

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Lockheed Martin NESS-Akron) ASBCA No. 54193
)
Under Contract No. N00024-98-C-6108)

APPEARANCE FOR THE APPELLANT: Donald J. Kinlin, Esq.
Thompson Hine L.L.P.
Dayton, OH

APPEARANCES FOR THE GOVERNMENT: Thomas B. Pender, Esq.
Chief Trial Attorney
Thomas S. Tyler, Esq.
Trial Attorney
Defense Contract Management Agency
Bratenahl, OH

OPINION BY ADMINISTRATIVE JUDGE DELMAN

The government has filed a motion to dismiss for failure to state a claim upon which relief can be granted, or in the alternative a motion for summary judgment.¹ Appellant opposes the motion. Both parties have filed affidavits in support of their positions and address evidence beyond the pleadings, and thus we shall treat the motion solely as one for summary judgment. For reasons stated below, we conclude that the record contains disputes of material fact that preclude the grant of summary judgment.

STATEMENT OF FACTS FOR PURPOSES OF MOTION

1. On 18 February 1986, the Department of Navy (government) entered into Contract No. N00024-86-C-6152 (Contract 6152) with Goodyear Aerospace Corporation (R4, tab 2). Appellant, Lockheed Martin NESS-Akron, is the current successor-in-interest to this contract.

2. By letter to appellant dated 6 May 1997, the Defense Finance and Accounting Service, Columbus Center, Columbus, Ohio (DFAS), issued a demand -- Bill of Collection (BOC) No. 97-S689 -- for \$949,704.50 arising out of an overpayment on Contract 6152

¹ This motion was originally filed under ASBCA No. 54048. The parties agreed to incorporate the record of the appeal under ASBCA No. 54193, and to dismiss ASBCA No. 54048. The Board dismissed the appeal on 27 August 2003.

(R4, tab 11). Appellant disputed the demand. At the request of the contracting officer, DFAS rescinded the BOC (R4, tabs 13-14).

3. By letter to appellant dated 1 July 1997, DFAS issued another demand under the contract, BOC No. 97-S930, in the amount of \$99,651.24. The letter stated, “If payment is not received within 30 days, interest will be charged on the unpaid portion from the date of this letter” (R4, tab 15) The contract contained the standard INTEREST clause, FAR 52.232-17 (APR 1984) (R4, tab 2 at 42).

4. By letter to appellant dated 11 November 1997, DFAS increased its demand for payment under the contract and issued BOC No. 98-S062, in the amount of \$420,218.41. This letter also stated, “If payment is not received within 30 days, interest will be charged on the unpaid portion from the date of this letter” (R4, tab 16)

5. By letter to DFAS dated 25 November 1997, appellant requested that the subject BOC be put in “disputes” pending agreement on the amount owed (R4, tab 18). The record contains no reply to this letter.

6. Over the next several years, the parties exchanged correspondence related to the amounts due and owing under Contract 6152 and under BOCs on another contract (R4, tabs 19-24). By letter to DFAS dated 14 March 2000, appellant noted that Contract 6152 was being reaudited by DFAS (R4, tab 25). It does not appear that appellant made any payments under Contract 6152 between 1997 and 2000.

7. As a result of the reaudit of Contract 6152, DFAS issued a demand letter to appellant dated 8 August 2001, in the amount of \$310,780.41, plus interest and administrative fees. DFAS stated that interest “is now being charged from the date of the original demand letter” (R4, tab 32). Based upon the interest calculation sheet attached to the letter, it appears that the original demand letter referred to is that of 11 November 1997 (finding 4).

8. Appellant concurred that it owed the government \$310,780.41 under Contract 6152. By email to DFAS dated 8 August 2001, appellant contended, however, that no interest was due and payable on this amount pursuant to the regulations because appellant had timely disputed the original bill of collection (R4, tab 35). Appellant also took this position with respect to a BOC on another contract under which it now conceded liability but had previously disputed the amounts owed.

9. By email dated 10 August 2001, DFAS replied to appellant’s email and a related telephone call. Insofar as pertinent, DFAS stated as follows (R4, tab 37):

[I] encourage you to submit the payments for the demands as quickly as possible. Since [you] have disputed the

interest charges on both debts, I will not use the checks to offset any accrued interest.

....

I understand that your ACO George Rung ((330) 796-1492) and his offices [sic] legal counsel have also advised you that no interest charges are due.

I must disagree with their opinion and the quoted FAR clause, and that is why the interest charges are included in the reaudit letters. [Emphasis added]

10. On 14 August 2001, appellant submitted a check to DFAS in the amount of \$885,350.65, which represented payment of the outstanding principal owed, exclusive of interest and administrative fees, of \$310,780.41 under Contract 6152, and the outstanding principal owed, exclusive of interest and administrative fees, in the amount of \$574,570.24 (R4, tab 36) under the other disputed BOC referenced above. (R4, tab 38)

11. By letter to DFAS dated 20 August 2001, appellant requested removal of all interest and administrative charges. Appellant stated as follows (R4, tab 39):

. . . We consistently maintained that the amount originally claimed by the government was not accurate. We finally agreed on the correct amount on 08 August 2001. The amount was paid within 30 days of demand. Interest, therefore is not applicable.

Appellant reiterated this request by letter to DFAS dated 28 August 2001 (R4, tab 41).

12. By letter to appellant dated 2 October 2001, DFAS advised that appellant was liable for interest, and that appellant's 14 August 2001 payment would be posted first to interest and administrative charges, leaving a balance owed that would also accrue interest if not paid within 30 days (R4, tab 42). It appears that this posting procedure was inconsistent with that communicated to appellant by DFAS on 10 August 2001 (R4, tab 37) (finding 9).

13. On or about 31 December 2002, DFAS took an offset against money due appellant under Contract No. N00024-98-C-6108, in the amount of \$79,241.97, to satisfy the debt claimed by the government under Contract 6152. It appears that this figure represented an amount owed under the BOC of \$74,332.73, plus interest in the amount of \$4,859.24, and administrative charges in the amount of \$50.00 (supp. R4, tab 103 at 11).

14. Appellant disputed the offset. By letter to the contracting officer dated 21 January 2003, appellant filed a claim seeking return of the \$79,241.97, and requested a contracting officer's decision within 60 days (supp. R4, tab 103).

15. By decision dated 7 May 2003, the contracting officer denied appellant's claim (Bd. file, ASBCA 54193). This appeal followed.

16. The Interest clause in the contract, FAR 52.232-17 (APR 1984), states in pertinent part as follows (R4, tab 2 at 42):

INTEREST (APR 1984)

(a) Notwithstanding any other clause of this contract, all amounts that become payable by the Contractor to the Government under this contract (net of any applicable tax credit under the Internal Revenue Code (26 U.S.C. 1481)) shall bear simple interest from the date due until paid unless paid within 30 days of becoming due. The interest rate shall be the interest rate established by the Secretary of the Treasury as provided in Section 12 of the Contract Disputes Act of 1978 (Public Law 95-563), which is applicable to the period in which the amount becomes due, as provided in paragraph (b) of this clause, and then at the rate applicable for each six-month period as fixed by the Secretary until the amount is paid.

(b) Amounts shall be due at the earliest of the following dates:

(1) The date fixed under this contract.

(2) The date of the first written demand for payment consistent with this contract, including any demand resulting from a default termination.

(3) The date the Government transmits to the Contractor a proposed supplemental agreement to confirm completed negotiations establishing the amount of debt.

(4) If this contract provides for revision of prices, the date of written notice to the Contractor stating the amount of refund payable in connection with a pricing proposal or a negotiated pricing agreement not confirmed by contract modification.

(c) The interest charge made under this clause may be reduced under the procedures prescribed in 32.614-2 of the Federal Acquisition Regulation in effect on the date of this contract.

17. In its opposition to the government’s motion, appellant furnished affidavits to the effect that there was a consistent practice for many years between appellant and DFAS that a BOC that was in “disputes” would not accrue interest (Keslar aff. at ¶ 21; O’Reilly aff. at ¶ 23-25). The government furnished affidavits in its reply that disputed such a course of dealing (Kissell aff. at ¶ 4; Spring aff. at ¶ 4).

18. In brief, the government contends that it was entitled under the contract and related regulations to assess interest on amounts overpaid from the date of the first written demand for payment pursuant to the Interest clause at (b)(2), and was entitled to recoup all amounts owing through the subject offset. Appellant generally contends that the government’s assessment of interest was unauthorized and inconsistent with the requirements of the Interest clause, or was waived by authorized government representatives expressly or through course of dealing (findings 9, 17), and its timely payment of the principal amount due and owing on 14 August 2001 extinguished all liability under Contract 6152. Appellant also contends that the government’s application of appellant’s payment to interest rather than to the principal amount owed was unauthorized and inconsistent with prior representations.

DECISION

We grant summary judgment where there are no disputed material facts and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-92 (Fed. Cir. 1987). The burden is on the movant to establish the absence of any issues of material fact. A material fact is one that may make a difference in the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Factual inferences are to be drawn in favor of the party opposing summary judgment. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Alvarez & Associates Construction Co., Inc.*, ASBCA No. 49341, 96-2 BCA ¶ 28,476. Our task is not to evaluate or weigh competing evidence but only to determine whether a genuine disputed issue of material fact exists that is suitable for resolution at trial. *Alvarez, supra*.

It is undisputed that under this contract the government had the right to assess interest on debts owed by the contractor under the Interest clause. The parties dispute, *inter alia*, whether the government’s actions here were authorized and were consistent with the contract and the law, and whether the government waived interest expressly or by course of dealing (findings 9, 17). We believe these disputes involve disputes of material fact, and are not subject to resolution through summary judgment. We also believe that the record needs to be better developed with respect to the propriety of the government’s application of appellant’s payment of 14 August 2001 to interest rather than to principal.

We conclude that the government – as the moving party – has not shown that the material facts are undisputed and that it is entitled to judgment as a matter of law. In view of

this conclusion, we need not address all the other issues raised by the parties in their motion papers.

The government's motion is denied.

Dated: 19 August 2004

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEPLER
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 No. 54193, Appeal of Lockheed Martin NESS-Akron, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals