I-FSS-106, which, in this case, is \$2500.

revenue. A zero report is rather a measure of the lack of earning a task order or award despite the vendor and GSA's efforts.

Appellant further argued that "GSA's Guaranteed Minimum Requirement is a sales tool to attract vendors. While the GMR is a small fraction of the cost of earning a Federal Supply Schedule, offering it suggests a good faith effort by GSA to help defray the cost of acquisition should the arrangement not yield mutual value."

On December 2, 2016, GSA filed its reply, which observed that ACT "admitted and/or failed to contest genuine facts" relating to the appeal. Respondent further stated, "ACT's request that the Board follow the spirit of the law rather than the letter of the law is beyond the authority of the Board." It characterized ACT's appeal as one rooted in policy rather than fact, and argued that policy matters are beyond the scope of the appeals process. Finally, respondent requested that the Board disregard as irrelevant articles that appellant included in its response that discussed judges exhibiting empathy in rendering decisions.

### Discussion

#### I. Standard of Review – Motion for Summary Relief

Summary relief is this Board's analogous procedure to summary judgment. *National Housing Development Group, Inc. v. Department of Housing and Urban Development*, CBCA 340, 341, 2009-1 BCA ¶ 34,043. Resolving a dispute by summary relief is appropriate when no material facts are in dispute and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "The purpose of summary [relief] is not to deprive a litigant of a [hearing], but to avoid an unnecessary [hearing] when only one outcome can ensue." *Vivid Technologies, Inc. v. American Science & Engineering, Inc.*, 200 F.3d 795, 806 (Fed. Cir. 1999).

When considering motions for summary relief, the moving party bears the burden of proving the absence of any genuine issue of material fact. *Vivid Technologies*, 200 F.3d at 806. All justifiable inferences must be drawn in favor of the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 255 (1986). However, when a motion for summary relief is properly supported, an adverse party may not rest upon the mere allegations or denials of its pleading. Rather, the response must set forth specific facts showing there is a genuine issue for trial. *First National Bank of Arizona v. Cities Services Co.*, 391 U.S. 253, 288 (1968) (citing Fed. R. Civ. P. 56(e)). A material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson*, 477 U.S. at 248. In addition, the tribunal will not make credibility determinations or weigh conflicting evidence. At this point, the judge's only function is to determine whether there is a genuine issue for a hearing. *Id.* at 249.

## II. Material Facts in Dispute

When GSA filed its motion, conflicting accounts existed between the parties with regard to whether ACT's sales reports were timely submitted—an issue that goes to the heart of this appeal, as it formed the basis of the agency's denial of the guaranteed minimum. Respondent determined the reports were late, while ACT maintained they were submitted on time. In support of its position, respondent relied on information contained in an online vendor support database which reflected that appellant had submitted five untimely reports during the contract term. The record appears to contain a printout from that database, purportedly showing the dates that Act reported its sales. However, the record contains no explanation of how the information was received, processed, or reported. The record contains email messages from agency employees, who merely inform the vendor of the non-compliant report dates. Nowhere in the record is there any narrative on how the reporting process works that would enable the Board to decide whether the agency could have contributed to the reports being late. The evidence is insufficient for the Board to grant relief in this instance, even in light of appellant's failure to respond to the motion with nothing more than personal knowledge.<sup>2</sup>

Even though there was no basis for filing this motion at the outset, respondent points to appellant's own statement in response to the motion as sealing appellant's fate: "ACT acknowledges that all '0' reports were not submitted." We disagree. This statement only serves to exacerbate the confusion. The agency never alleged that appellant failed to *submit* reports; it simply claimed that appellant submitted them *late*. Appellant did not recant its earlier statements about having trouble with the reporting system or sending reports directly to the contracting officer, nor did it elaborate on its last statement, leaving the Board with little reassurance that this single statement wipes away all of its earlier contentions about timeliness. Furthermore, the contract provides for different remedies depending upon whether a report is late or not submitted at all.

Our duty to construe inferences in favor of the non-movant precludes us from granting summary relief on the facts as presented by the parties. However, even if the parties had developed the record sufficiently on those aspects of the record that we find lacking, we are not persuaded that respondent would have prevailed on its motion as a matter of law. To ensure that further development of the record includes both factual and legal matters, we briefly address the legal deficiencies of respondent's arguments below.

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<sup>2</sup> No electronic receipts, vendor reports, email messages, employee affidavits, or other facts and circumstances surrounding the submission of sales reports, were attached to appellant's response to further explain its statements in the notice of appeal and complaint.

### III. Summary Relief as a Matter of Law

Respondent's legal argument is that appellant failed to meet the terms and conditions of its schedule contract when it submitted untimely reports, and that as a result, it forfeited its right to a guaranteed minimum payment, even if it earned zero sales. That is the extent of its legal argument and analysis. Perhaps this straightforward approach is meant to underscore the simplicity of its position, or highlight the lack of ambiguity in clauses that conspire to divest a schedule contractor, which fully performs, of its guaranteed minimum. Either way, the argument is inadequate to prevail on summary relief.

Substantial precedent exists on the issues of material breach, waiver, the sufficiency of consideration to ensure mutuality of obligation, and the circumstances under which parties are excused from performing their legal obligations. None of those issues is addressed here. The record requires substantial further development on the facts and the law.

#### Decision

Respondent's motion for summary relief is **DENIED**.

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KATHLEEN J. O'ROURKE  
Board Judge

We concur:

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H. CHUCK KULLBERG  
Board Judge

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HAROLD D. LESTER, JR.  
Board Judge