

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Consolidated Defense Corporation) ASBCA Nos. 52315, 52719
)
Under Contract No. N00024-92-C-4188)

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OPINION BY ADMINISTRATIVE JUDGE REED
ON GOVERNMENT'S MOTIONS TO DISMISS
AND FOR SUMMARY JUDGMENT

The Government terminated appellant's supply and services contract for the convenience of the Government. Thereafter, asserting that appellant failed to submit a timely termination for convenience settlement proposal (TFCSP), the contracting officer (CO) issued a unilateral determination (UD) in the amount of \$725,366.06. The UD also stated that appellant had lost the right to appeal the Government's decision. The Government concurrently asserted a Government claim for return of \$138,240.94, the difference between amounts already paid to appellant under the contract (\$863,607) and the amount allowed under the UD.

Appellant filed a timely appeal. The Board docketed the challenge by appellant to the UD as ASBCA No. 52315, and later docketed the appeal of the Government's claim for return of \$138,240.94, as ASBCA No. 52719.

In its complaint, appellant demands payment of \$1,707,117.10, on account of the TFC, plus unspecified punitive damages. The present record shows no claim for punitive damages submitted to the CO. Therefore, the matter of punitive damages is not yet before the Board for resolution.

The Government asks the Board to dismiss ASBCA No. 52315, as time-barred by appellant's alleged untimely TFCSP. The Government also seeks summary judgment on its affirmative claim under ASBCA No. 52719. Appellant has responded by its "Appellant's

Objection” to the Government’s motions (App. mot.), asserting that there are material facts in dispute that preclude summary judgment.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

1. On 17 March 1992, the Naval Sea Systems Command, Department of the Navy (Government) awarded Contract No. N00024-92-C-4188 (the contract) to Consolidated Defense Corporation (CDC or appellant) for the provision of shipboard trash compactors and related items. The contract incorporated by reference the following standard provisions:

a. FAR 52.233-1 DISPUTES (APR 1984); and

b. 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 [CO] in the form and with the certification prescribed by the [CO]. 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 [CO] upon written request of the Contractor within this 1-year period. However, if the [CO] 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 [CO] 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 [CO] under paragraph (d) . . . except that if the Contractor failed to submit the termination settlement proposal within the time provided in paragraph (d) . . . and failed to request a time extension, there is no right of appeal. . . .

(Complaint and Answer (C&A) (¶¶ 1); R4, tab 50; SR4, tabs 53-54)

2. By contract Modification No. P00009 (Mod P9), dated 16 March 1993, and effective on the date of receipt by CDC, the Government terminated the contract in its entirety for the Government’s convenience. CDC received a copy of Mod P9 on 18 March

1993. (C&A (¶¶ 3); R4, tab 48; Gov't Motions to Dismiss and for Summary Judgment (Gov't mot.); Declaration of James Ljutic (sworn decl.) (¶4), ex. 1)

3. On or about 15 September 1993, CDC's President was able to establish contact with the original termination CO (TCO) (Joseph Brunelle). CDC had been preparing its TFCSP but did not yet have "the inventory pages done." The original TCO advised CDC's President to submit the settlement proposal "as it existed . . . so the process could begin." The TCO also provided advice on how to structure the inventory so as to maximize any re-sale value. (R4, tab 30; app. mot. ex. B (¶¶ 1, 4-5, 8-12))

4. Appellant submitted an interim TFCSP dated 31 October 1993, in the total amount of \$1,696,704. Documents signed by CDC's President included Standard Form (SF) 1435, "Settlement Proposal (Inventory Basis)," including the preprinted certificate, SF 1439, "Schedule of Accounting Information," and SF 1440, "Application for Partial Payment." (R4, tabs 46-47; Gov't mot. sworn decl. (¶ 5); app. mot. ex. B (¶ 13))

5. The original TCO rejected the interim TFCSP dated 31 October 1993, as incomplete and incorrect as to the inventory presented by appellant. CDC's President maintained contact with the TCO and periodically but unsuccessfully requested guidance from him. CDC struggled with issues related to a proper inventory and how best to prepare a final TFCSP. (App. mot. ex. B (¶¶ 14-17, 19-20, 25))

6. The original TCO initially authorized two partial payments, "for the terminated contract," to CDC on 3 and 23 December 1993 (R4, tabs 44-45).

7. In March 1994, CDC was preparing a final TFCSP to submit prior to the expiration of one year after the termination. However, the original TCO directed a different inventory method. By letter dated 11 March 1994, "faxed" to the TCO, appellant's President advised the TCO "that as a result of unforeseen delays beyond our control, we will need a little more time to submit our final [TFCSP]." The TCO received the letter on 14 March 1994. (R4, tab 43; Gov't mot. sworn decl. (¶ 8), ex. 2)

8. By letter dated 16 March 1994, received by CDC on 21 March 1994, the original TCO advised appellant that it must submit a request for a specific time extension and the reasons therefor within 15 days of receipt of the letter. The TCO further stated that the request would be evaluated and CDC "will be advised of the decision in this matter." The letter also reminded appellant of the requirements stated in FAR 49.206-1, and that "[t]he final settlement proposal must be submitted within one year from the effective date of the termination, unless the period is extended by the TCO." The TCO's letter further advised "[i]f a response to the above questions [that is, how much time is needed and for what reasons] is not received in the time requested, then the undersigned TCO may unilaterally determine, on the basis of the information available, the amount due CDC for this termination. CDC would have no right of appeal to a determination." In a telephone conversation with CDC's President, the TCO minimized his written advice, advising CDC to submit "an explanation and

a time frame . . . ‘as soon as you can’ and that the TCO’s office was ‘so busy no one would look at the [TFCSP] right away anyway.’” (R4, tab 42; Gov’t mot. sworn decl. (¶ 8); app. mot. ex. B (¶ 24))

9. Appellant’s President responded to the original TCO by letter dated 17 March 1994, “faxed” to the TCO on 17 March 1994, and postmarked 18 March 1994, stating that appellant would be able to get the proposal to the TCO within 30 days. CDC’s response to the TCO related the delay in submitting a final TFCSP to “events arising from the timing of payment receipts from the Government.” (R4, tab 41; Gov’t mot. sworn decl. (¶ 9), ex. 3)

10. By letter dated 17 April 1994, a Sunday, appellant advised the original TCO that “[w]e will have the final [TFCSP] to you in a few more days, tax time has made it a little difficult to get our accountants (outside accountants) in to do the final drill.” A handwritten note on the letter’s margin stated: “We’ve been trying to reach you since Sunday by fax and phone to no avail. Nobody there seems to know the correct numbers. . . . What are your new fax and phone numbers?” The TCO received the letter on 19 April 1994. (R4, tab 40; Gov’t mot. sworn decl. (¶ 10))

11. In a letter dated 23 April 1994, received by the Government on 29 April 1994, appellant advised the original TCO that expenses through 30 April 1994, would be included and that it expected to hand-carry the submission “just to be safe” (R4, tab 39; Gov’t mot. sworn decl. (¶ 10)).

12. Appellant notified the Government by “fax” on 5 May 1994 that appellant would hand carry the proposal on 9 May 1994. The letter stated, in part: “While your phone and fax numbers have been changed, I assume that your address has remained the same.” (R4, tab 37; Gov’t mot. sworn decl. (¶ 10))

13. The present record reflects no response from the original TCO to appellant’s letters dated 17 March, and 17 and 23 April, and the “fax” dated 5 May 1994 (Gov’t mot. at 7; app. mot. ex. B (¶¶ 27-28)).

14. On 11 May 1994, the original TCO received and accepted for review CDC’s revised interim TFCSP, dated 30 April 1994, totaling \$2,122,819.75. The proposal was submitted on SFs 1435, including the pre-printed certificate, and 1439, both signed by CDC’s President. (C&A (¶¶ 11); R4, tabs 30, 38; Gov’t mot. sworn decl. (¶¶ 5-6); app. mot. ex. B (¶ 29))

15. On 22 November 1994, the original TCO offered to settle appellant’s TFCSP for a specified sum. In a letter dated 9 February 1995, the TCO withdrew that offer, but authorized additional partial payments. (Statement of Fact 6; C&A, ¶¶ 13-15; R4, tab 29; app. mot. exs. D-E)

16. Other partial payments on account of the TFCSP were authorized by the original TCO, the first successor TCO (Daniel Sorkin), and the second successor TCO (Vincent Cheeseman) by Government documents dated 23 August and 29 November 1994, and 22 February, 20 March, and 8 May 1995 (C&A (¶¶ 15); R4, tabs 26-29, 31, 35; Gov't mot. at 1, 5-6; app. mot. exs. A (¶¶ 17-18), E).

17. The parties and counsel continued to exchange information and to negotiate the TFCSP, with the involvement of the original TCO, the first and second successor TCOs, and the third successor TCO (Joel Mason) until 7 October 1997 (Statement of Fact 15; C&A (¶¶ 13-14); R4, tabs 7 (attach. D), 8-13, 17-21, 23-25, 30, 32-33, 36; app. mot. exs. B (¶¶ 30-31, 33, 36-38), C).

18. The first documented allegation by the Government of an untimely TFCSP by CDC was the Government's letter dated 10 February 1999 (R4, tabs 5-6).

19. By Modification No. A00006 (Mod A6) and a separate demand letter, both dated 12 May 1999, the fourth successor TCO (James Ljusic), issued a UD in the amount of \$725,366.06 as the termination settlement in accordance with the TFC provision of the contract, paragraph (f) and demanded that \$138,240.94 be returned to the Government by CDC. The demanded refund follows from deducting the amount of the UD from \$863,607, the amount of progress and partial payments made to CDC by the Government. The UD advised CDC that the UD was not subject to appeal because the contractor's TFCSP was submitted beyond the one year period required for such submission by the TFC provision of the contract. The demand letter by which the Government required that \$138,240.94, be returned to the Government, stated, among other things, that CDC could appeal to the Board. (R4, tabs 1-2; Gov't mot. sworn decl. (¶¶ 1, 3-10, 12-15))

DECISION

ASBCA No. 52315

When a motion presents a non-jurisdictional, affirmative defense to a claim¹ and relies on material other than the pleadings, we will resolve it as a motion for summary judgment. Accordingly, we treat both motions as motions for summary judgment. *Do-Well*

¹ The Government asserts that appellant has not submitted a certified claim under the Contract Disputes Act, as amended, 41 U.S.C. §§ 601-13, for the TFC. The Government overlooks appellant's TFCSP, dated 31 October 1994, revised on 30 April 1995, both certified on SF 1435, and the impasse reached on the TFCSP. (Statement of Facts 4, 14, 17-18) *Rex Sys., Inc. v. Cohen*, 224 F.3d 1367, 1372-73 (Fed. Cir. 2000); *see James M. Ellett Constr. Co., Inc. v. United States*, 93 F.3d 1537, 1543-46 (Fed. Cir. 1996); *Metric Constructors, Inc.*, ASBCA No. 50843, 98-2 BCA ¶ 30,088 at 148,940-41 (identical, correctable, pre-printed certificates on SFs 1435 and 1436; FAR 53.301-1435, -1436).

Machine Shop, Inc. v. United States, 870 F.2d 637, 638-39 (Fed. Cir. 1989); *The Swanson Group, Inc.*, ASBCA No. 52109, 01-1 BCA ¶ 31,164 at 153,929.

As framed by the parties, the issue here is whether appellant timely submitted to the Government its TFCSP. Both parties rely on factual evidence addressing the actual submittal dates, whether CDC requested an enlargement of time within which to file its TFCSP, whether the original TCO allowed an extension of time for receipt of the TFCSP, and how the original and successor TCOs treated the TFCSPs that were submitted. (Statement of Facts 2-4, 6-18)

In the context of the Government's motion, summary judgment is properly granted only where there is no genuinely disputed issue of material fact and the movant is entitled to judgment as a matter of law. To determine whether a material fact is disputed, we construe all reasonable inferences in favor of the non-moving party. The moving party has the burden of showing an absence of genuine issues of material fact. We neither weigh evidence to determine the truth of a matter nor resolve factual differences in deciding whether a material fact dispute genuinely exists. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 249-50, 255 (1986); *Jay v. Secretary of DHHS*, 998 F.2d 979, 982 (Fed. Cir. 1993); *United Technologies Corp., Pratt & Whitney Div.*, ASBCA Nos. 50465 *et al.*, 00-2 BCA ¶ 31,020 at 153,207.

The primary function of a TFCSP is to resolve, by negotiation, matters arising under a TFC. If a TFCSP is submitted within the requisite one year period, but contains flaws that are not so severe as to render the TFCSP meaningless as a vehicle for negotiation and those flaws are susceptible of resolution within a reasonable time, then the TFCSP has been timely submitted. *Rex Sys., supra* at 1371; *Astor Bolden Enter., Inc.*, ASBCA No. 52377, 00-2 BCA ¶ 31,115 at 153,675.

Appellant timely submitted its TFCSP on or about 31 October 1993, well before the deadline set out in the TFC provision of the contract. The basis for the original TCO's rejection of the initial TFCSP has not been explained by the Government (other than the generalized reference to its being incomplete or incorrect) or even addressed in the motion. The TFCSP has not been shown by the Government to be so flawed as to render the submittal meaningless as a vehicle for resolution of the TFC. *Marine Instrument Co.*, ASBCA Nos. 41370, 46295, 97-2 BCA ¶ 29,082 at 144,778.

To the contrary, the TCO authorized partial payments after the initial TFCSP was submitted. We view this, without a more complete record, as evidence that the initial TFCSP was remediable. (Statement of Facts 1-2, 4-6)

Later, CDC submitted a revised interim TFCSP. The Government has presented no evidence that explains how the revised TFCSP was more susceptible of negotiation than the initial TFCSP. The Government negotiated over the revised TFCSP for more than three years

(at least, perhaps as long as nearly five years) and made several additional partial payments based on the revised TFCSP. (Statement of Facts 14-19)

Neither has the revised interim TFCSP been shown to be untimely. Subparagraph (i) of the TFC provision of the contract states, in pertinent part, that the right of appeal would be lost if CDC failed to submit the TFCSP within one year and failed to request a time extension. Where an appellant requests an extension of time to submit its TFCSP within one year of the effective date of the TFC, FAR 52.249-2(i) does not operate to deny appellant's right of appeal from a UD. *The Swanson Group, supra* at 153,930.

CDC did not fail timely to request a time extension. The request for an enlargement of time within which to submit its TFCSP was submitted prior to the expiration of the obligatory one year time period but was not answered by the Government prior to submittal of the revised interim TFCSP.² The original TCO received and accepted for review appellant's revised TFCSP. Thereafter, he and three successor TCOs administered the TFC as if the revised TFCSP was timely. The present record does not reflect an assertion of untimeliness by the Government until 10 February 1999. (Statement of Facts 1, 7-18)

Board decisions cited by the Government are distinguishable: *Indus. Data Link Corp.*, ASBCA No. 49348, 98-1 BCA ¶ 29,634 (contractor submitted no TFCSP and no request for a time extension within one year); *Rivera Technical Products, Inc.*, ASBCA Nos. 48171, 49564, 96-2 BCA ¶ 28,564 (contractor submitted no TFCSP within one year). *Harris Corp.*, ASBCA No. 37940, 89-3 BCA ¶ 22,145 at 111,460.

Waiver of the timeliness of submission of the revised TFCSP is also raised by the present record. Having been raised, the Government has failed to establish that the TCOs did not waive the time limit set by subparagraph (d) of the TFC provision of the contract. *Halifax Eng'g, Inc.*, ASBCA No. 34779, 88-1 BCA ¶ 20,227 at 102,430.

Based on the continued negotiations, the partial payments, and the delayed assertion of an untimely TFCSP (Statement of Facts 6, 14-18), we conclude that the Government waived any alleged untimeliness of the TFCSP. Accordingly, the Government is not entitled to judgment as a matter of law.

The motion for summary judgment as to the conclusiveness of the UD is denied.

ASBCA No. 52719

Having concluded above that summary judgment must be denied concerning the timeliness of appellant's TFCSP and the conclusiveness of the Government's UD, we must deny the Government's motion for summary judgment asserting its claim for \$138,240.94,

² We also note that the present record is not clear concerning appellant's ability to contact the Government during the applicable time period (Statement of Facts 10, 12).

based in part on the amount allowed by the UD. In any event, the Government's affirmative claim for return of money by CDC does not necessarily follow, as a matter of law, from the issuance of the UD. *Rivera Technical Products, supra* at 142,600-01.

CONCLUSION

The Government's motions for summary judgment as to ASBCA Nos. 52315 and 52719 are denied.

Dated: 27 June 2001

STEVEN L. REED
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

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

EUNICE W. THOMAS
Administrative Judge
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 Nos. 52315, 52719, Appeals of Consolidated Defense Corporation, rendered in conformance with the Board's Charter.

Dated:

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