

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Systems Integrated) ASBCA No. 54439
)
Under Contract Nos. N00014-88-C-6035)
)
N00014-89-C-6021)
N00014-90-C-6031)

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OPINION BY ADMINISTRATIVE JUDGE DELMAN
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Systems Integrated (SI or appellant) has moved for summary judgment, contending that it is entitled as a matter of law to an equitable distribution of property based upon cost pursuant to the LIMITATION OF COST (LOC) and LIMITATION OF FUNDS (LOF) clauses of the three subject contracts. The Department of the Navy (Navy or government) opposes summary judgment, asserting, *inter alia*, that the affirmative defense of laches precludes recovery.

The Navy has also filed a motion for partial summary judgment, as revised by letter dated 10 May 2005, contending as a matter of law that SI is not entitled to an equitable distribution of property under the LOF clause under Contract No. N00014-90-C-6031 because the contract was not terminated. SI opposes the

government's motion. We have jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601 *et seq.*

STATEMENT OF FACTS FOR PURPOSES OF MOTIONS

1. The Department of the Navy, Naval Ocean Research and Development Activity at Stennis Space Center, Mississippi awarded Contract No. N00014-88-C-6035 (Contract No. 6035) to appellant on 22 September 1988 (R4, tab 1). Under this research and development type contract, appellant was to perform work described in its proposal for the design and development of an integrated data archival and processing system known as the NRL-SRC Acoustic Processing Facility (NAPF) on a cost-reimbursement, fixed fee basis. The contract, as awarded, contained the LIMITATION OF FUNDS (LOF) clause, FAR 52.232-22 (APR 1984) (R4, tab 1 at SYSR0000014). Per Modification No. P00017, the LIMITATION OF COST (LOC) clause, FAR 52.232-20 (APR 1984) was added to the contract (R4, tab 2 at SYSR0000025-27). Appellant performed under this contract. Appellant's final report to the government was dated May 1993 (R4, tab 13 at SYSR0000434).

2. The Navy also used Contract No. 6035 as the vehicle to procure certain items on an expeditious, as needed basis. Specifically, SI purchased for the Navy, and delivered certain computer hardware and support necessary to develop the Experimental Line Array Measurement System (ELAMS). (DeLeeuw decl., ¶ 8.c.)

3. SI exceeded the cost ceiling of Contract No. 6035 on or about 2 May 1991 (Skinner decl., ¶ 6). SI did not provide the government with timely, written notification of the funding status of the contract prior to cost overrun as required by the LOF and LOC clauses.

4. SI's claimed total costs under the contract based upon final agreed rates were \$1,326,687, compared to the contract cost ceiling of \$1,211,165 (R4, tab 11). As of the date of cost overrun, the NAPF was substantially complete but not yet fully functioning. (DeLeeuw decl., ¶ 8.f.)

5. According to SI, the overrun costs included the purchase of equipment, and labor costs incurred to refine computer software needed to complete the design, integration, test and documentation of the NAPF. The equipment included filters, transparencies, printers, computer parts, memory and a Sun Microsystems Sparc Station 4/470 computer system (DeLeeuw decl., ¶ 8.g.).

6. None of the material and equipment produced or purchased after May, 1991 has been returned to SI (DeLeeuw decl., ¶ 8.i.; Corrales-Diaz decl., ¶ 4).

7. According to SI, the reasonable value of the property produced or purchased by SI after the date of cost overrun under Contract No. 6035 was the amount of the cost overrun, \$115,523 (DeLeeuw decl., ¶ 8.h.) (\$115,522 per SI's revised claim, *see* finding 4).

8. The Navy awarded Contract No. N00014-88-C-6021 to appellant on 26 May 1989 (R4, tab 3). The contract number was changed by Modification No. P00001 to N00014-89-C-6021 (Contract No. 6021) (R4, tab 4 at SYSR0000114).

9. Under this research and development type contract, appellant was to perform work described in its proposal for the design and development of a Portable Multi-Channel Acoustic Data Collection and Processing System on a cost-reimbursement, fixed fee basis (compl., ¶ 4). The contract, as awarded, contained the LOF clause, FAR 52.232-22 (APR 1984) (R4, Tab 3 at SYSR0000075). Per Modification No. P00011, the LOF clause was deleted and the LOC clause, FAR 52.232-20 (APR 1984), was added to the contract (R4, Tab 4 at SYSR0000093-94). Appellant performed under this contract. It delivered its final report to the government in May, 1993 (compl., ¶ 9).

10. SI performed work and incurred costs under the contract from May, 1989 to October, 1991. SI developed a portable sonar array performance-monitoring module usable during at-sea exercises known as the Fault Localization and Processing System (FLAP), and also developed a system known as the Optimization of the Performance of Theater ASW Mobile Acoustic Sensor (OPTAMAS), that was installed at several locations throughout the world and could integrate data and perform predictions to advise Anti-Submarine Warfare (ASW) commanders precisely where to deploy ASW assets throughout the world. (DeLeeuw decl., ¶ 9.a.)

11. SI exceeded the cost ceiling on Contract No. 6021 in May, 1990 (Skinner decl., ¶ 6). SI did not provide the government with timely, written notification of the funding status of the contract prior to cost overrun as required by the LOF and LOC clauses.

12. SI's claimed actual costs were \$1,720,650, compared to the contract cost ceiling of \$1,289,222 (R4, tab 11).

13. As of the date of cost overrun, SI had not completed final integration, documentation and training requirements for the NRL processing facility, and final documentation and support was also still necessary for the OPTAMAS system. (DeLeeuw decl., ¶ 9.b.) After the date of cost overrun, SI incurred labor cost to support OPTAMAS and NRL processing, and to complete the design, integration test and documentation of OPTAMAS and to complete the integration of standard Navy models

and the software on which OPTAMAS was based into the equipment purchased for the Navy. The equipment purchased after the date of cost overrun was primarily OPTAMAS-related. (*Id.*, ¶ 9.c.)

14. As for equipment and material purchased after May, 1990, none has been returned to SI (DeLeeuw decl., ¶ 9.e.; Corrales-Diaz decl., ¶ 4).

15. According to SI, the reasonable value of the property produced or purchased after the cost ceiling was exceeded under Contract No. 6021 was the amount of the cost overrun, \$431,428 (DeLeeuw decl., ¶ 9.d.)

16. The Navy awarded Contract No. N00014-90-C-6031 to SI on or about 7 September 1990 (Contract No. 6031) (R4, tab 5 at SYSR0000115). Under this research and development type contract, SI was to perform work described in its proposal for the design and development of a Modular, Multi-Platform Performance Assessment, Prediction and Simulation System on a cost-reimbursement, fixed fee basis (compl., ¶ 27). This contract contained the LOF clause, FAR 52.232-22 (APR 1984) (R4, tab 5 at SYSR0000129).

17. In general, the work under Contract No. 6031 was a refinement and implementation of the systems developed under Contract No. 6021 and Contract No. 6035 (compl., ¶ 28). SI developed additional systems, including a computer-based subsystem to support the Navy's Versatile Data Acquisition Buoy System (VEDABS), and upgrades for the ELAMS developed under Contract No. 6035. (DeLeeuw decl., ¶ 10.a.)

18. SI performed work and incurred costs from contract award through November, 1992 (DeLeeuw decl., ¶ 10.a.) It delivered its final report to the Navy in May, 1993. This report stated, *inter alia*, that the total amount allotted to the contract was \$4,212,702.69, as compared to the total contract amount of \$4,219,812.00, which appears to show that the contract was 99.83% fully funded (gov't mot., ex. 3 at SYSR0002334). In October, 1996, Mr. Jack McDermid, the contracting officer's technical representative, forwarded to the contracting officer (CO) an executed certificate of completion, certifying that SI had satisfactorily completed all effort under this contract, including data requirements (app. opp'n at SYSR0003575-76).

19. SI exceeded the cost ceiling of Contract No. 6031 in February, 1992 (Skinner decl., ¶ 6). SI did not provide the government with timely, written notification of the funding status of the contract prior to cost overrun as required by the LOF clause.

20. SI's claimed total actual costs based on final agreed rates were \$4,589,174, compared to the contract cost ceiling of \$3,958,283 (R4, tab 11).

21. As of the date of cost overrun in February, 1992, all VEDABS analog data had not been processed, and training of Navy personnel was not complete. In addition, work on OPTAMAS had not been completed. SI also incurred labor and equipment costs after February, 1992 to perform sea tests in Italy. (DeLeeuw decl., ¶ 10.b.)

22. Included in the products produced or purchased after the date of cost overrun in February, 1992 was Sun Microsystems equipment shipped to a Navy facility in Port Hueneme, California, at the request and direction of the Navy, for which SI incurred a total cost, including G&A, of \$274,778.69 (DeLeeuw decl., ¶ 10.c.; Skinner decl., ¶ 11.).

23. According to SI, the reasonable value of the property produced and purchased after the cost ceiling was exceeded in February, 1992 was the amount of the cost overrun, \$630,891 (DeLeeuw decl., ¶ 10.e.).

24. None of the material and equipment items purchased after February, 1992 has been returned to SI (DeLeeuw decl., ¶ 10.f.; Corrales-Diaz decl., ¶ 4.).

25. According to SI, the software and hardware produced and delivered under Contract Nos. 6021, 6035 and 6031 were non-severable because they were part of integrated, functioning systems, and the individual elements of the systems could not be separated into individual elements or parts without impacting the ability of the systems to function as designed (DeLeeuw decl., ¶¶ 5., 11.).

26. The process to determine SI's allowable direct costs and final indirect cost rates for the relevant performance period for the contracts was completed in September, 2000, after the Defense Contract Audit Agency (DCAA) completed its audit of SI's records for 1992, the final year in which SI performed cost reimbursement contracts (Skinner decl., ¶ 4).

27. By letter to the government dated 7 June 2002, appellant requested payment of \$1,184,507, reflecting claimed actual costs that exceeded the target cost ceilings under the three subject contracts (R4, tab 7). By letter dated 31 July 2002, SI certified this letter as a claim under the CDA (R4, tab 9).

28. By letter dated 24 April 2003, appellant revised its claimed amount to \$1,177,842. Appellant stated the legal theory of its case as follows:

Our entitlement to recover those costs incurred is established by the contract. Contract clauses which deal with costs in excess of contract ceilings, including the Limitation of Funds and Limitation of Cost, say that you as Contracting Officer

have discretion to pay those costs *either by raising the ceiling or in the form of an 'equitable distribution.'* Since the Navy obviously benefited, it is very reasonable to use your discretion to pay the overrun amounts. [Emphasis added]

(R4, tab 11)

29. By letter dated 26 June 2003, the CO declined to increase the contract target cost ceilings, citing, among other things, the LOF clause and SI's failure to timely notify respondent of the prospective cost overruns as provided by the clause (R4, tab 12).

30. Appellant replied by letter dated 22 July 2003, disagreeing with a number of the government's contentions. Appellant reasserted its two theories of recovery – *i.e.*, that respondent should exercise its discretion to pay for overruns or, alternatively, that appellant should be entitled to an equitable distribution of property produced or purchased for the government and incurred through costs beyond those authorized by the contract. Insofar as pertinent, appellant stated as follows:

If you elect not to exercise your discretion under the LOF and LOC clauses to increase the ceiling . . . you are then required to negotiate an 'equitable distribution' under . . . the LOC clause. In this instance, the equitable distribution is most appropriately measured by the costs incurred, but an alternative is for the Navy to return the equipment for which it has not paid including 15 Sun workstations. . . .

. . . You . . . have had available all of the information you need either to exercise your discretion under the LOF and LOC clauses to increase the cost ceiling, or to negotiate an equitable distribution of the property that SI purchased with its own funds, property which has been in the Navy's possession for many years, and for which the Navy has not paid.

(R4, tab 13 at SYSR0000432-3) Appellant requested final action on its claim no later than 30 days from the date of its letter (R4, tab 13).

31. On 2 September 2003, the CO issued a decision denying appellant's claim (R4, tab 14). Appellant sought reconsideration and met with the CO. By letter to SI dated 5 November 2003, the CO again denied appellant's claim (R4, tab 16). On 26 November 2003, appellant filed a timely appeal with the Board (R4, tab 18).

32. By letter to the Board dated 10 May 2005, SI withdrew any claim relating to the abuse of discretion of the CO in declining to fund the cost overruns, but retained its claim for equitable distribution under the three contracts (bd. corr. file).

33. In its opposition to SI's motion for summary judgment, the government adduced evidence to show, *inter alia*, that SI unreasonably and inexcusably delayed submission of its equitable distribution claim (resp't opp'n, tab 5, Adams decl., ¶ 20), and pending that delay the government lost or destroyed documents, such as DD 250 forms, that would have assisted the government to identify and trace the property subject to the claim of equitable distribution (*id.*, McDermid decl., ¶ 18); that the Navy has disposed of equipment for which the claim of equitable distribution is now made (*id.*, ¶¶ 25, 26); and that it has been unable to trace this equipment (*id.*, ¶¶ 30-32). Appellant has submitted evidence to show, *inter alia*, that any delays in claim submission were attributable, in large measure, to unreasonable DCAA demands and difficulties with obtaining an agreement on final rates (Corrales-Diaz supp. decl., ¶¶ 3, 9). According to SI, it was reasonably diligent in ascertaining and presenting its claim under these circumstances.

34. The LOC clause, FAR 52.232-20, provided in pertinent part as follows:

LIMITATION OF COST (APR 1984)

(a) The parties estimate that performance of this contract, exclusive of any fee, will not cost the Government more than (1) the estimated cost specified in the Schedule The Contractor agrees to use its best efforts to perform the work specified in the Schedule and all obligations under this contract within the estimated cost,

(b) The Contractor shall notify the Contracting Officer in writing whenever it has reason to believe that –

(1) The costs the contractor expects to incur under this contract in the next 60 days, when added to all costs previously incurred, will exceed 75 percent of the estimated cost specified in the Schedule; or

(2) The total cost for the performance of this contract, exclusive of any fee, will be either greater or substantially less than had been previously estimated.

(c) As part of the notification, the Contractor shall provide the Contracting Officer a revised estimate of the total cost of performing this contract.

(d) Except as required by other provisions of this contract, specifically citing and stated to be an exception to this clause –

(1) The Government is not obligated to reimburse the Contractor for costs incurred in excess of (i) the estimated cost specified in the Schedule

(2) The Contractor is not obligated to continue performance under this contract (including actions under the Termination clause of this contract) or otherwise incur costs in excess of the estimated cost specified in the Schedule, until the Contracting Officer (i) notifies the Contractor in writing that the estimated cost has been increased and (ii) provides a revised estimated total cost of performing this contract. . . .

(e) No notice, communication, or representation in any form other than that specified in subparagraph (d)(2) above, or from any person other than the Contracting Officer, shall affect this contract's estimated cost to the Government. In the absence of the specified notice, the Government is not obligated to reimburse the Contractor for any costs in excess of the estimated cost

. . . .

(h) If this contract is terminated or the estimated cost is not increased, the Government and the Contractor shall negotiate an equitable distribution of all property produced or purchased under the contract, based upon the share of costs incurred by each. [Emphasis added]

35. The LOF clause, FAR 52.232-22, provided in pertinent part as follows:

LIMITATION OF FUNDS (APR 1984)

(a) The parties estimate that performance of this contract will not cost the Government more than (1) the

estimated cost specified in the Schedule The Contractor agrees to use its best efforts to perform the work specified in the Schedule and all obligations under this contract within the estimated cost,

(b) The Schedule specifies the amount presently available for payment by the Government and allotted to this contract, the items covered, the Government's share of the cost if this is a cost-sharing contract, and the period of performance it is estimated the allotted amount will cover. The parties contemplate that the Government will allot additional funds incrementally to the contract up to the full estimated cost to the Government specified in the Schedule, exclusive of any fee. The Contractor agrees to perform, or have performed, work on the contract up to the point at which the total amount paid and payable by the Government under the contract approximates but does not exceed the total amount actually allotted by the Government to the contract.

(c) The Contractor shall notify the Contracting Officer in writing whenever it has reason to believe that the costs it expects to incur under this contract in the next 60 days, when added to all costs previously incurred, will exceed 75 percent of (1) the total amount so far allotted to the contract by the Government The notice shall state the estimated amount of additional funds required to continue performance for the period specified in the Schedule.

(d) Sixty days before the end of the period specified in the Schedule, the Contractor shall notify the Contracting Officer in writing of the estimated amount of additional funds, if any, required to continue timely performance under the contract or for any further period specified in the Schedule or otherwise agreed upon, and when the funds will be required.

(e) If, after notification, additional funds are not allotted by the end of the period specified in the Schedule or another agreed-upon date, upon the Contractor's written request the Contracting Officer will terminate this contract on that date in accordance with the provisions of the Termination clause of this contract. If the Contractor estimates that the

funds available will allow it to continue to discharge its obligations beyond that date, it may specify a later date in its request, and the Contracting Officer may terminate this contract on that later date.

(f) Except as required by other provisions of this contract, specifically citing and stated to be an exception to this clause –

(1) The Government is not obligated to reimburse the Contractor for costs incurred in excess of the total amount allotted by the Government to this contract; and

(2) The Contractor is not obligated to continue performance under this contract (including actions under the Termination clause of this contract) or otherwise incur costs in excess of (i) the amount then allotted to the contract by the Government . . . until the Contracting Officer notifies the Contractor in writing that the amount allotted by the Government has been increased and specifies an increased amount, which shall then constitute the total amount allotted by the Government to this contract.

. . . .

(h) No notice, communication, or representation in any form other than that specified in subparagraph (f)(2) above, or from any person other than the Contracting Officer, shall affect the amount allotted by the Government to this contract. In the absence of the specified notice, the Government is not obligated to reimburse the Contractor for any costs in excess of the total amount allotted by the Government to this contract, whether incurred during the course of the contract or as a result of termination.

. . . .

(k) Nothing in this clause shall affect the right of the Government to terminate this contract. *If this contract is terminated, the Government and the Contractor shall negotiate an equitable distribution of all property produced*

or purchased under the contract, based upon the share of costs incurred by each. [Emphasis added]

DECISION

The Government's Motion for Partial Summary Judgment¹

Subsection (k) of the LOF clause under Contract No. 6031 provides for an equitable distribution of property produced or purchased if the government terminates the contract. The record is undisputed that the Navy did not issue a termination for default or a termination for convenience under Contract No. 6031. Given the foregoing, the Navy contends that subsection (k) of the LOF clause precludes the grant of an equitable distribution to appellant as a matter of law.

However, the record raises questions that preclude us from reaching this issue at this time. Subsection (h) of the LOC clause does not make a termination a condition precedent to equitable distribution, as the parties recognize under Contract No. 6035 and Contract No. 6021. FAR 32.705-2(a) provides that the LOC clause shall be inserted in contracts if a fully funded cost reimbursement contract is contemplated, with exceptions not relevant here. It appears that Contract No. 6031 was 99.83% fully funded (finding 18). This raises the question as to whether the government should have inserted the LOC clause in Contract No. 6031, as it did in the other contracts.

Based upon the foregoing, the Navy has not persuaded us that it is entitled to partial summary judgment under Contract No. 6031. The government's motion is denied.

¹ In its opposition to the Navy's motion, SI objects to a DCAA audit report dated 25 September 2000 attached to the motion, with the exception of Appendix 1 and Appendix 2 to the report, on the grounds of hearsay (gov't mot., at ex. 4). This audit report consists of an audit determination of appellant's revised, certified final indirect cost rate proposal dated 23 August 2000, as required by law, FAR 42.705-2(b). Such audits are also authorized by the subject contracts. *See, e.g.*, clause FAR 52.216-7(g), ALLOWABLE COST AND PAYMENT (APR 1984) (R4, tab 5 at SYSR0000126). Appellant does not question the authenticity of the report. We believe the DCAA audit report is a contract-related record that contains information relevant to the subject matter of these proceedings, and is not excludable from the Navy's motion under the Board's rules on the grounds of hearsay. *See generally*, Board Rule 20 (evidence in board proceedings admissible within the sound discretion of the presiding judge). SI's objection is overruled.

The Appellant's Motion for Summary Judgment

SI contends that it is entitled to judgment as a matter of law on its claim for equitable distribution of non-severable property based upon cost because the record shows that SI overran the contract cost ceiling on the three subject contracts; the government declined to fund the overruns; SI produced or purchased property and incurred costs under the contracts before and after the cost limits were reached; the items were not severable; and the government retained or used the property without providing for an equitable distribution as required by the contracts. *SMS Agoura Systems, Inc.*, ASBCA Nos. 51441, *et. al.*, 99-2 BCA ¶ 30,524. We understand the government's position to be that assuming, *arguendo*, SI can establish a *prima facie* case for equitable distribution, SI is not entitled to judgment because of the doctrine of laches.

It is well settled under our jurisprudence that the doctrine of laches may be successfully invoked under appropriate circumstances. Laches is an affirmative defense, which if proven, bars an affirmative claim. *City of Sherrill v. Oneida Indian Nation*, 125 S. Ct. 1478, 1491, 1492 (2005); *A.C. Aukerman Co., v. R.L. Chaides Construction Co.*, 960 F.2d 1020, 1038-40 (Fed. Cir. 1992); *Ahmed S. Al-Zhickrulla Est.*, ASBCA No. 52137, 03-2 BCA ¶ 32,409. In order to establish laches, the government must show that a contractor delayed the filing of its claim for an unreasonable and inexcusable length of time from the point it knew or reasonably should have known of its claim, and that this delay resulted in prejudice or injury to the government. *Aukerman*, 960 F.2d at 1032.

As stated in CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2734 at 256 (3d ed. 1998):

[A] claimant's motion for summary judgment should be denied when any defense presents significant fact issues that should be tried [footnote omitted].

The government's laches defense presents a number of significant fact issues disputed by the parties, including but not limited to, when appellant knew of, or should have known of its claim for equitable distribution; whether any delay in asserting the claim was attributable, in whole or in part, to the government; and how the passage of time prejudiced the government and impacted government decision-making regarding its retainage and/or disposal of specific property items subject to equitable distribution. These issues must await the hearing for resolution. SI has not shown that it is entitled to judgment on its claim as a matter of law.

CONCLUSION

The government's motion for partial summary judgment is denied. Appellant's motion for summary judgment is denied.

Dated: 24 May 2005

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

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 No. 54439, Appeal of Systems Integrated, rendered in conformance with the Board's Charter.

Dated:

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