

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Rex Systems, Inc. ) ASBCA No. 54436  
 )  
Under Contract No. N00000000 )

APPEARANCES FOR THE APPELLANT: Christopher M. Johnson, Esq.  
James S. Phillips, Esq.  
Centre Law LLC  
Vienna, VA

APPEARANCES FOR THE GOVERNMENT: Susan Raps, Esq.  
Navy Chief Trial Attorney  
Mark R. Wiener, Esq.  
Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE FREEMAN  
ON THE GOVERNMENT’S MOTION TO DISMISS

Rex Systems, Inc. (RSI) appeals the deemed denial of its claim for the government’s breach of three alleged implied-in-fact contracts in connection with a source solicitation. The government moves to dismiss the appeal for lack of subject matter jurisdiction. We grant the motion as to one of the alleged contracts and deny it as to the other two.

STATEMENT OF FACTS (SOF)  
FOR PURPOSES OF THE MOTION

1. The RT859A/APX-72 is an electronic system that permits military aircraft to identify other aircraft as friend or foe (IFF). RSI is a manufacturer of the system which has been in use since the late 1960s. (Compl. & answer ¶¶ 5-6) By letter dated 30 June 1997, the government told RSI that configuration control of the system “has evaded government control for several years,” and requested RSI to provide its “complete set of drawings” to assist the government in a physical configuration audit (PCA) of the system (app. resp., attach. 1).
2. On 3 September 1997, RSI provided to the government “certain” of its drawings marked with limited rights legends (R4, tab 13 at 14). By letter dated 25 November 1997, the government requested RSI to provide a “budgetary cost estimate” for providing a complete RT859A/APX-72 Technical Data Package “with U.S.

Government rights for use of data for competitive requirements” (app. resp., attach. 2). By letter to the government dated 22 January 1998, RSI provided two proposals for government acquisition of its TDP (app. resp., attach. 3). As of 10 June 1998, however, neither of these proposals had been accepted.

3. On 10 June 1998, the government published an announcement seeking potential sources for procurement of the RT859A/APX-72 system. The announcement stated, among other things, that interested companies should submit documentation showing that they could meet the specified minimum requirements, and that respondents meeting those requirements would be asked to submit a hardware sample for testing and evaluation. The announcement further stated that it was not an “IFB or RFP” and that it was “not a commitment by the Government to pursue or award a contract for this effort.” (R4, tab 1)

4. On 3 July 1998, RSI submitted a Source Approval Request (SAR) in response to the announcement. On 2 September 1998, the government replied to RSI’s SAR and requested additional evidence. (R4, tab 4) On 5 October 1998, the government issued a purchase order for, and RSI subsequently shipped, a sample RT859A/APX-72 system for government testing (R4, tab 9; compl. & answer ¶ 12). Neither the source solicitation announcement, nor the 2 September 1998 letter, nor the 5 October 1998 purchase order, required submittal of drawings as part of the source approval process (R4, tabs 1, 4, 9).

5. RSI alleges that while testing of its sample unit was underway, government personnel requested it to provide level 2 drawings for the system. RSI further alleges that it was told at that time that the government had lost its entire drawing database for the RT859A/APX-72 system and that RSI was its only viable source for recovering that database. RSI did not provide any drawings in response to this request. (Compl. ¶¶ 13-15)

6. The government alleges that submission of level 2 drawings was a requirement for source approval (answer ¶¶ 17, 18). However, no level 2 drawings had been submitted when the government notified RSI by letter dated 8 January 1999 that it had successfully completed all the necessary test requirements for the RT859A/APX-72 system and would be solicited for all future spares requirements for that system (R4, tab 10).

7. In a telephone conversation with the contracting officer on 14 January 1999 and by confirming FAX message of the same date, RSI agreed to provide the government with its level 2 drawings as follows:

AS DISCUSSED DURING REF. (B) PHONE CONVERSATION, REX SYSTEMS INCORPORATED WILL SUPPLY NAVICP PHILADELPHIA AN RT-859A/APX-72 LEVEL 2 PROVISIONING DATA PACKAGE BY 99 FEB 14, 30 DAYS AFTER RECEIPT OF WRITTEN RT-859A/APX-72 QUALIFICATION. THE RT-859A/APX-72 DRAWINGS WILL BE MARKED APPROPRIATELY.

IT IS OUR UNDERSTANDING THAT RSI HAS SUCCESSFULLY FULFILLED ALL OF THE QUALIFICATION REQUIREMENTS LISTED IN THE COMMERCE BUSINESS DAILY (CBD) POSTED 98 JUN 12 AND NAVICP LETTER DATED 98 SEP 02.

(R4, tab 12)

8. By letter of the same date, the government provided a second notice that RSI had completed all necessary test requirements. This letter also stated that RSI “will be solicited for all future requirements associated with the RT-859A/APX-72 system.” (R4, tab 11)

9. Pursuant to the 14 January 1999 agreement, RSI provided its level 2 drawings for the RT859A/APX-72 system to the government (compl. & answer ¶ 21). RSI alleges that all drawings were stamped with the “Limited Rights” legends in accordance with the clauses at DFARS 252.227-7013 and 252.227-7016. The government alleges that not all drawings were so marked. (Compl. & answer ¶ 23)

10. RSI alleges that “no other offeror has completed the Government’s rigorous testing and source approval requirements to become qualified to supply APX-72 system hardware and test equipment.” The government admits the allegation as to the hardware, and denies it as to the test equipment. (Compl. & answer ¶ 28)

11. RSI alleges that beginning sometime in 2002 the government attempted to qualify new sources for the RT859A/APX-72 using “alternative means [that] do not remotely resemble the rigorous testing which Appellant was required to undergo . . .” (compl. ¶¶ 31-33). RSI further alleges that, to accomplish this, the government “misappropriated” RSI’s level 2 drawings to develop and evaluate test procedures and TDPs and to prepare technical manuals and other provisioning documentation to repair RT859A/APX-72 hardware rather than procure new products from RSI as the sole approved source (compl. ¶¶ 34-35).

12. On 24 July 2003, RSI submitted a certified claim to the contracting officer for government breach of three implied-in-fact contracts in connection with the source solicitation and for a government taking of its proprietary data without the compensation due under the Fifth Amendment of the Constitution. The breach claim was quantified in the amount of \$1,114,995.

13. The first alleged implied-in-fact contract was that in exchange for RSI responding to the government's source solicitation, the government agreed that "all future requirements for [the RT859A/APX-72 system] would be restricted to the sources that successfully completed the same rigorous source approval/qualification tests and evaluations that RSI was required to complete." (R4, tab 13 at 5)

14. The second alleged implied-in-fact contract was that in response to requests and demands by the government, RSI agreed to provide its level 2 drawings and related documentation in exchange for a government agreement that "such drawings and documentation were proprietary to RSI and would be used by [the government] solely to re-establish configuration control over the system by establishing the parts and assemblies used by RSI to manufacture the RT859A/APX-72 as the Government's provisioning database" (R4, tab 13 at 6).

15. The third alleged implied-in-fact contract was that by accepting RSI's drawings and data with the DFARS 252.227-7013 "Limited Rights" legend, the government agreed that it would restrict its use of the drawings to the uses authorized by that legend (R4, tab 13 at 6).

16. When the contracting officer failed within 60 days of receipt of the claim to decide it or notify RSI when a decision would be issued, RSI appealed the deemed denial to the Board.

### DECISION

The government moves to dismiss for lack of subject matter jurisdiction on the ground that none of the three implied-in-fact contracts for which breach damages are claimed are within our subject matter jurisdiction.\* Since the facts on jurisdiction and the merits are inextricably intertwined, we apply the summary judgment procedural standard in deciding the motion, *i.e.*, the motion can be granted only if there are no genuine issues

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\* Appellant has not included its Fifth Amendment taking claim in its complaint, and the parties have not addressed it in the motion. We assume it is withdrawn. In any event, it is not within our jurisdiction. *See Kearfott Guidance & Navigation Corp.*, ASBCA No. 45536, 01-2 BCA ¶ 31,496 at 155,556.

of material fact and the moving party is entitled to judgment as a matter of law. *See RGW Communications, Inc.*, ASBCA Nos. 54495, 54557, 2005 ASBCA LEXIS 41, at \*33 (May 18, 2005).

The applicable substantive standard for determining our subject matter jurisdiction is § 3(a) of the Contract Disputes Act of 1978, 41 U.S.C. § 602(a). Section 3(a) limits our jurisdiction to disputes arising under or related to express or implied contracts of an executive agency for (i) the procurement of property, other than real property in being; (ii) the procurement of services; (iii) the procurement of construction, alteration, repair or maintenance of real property; or, (iv) the disposal of personal property.

With respect to the first of the alleged implied-in-fact contracts, we assume for purposes of the motion that the government agreed that all future requirements for the RT859A/APX-72 system would be restricted to sources meeting the same qualifications as RSI. That agreement by itself, however, did not procure any property, service, construction etc., or dispose of any personal property for the government. That agreement was no different from an implied-in-fact contract to treat a bidder honestly and fairly, and is not within our CDA subject matter jurisdiction. *See Coastal Corp. v. United States*, 713 F.2d 728 (Fed. Cir. 1983).

For purposes of the motion, we consider the second and third of the alleged implied-in-fact contracts as being in substance the same contract for procurement of the drawings with restricted use provisions. RSI provided its level 2 drawings “marked appropriately” to the government pursuant to the 14 January 1999 agreement. The submission was made in exchange for government confirmation that RSI had successfully qualified as a source for the RT859A/APX-72 system. *See* SOF ¶¶ 7-9. The government alleges that submission of these drawings was a requirement for source approval. However, the government’s 8 January 1999 letter that was issued before the drawings were submitted stated that RSI had successfully completed all test requirements for the RT859A/APX-72 system. *See* SOF ¶ 6. That letter, plus the absence of any requirement for submission of drawings in the government’s source approval documents (*see* SOF ¶ 4), plus the government’s letters of 30 June and 25 November 1997 (*see* SOF ¶¶ 1-2) create a genuine issue of material fact as to whether the drawings were sought by the government solely for determining RSI’s qualifications as a source.

If the level 2 drawings were sought by the government wholly or in part for other purposes, we would conclude that the procurement of the drawings either as a requirement of the source selection process or pursuant to the 14 January 1999 agreement was to that extent a contract for the procurement of property within our CDA jurisdiction, and that RSI’s claim for breach of the restricted use provisions in that contract was properly before us. To that extent also, our decision in *Wesleyan Company, Inc.*,

ASBCA No. 53896, 05-1 BCA ¶ 32,950 would not be controlling. In *Wesleyan*, the proprietary data were acquired by the government solely for purposes of evaluating the offeror's unsolicited proposals to sell products to the government. Therefore, we deny the motion to dismiss as to the claim for breach of the restricted use provisions in the alleged contract for procurement of the drawings.

The appeal is dismissed in part for lack of subject matter jurisdiction as indicated above.

Dated: 21 July 2005

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MONROE E. FREEMAN, JR.  
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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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. 54436, Appeal of Rex Systems, Inc., rendered in conformance with the Board's Charter.

Dated:

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