

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

NATIONAL GLASS & GATE SERVICE, INC., :
Plaintiff, :
v. : CA 11-223 ML
HARBOR FREIGHT TOOLS USA, INC., and :
CENTRAL PURCHASING, LLC, :
Defendants. :

**MEMORANDUM AND ORDER
GRANTING IN PART
DEFENDANTS' MOTION TO COMPEL**

Before the Court is Harbor Freight Tools USA, Inc. and Central Purchasing, LLC's Motion to Compel (Docket ("Dkt.") #21) ("Motion to Compel" or "Motion"). Plaintiff National Glass & Gate Service, Inc. ("Plaintiff" or "NG&G"), has filed an opposition to the Motion. See National Glass & Gate Service, Inc.'s Memorandum of Law in Opposition to Harbor Freight Tools USA, Inc. and Central Purchasing, LLC's Motion to Compel (Dkt. #22) ("Opposition"). A hearing was held on February 17, 2012.

Background

In this action, NG&G has sued Harbor Freight Tools USA, Inc., and Central Purchasing, LLC (collectively "Harbor Freight"), for breach of contract, book account, and unjust enrichment. See Amended Complaint (Dkt. #6) ("Complaint") ¶¶ 15-32. NG&G alleges that pursuant to a maintenance agreement (the "Maintenance

Agreement" or "Agreement") it provided repair and maintenance services to Harbor Freight stores and facilities throughout the United States. Id. ¶¶ 8-11. Most, if not all, of the services were provided by subcontractors engaged by NG&G. Id. ¶ 8. NG&G claims that Harbor Freight has failed to pay invoices which total \$432,916.35. Id. ¶ 13. Attached to the Complaint as Exhibit ("Ex.") A is a computer printout listing 866 unpaid invoices which together total \$432,916.35. Id., Ex. A. The invoices are dated between December 30, 2010, and May 16, 2011. Id.

In response to the suit, Harbor Freight has filed a counterclaim for breach of contract and for indemnification. See Defendants Harbor Freight Tools USA, Inc. and Central Purchasing, LLC's Amended Answer and Counterclaim (Dkt. #12) ("Answer and Counterclaim") ¶¶ 12-20.¹ The basis for the indemnification claim is that several subcontractors engaged by NG&G to perform services pursuant to the Maintenance Agreement allegedly have demanded payment from Harbor Freight. Id. ¶ 19. In its counterclaim, Harbor Freight alleges that NG&G has breached the Maintenance Agreement by charging Harbor Freight amounts not agreed upon in the contract. Id. ¶ 14. Specifically, Harbor Freight asserts that NG&G overbilled for charges billed by subcontractors, "drastically marking up certain charges, while also creating other expenses that

¹ In citing to specific paragraphs of the Answer and Counterclaim, the Court is citing to the counterclaim portion of that pleading.

were never charged by the particular subcontractor.” Memorandum of Law in Support of Harbor Freight Tools USA, Inc. and Central Purchasing, LLC’s Motion to Compel (“Defendants’ Mem.”) at 2.

Discussion

Harbor Freight contends that the only way for it to determine if NG&G charged the proper amount on the invoices (both those for which NG&G seeks payment and those which Harbor Freight has already paid) is to compare the back-up documentation - what the vendor billed to NG&G - with the bills from NG&G to Harbor Freight. See Reply Memorandum in Support of Harbor Freight Tools USA, Inc. and Central Purchasing, LLC’s Motion to Compel (Dkt. #23) (“Defendants’ Reply Mem.”) at 2. As support for its contention that NG&G has overcharged Harbor Freight, Harbor Freight represents that it has obtained from other sources 29 of the approximately 8000 vendor bills in question and that a comparison of those bills to the NG&G invoices “demonstrates shocking inconsistencies.” Id. Among the inconsistencies cited, in some instances NG&G charged for more labor hours on its invoice to Harbor Freight than are reflected on the corresponding vendor’s bill to NG&G. Id. at 2-3. Similarly, NG&G in some instances billed for material costs greater than the material costs billed to NG&G by the vendor. Id. at 3. Harbor Freight also alleges that NG&G invoiced Harbor Freight for trip charges even when no trip charges were billed to NG&G by its vendor. Id.

NG&G has objected to the Motion on the ground that the requested documents are not relevant and, even if they are relevant, NG&G's burden of identifying and collecting the documents substantially outweighs the likely benefit of collecting and producing them. Opposition at 1. NG&G's relevancy argument is based on its contention that the charges about which Harbor Freight is complaining are not prohibited by the Maintenance Agreement. Id. NG&G notes that the Maintenance Agreement does not contain any specific formula or provision by which NG&G is to mark up its subcontractor invoices to cover its costs and profits, id. at 3, 5, although NG&G did commit to maintaining a profit margin of less than 19% on an annual basis, id. at 3. NG&G also contends that Harbor Freight failed to timely dispute the charges as the Agreement requires. Id.

Harbor Freight, however, argues that "[u]nder the Maintenance Agreement, NG&G was to make its profit through charging Harbor Freight agreed hourly rates for the services provided and then, presumably, negotiate lower bulk rates from its vendors." Defendants' Reply Mem. at 2. As support for this contention, Harbor Freight cites a February 29, 2008, email between the parties in which NG&G's representative, Tom Marcello, wrote in part:

Hi Lori

Please find enclosed our by state rates for both Plumbing and Locksmith services. These rates include our overhead and profit so no additional charges would be added to what is published when we invoice. In addition, if we

could achieve a set volume of calls within these trades we would have an opportunity to offer you some additional discounts as well.

As we discussed yesterday we would limit trip charges for non-emergency by targeting one half hour or less. This target is actually less than the current industry standard of one hour for these particular trades. Therefore for service that does not require same day or emergency service the cost to you would actually be better than that experienced by most purchasers of this service. In addition, we will guarantee annually that our overall margin including our direct cost of call management and overhead will not exceed 19%.

Defendants' Reply Mem., Ex. A (Email from Marcello to Day of 2/29/08 ("Marcello Email")).

The Court has little difficulty finding that the documents sought by Harbor Freight are relevant. They constitute supporting documentation for the charges which are listed in Ex. A to NG&G's Complaint and for the other invoices which are the subject of Harbor Freight's Counterclaim. See Complaint, Ex. A; Answer and Counterclaim ¶¶ 12-16; see also Beyer v. Medico Ins. Grp., 266 F.R.D. 333, 338-39 (D.S.D. 2009) ("Discovery requests should be considered relevant if there is any possibility that the information sought is relevant to any issue in the case, and should ordinarily be allowed, unless it is clear that the information sought can have no possible bearing on the subject matter of the action."); EEOC v. Klockner H & K Machs., Inc., 168 F.R.D. 233, 235 (E.D. Wis. 1996) ("A request for discovery should be considered relevant if there is any possibility that the information sought may be relevant to the subject matter of the action.") (internal

quotation marks omitted); Bass v. Gulf Oil Corp., 304 F.Supp. 1041, 1049 (S.D. Miss. 1969) (granting motion to compel production of documents showing prices paid for crude oil where plaintiff claimed defendant engaged in a price-fixing scheme as to the crude oil).

In addition, NG&G appears not to dispute that, as part of the agreement, it "guarantee[d]," Marcello Email, that its overall margin annually would not exceed 19%. The only means Harbor Freight has of determining whether NG&G honored this guarantee is by comparing the underlying invoices which NG&G received from its subcontractors with the corresponding invoices which NG&G sent to Harbor Freight. Thus, even if the Court were to accept NG&G's argument that the Maintenance Agreement does not specifically prohibit the charges about which Harbor Freight is complaining and that this renders the underlying documentation irrelevant, the guarantee that NG&G's margin would not exceed 19% on an annual basis makes the documents relevant.

The far more difficult question, however, is whether requiring production of the documents sought imposes an unreasonable burden on NG&G. NG&G has explained that to identify and collect approximately 8,000 subcontractor invoices dating back to 2007 would require more than 1,000 hours of electronic and manual searching. See Opposition at 6; see also id., Ex. D (Affidavit of Thomas Marcello) ¶ 18 ("It would take more than one-thousand hours to identify and produce approximately 8,000 subcontractor invoices

from 2007 through 2011.”). Harbor Freight has not disputed this estimate, but maintains that production of the documents is still necessary.

The Court, however, is inclined to agree with NG&G that even if the records were produced, the time required for Harbor Freight to go through and compare 8,000 subcontractor invoices with the corresponding invoices which NG&G sent to Harbor Freight would be cost prohibitive in a case where the amount in controversy is at most \$500,000. Counsel for Harbor Freight indicated at the hearing that it had taken considerable time to make the necessary comparisons utilizing the 29 subcontractor invoices which Harbor Freight had been able to obtain from other sources. Even if paralegals were utilized by Harbor Freight to perform the task of reviewing the invoices and making the comparisons, given the detailed nature of the work involved and the lack of standardized formats, the process would take hundreds of man hours.²

At the same time, the Court is not entirely persuaded by NG&G’s citation of Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 98 S.Ct. 2380 (1978), for the proposition that a party should not

² While NG&G’s invoices to Harbor Freight have a standardized format, the invoices from the subcontractors to NG&G do not. See Defendants’ Reply Mem., Exs. B E. Thus, the process of correlating the charges which appear on the two invoices requires flipping back and forth between documents and searching for corresponding entries. Recording the differences noted is an additional task. Performing this exercise just utilizing the eight invoices attached to Defendants’ Reply Mem. quickly demonstrates that doing it for 8,000 invoices would be a monumental undertaking.

be penalized for not maintaining its records in the form most convenient to some potential future litigant.³ Id. at 363. In Oppenheimer Fund, Inc., the Court stated “we do not think a defendant should be penalized for not maintaining his records in the form most convenient to some potential future litigants *whose identity and perceived needs could not have been anticipated.*” Id. (italics added). Here NG&G guaranteed to Harbor Freight that its overall margin would not exceed 19% on an annual basis. See Marcello Email. Having made this guarantee, NG&G should have anticipated that it might be required to demonstrate that it had performed as guaranteed. While it is understandable that NG&G might have difficulty producing at this point records demonstrating such performance for 2010 and earlier years, NG&G’s inability to produce the records for 2011 without expending hundreds of man hours is somewhat surprising.

Nevertheless, at the hearing the Court observed that, given the enormous effort which would be required to produce the documents sought, it might make sense to determine first whether either of the following alleged practices violated the Agreement: (1) billing Harbor Freight more for labor, materials, trip charges, and estimates than NG&G was billed for those items by the subcontractor performing the work, or (2) billing Harbor Freight

³ Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 98 S.Ct. 2380 (1978), was cited by NG&G’s counsel at the February 17, 2012, hearing.

for one or more of these items despite the fact that the subcontractor did not bill for the item(s).⁴ If neither practice violated the Maintenance Agreement, then Harbor Freight's defense against the NG&G's breach of contract claim and also Harbor Freight's counterclaim would be negated, and there would be no reason to require production of the documents.⁵ If either practice is determined to have violated the Agreement, then production of additional documents could be ordered. After further consideration, the Court elects to follow this procedure.

Determining whether either of the above practices violated the Maintenance Agreement does not require the production of 8,000 subcontractor invoices or even the much smaller number of invoices corresponding to the 866 overdue invoices identified in the Complaint. See Complaint, Ex. A. However, it seems reasonable that some sampling of invoices should be produced to insure that

⁴ To one unfamiliar with the contract, the answer with respect to whether the second alleged billing practice would violate the Maintenance Agreement might seem intuitive. The Court, having read the Maintenance Agreement and the Marcello Email, does not believe that the answer is at all clear.

⁵ The Court recognizes that it is possible that neither billing practice would violate the Maintenance Agreement but that NG&G still could have violated the guarantee that its margin would not exceed 19% annually. However, Harbor Freight's complaint is that it has been overcharged for labor, materials, and trip charges and that the amounts billed for these items violate the Maintenance Agreement. See Answer and Counterclaim ¶¶ 13-14. Harbor Freight has not alleged that NG&G violated the profit margin cap, and it has not argued that the documents are needed to determine whether NG&G exceeded that cap. The Court is not inclined to impose an extreme discovery burden on NG&G based on a rationale that has not been advanced as a basis for the instant Motion.

the determination regarding the two alleged practices is an informed one. As Harbor Freight has already been able to obtain 29 subcontractor invoices from other sources, the Court takes this fact into consideration in determining what number would constitute a fair sampling. The Court concludes that a total of 50 invoices (approximately 5.77% of 866) is sufficient. To be clear, the 50 invoices include the 29 already in Harbor Freight's possession.

Accordingly, the Court grants the Motion to the extent that Harbor Freight may select 21 invoices listed in Ex. A to the Complaint and NG&G shall produce the subcontractor invoices which correspond to those invoices within thirty days of the date of this Order. The Court allows Harbor Freight to make the selection (instead of ordering that the invoices be randomly selected) to further increase the relief granted to Harbor Freight by this Order.⁶

Conclusion

The Motion is GRANTED to the extent stated immediately above. To the extent that the Motion seeks greater relief, it is denied. The denial, however, is without prejudice. If the Court subsequently determines that either of the two possible practices described at pages 8-9 of this Memorandum and Order violate the Maintenance Agreement, Harbor Freight may seek production of

⁶ Thus, if Harbor Freight wishes to select the 29 invoices with the largest amounts billed (because it believes that they are more likely to contain overcharges), it is free to do so.

additional invoices.

So ordered.

ENTER:

/s/ David L. Martin
DAVID L. MARTIN
United States Magistrate Judge
February 21, 2012