

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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The Swanson Group, Inc. ) ASBCA No. 52109  
 )  
Under Contract No. N68711-91-C-9509 )

APPEARANCE FOR THE APPELLANT: Mr. Johnny Swanson, III  
President

APPEARANCES FOR THE GOVERNMENT: Arthur H. Hildebrandt, Esq.  
Navy Chief Trial Attorney  
John S. McMunn, Esq.  
Senior Trial Attorney  
Naval Facilities Engineering  
Command  
San Bruno, CA

OPINION BY ADMINISTRATIVE JUDGE TODD  
ON THE GOVERNMENT'S MOTION TO DISMISS

The Government moves to dismiss the appeal on the ground that appellant's failure to file a termination for convenience settlement proposal with the contracting officer within one year of the Board's conversion of its contract's termination for default into a termination for convenience constituted a waiver of its right to appeal the contracting officer's unilateral settlement determination. Appellant opposes the motion on the grounds that it did not intend to surrender its rights and the Government unfairly delayed responding to its request for an extension of time. Since the motion involves matters outside the pleadings, we have treated the motion as one for summary judgment. We deny the Government's motion.

STATEMENT OF FACTS

On 20 December 1991, the Western Division of the Naval Facilities Engineering Command (NAVFAC) awarded Contract No. N68711-91-C-9509 to appellant, The Swanson Group, Inc., to provide guard services at the naval shipyard in Long Beach, California (R4, tab 2 at 9). The contract incorporated by reference the standard provision FAR 52.249-2 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (APR 1984), which provides in pertinent part:

(d) After termination, the Contractor shall submit a final termination settlement proposal to the Contracting

Officer in the form and with the certification prescribed by the Contracting Officer. The Contractor shall submit the proposal promptly, but no later than 1 year from the effective date of termination, unless extended in writing by the Contracting Officer upon written request of the contractor within this 1-year period. However, if the Contracting Officer determines that the facts justify it, a termination settlement proposal may be received and acted on after 1 year or any extension. If the Contractor fails to submit the proposal within the time allowed, the Contracting Officer may determine, on the basis of information available, the amount, if any, due the Contractor because of the termination and shall pay the amount determined.

....

(i) The Contractor shall have the right of appeal, under the Disputes clause, from any determination made by the Contracting Officer under paragraph (d), (f), or (k), except that if the Contractor failed to submit the termination settlement proposal within the time provided in paragraph (d) or (k), and failed to request a time extension, there is no right of appeal.

(*Id.* at I-18)

By letter dated 27 April 1992, the contracting officer issued a final decision terminating the contract in whole for default for failure to comply with the terms of the contract and to meet the conditions identified in a cure notice. Appellant filed a timely appeal to the Board. (R4, tab 1)

The Board's decision, dated 7 November 1997, sustained the appeal and converted the termination for default into a termination for the convenience of the Government for failure of the Government to follow proper procedures. *The Swanson Group, Inc.*, ASBCA No. 44664, 98-2 BCA ¶ 29,896. The Board mailed a copy of the decision to appellant on 12 November 1997. Appellant received the decision on 17 November 1997 (comp., tab B at 2).

By letter dated 10 November 1998, appellant's then counsel advised Government counsel that appellant's principal, Mr. Swanson, was incarcerated. The letter requested a one-year extension of time to submit appellant's termination settlement proposal. Government counsel, by letter dated 23 November 1998, advised appellant that the

request was untimely. He told appellant that he would nevertheless refer it to the contracting officer, who was then unavailable due to a family emergency, for consideration. (Comp., tab B at 6) By letter dated 9 December 1998, Government counsel advised appellant's then counsel that the contracting officer, who was not identified, declined to grant the extension and would proceed to issue a unilateral settlement determination. He further stated that "[a]ny information which Mr. Swanson wishes to submit for consideration in the determination may be provided the Contracting Officer through me." (*Id.* at 7) Appellant did not submit any information in response to Government counsel's suggestion. The letter does not reveal the specifics of any consideration by the contracting officer of appellant's explanation for requesting an extension of time and does not provide reason other than untimeliness for refusing appellant's request.

On 2 March 1999, the contracting officer made a settlement determination in accordance with the Federal Acquisition Regulation (FAR) 49.109-7 for a net amount of \$12,294.21. The contracting officer's decision noted that the Internal Revenue Service (IRS) had placed a lien on all monies due to appellant for unpaid taxes. (R4, tab 13) On 4 March 1999, the termination contracting officer's final decision was issued (R4, tab 16). On 28 April 1999, the final decision was incorporated into unilateral Modification No. P00003 to the contract. The modification provided for payment of the settlement amount to the United States Treasury pursuant to an IRS notice of levy, dated 14 April 1999. (R4, tab 15)

Appellant filed this timely appeal. In its complaint, appellant alleged that its actions were intended to preserve its right to submit a proposal for quantum. Appellant further alleged that the Government delayed responding to its timely request for an extension of time and then asserted, after the expiration of the one-year period, that the request was untimely (comp., tab B at 2). Appellant provided an estimate of amounts for a termination settlement proposal in its complaint and stated that it could not accurately detail its separate claim item amounts without access to appellant's files, which Mr. Swanson did not have while he was incarcerated. Appellant sought \$1,920,000 for contract start-up expenses, unpaid fixed price contract charges, interest, interest and penalties due to the IRS, legal expenses, and damages for the loss of use of funds and intentional infliction of loss.

Appellant filed a motion for stay of proceedings until Mr. Swanson was released from prison and could better prosecute the appeal. The Board suspended the proceedings and provided appellant an opportunity to submit a further response to the Government's motion. Appellant notified the Board of Mr. Swanson's change of address, effective 14 March 2000. Appellant filed its further response within the time period allowed by the Board, and the Government filed a reply. Appellant filed a further reply.

Appellant has filed a supplement to the Rule 4 File that the Government has stated appears to constitute a *de facto* convenience settlement proposal (Gov't reply at 4). The revised amount of appellant's proposal is \$975,562.76 (app. supp. R4, ex. 17).

### DECISION

When a motion presents a non-jurisdictional, affirmative defense to a claim and relies on material other than the pleadings, it is treated as a motion for summary judgment. *Bankruptcy Estate of Dr. William Barry*, ASBCA No. 50345, 99-2 BCA ¶ 30,469; *see Do-Well Machine Shop, Inc. v. United States*, 870 F.2d 637 (Fed. Cir. 1989). Summary judgment is properly granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The moving party bears the burden of establishing the absence of any genuine issue of material fact and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987); *Lockheed Martin Librascope Corporation*, ASBCA No. 50508, 00-1 BCA ¶ 30,635. The undisputed facts set forth above are based on the evidentiary file and documents accompanying the parties' submissions. The parties have not submitted affidavit evidence.

The one-year period for the submission of settlement termination proposals has been held enforceable by the Government to effect a waiver of a contractor's statutory right of appeal. *Do-Well Machine Shop, Inc. v. United States*, *supra*. Failure to submit a termination settlement proposal timely constitutes an affirmative defense. *Varo, Inc.*, ASBCA Nos. 47945, 47946, 98-1 BCA ¶ 29,484. We have granted summary judgment for the Government where an uncontroverted declaration from the termination contracting officer stated that no termination settlement proposal was received and no extension was granted within the one-year period. *Industrial Data Link Corporation*, ASBCA No. 49348, 98-1 BCA ¶ 29,634, *motion for reconsid. dismissed*, 98-2 BCA ¶ 29,866. In that appeal the appellant conceded it did not submit its proposal within the one-year period. The appellant had not requested an extension of time.

A motion to dismiss on the ground that a claim is barred by a contractual time limitation is in the nature of an affirmative defense, which must be established by the asserting party. *Stradedile/Aegis Joint Venture*, ASBCA No. 39318, 95-1 BCA ¶ 27,397; *Lumanlan Portrait & Painting Service*, ASBCA No. 35709, 91-2 BCA ¶ 23,988, *motion for reconsid. denied*, 91-3 BCA ¶ 24,299. The motion before us should be denied because the arguments advanced do not entitle the Government to judgment as a matter of law. The contracting officer denied appellant's request for an extension of the one-year period for filing a termination settlement proposal with the contracting officer. The Government argues that appellant's appeal from the contracting officer's unilateral determination of the settlement amount due is, therefore, time-barred. In support of its

motion, the Government states that appellant's termination settlement proposal was due to be filed with the contracting officer on 6 November 1998, which was one year from the date of the Board's decision. In reply to appellant's opposition, the Government maintained its position that appellant's request was untimely. The Government added that as appellant's principal is a convicted felon recently released from prison, appellant is not excused as a matter of law from the one-year submission period. The Government also argued that neither appellant's principal nor appellant have any equity or legal standing to pursue the appeal. The Government did not submit an affidavit from the contracting officer in support of its motion.

We find no merit in the Government's arguments. Appellant's request for an extension of time was timely. The FAR defines the "[e]ffective date of termination" as meaning:

the date on which the notice of termination requires the contractor to stop performance under the contract. If the termination notice is received by the contractor subsequent to the date fixed for termination, then the effective date of termination means the date the notice is received.

FAR 49.001; *see United Electronics Company*, ASBCA No. 21686, 78-1 BCA ¶ 13,091 at 63,987. Appellant received notice of the termination for convenience upon its receipt of the Board's decision on 17 November 1997, and had until 16 November 1998 to submit its termination settlement proposal or request for a time extension. On 10 November 1998, within the one-year period, appellant requested additional time for submitting its proposal explaining the circumstances that prevented timely submission. The contracting officer declined to grant the request and proceeded to issue a unilateral settlement determination. The Government's interpretation of what constituted the effective date of the termination was erroneous and did not support its consideration that appellant's request was untimely.

Appellant submitted a timely written request for an extension, and FAR 52.249-2(i) does not, therefore, operate to deny appellant its right of appeal. Appellant did not submit a termination settlement proposal within the time provided in FAR 52.249-2(d), but did request a time extension within the required time.

The Government's motion for summary judgment is denied. The Government shall file its answer within 21 days of its receipt of this decision.

Dated: 2 November 2000

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LISA ANDERSON TODD  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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MARK N. STEMLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

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RONALD JAY LIPMAN  
Administrative Judge  
Acting Vice Chairman  
Armed Services Board  
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 52109, Appeal of The Swanson Group, Inc., rendered in conformance with the Board's Charter.

Dated:

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EDWARD S. ADAMKEWICZ  
Recorder, Armed Services  
Board of Contract Appeals