

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Electric Boat Corporation) ASBCA No. 55574
)
Under Contract No. N00024-04-D-4408)

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OPINION BY ADMINISTRATIVE JUDGE YOUNGER
ON RESPONDENT'S MOTION TO DISMISS WITHOUT PREJUDICE
OR TO STAY PROCEEDINGS

In this defective pricing case, the Navy issued a unilateral modification reducing the contract price. Electric Boat Corporation (Electric Boat) then brought this appeal challenging the modification. Respondent moved to dismiss without prejudice, or for a stay, pending issuance of a contracting officer's final decision, contending that we lacked jurisdiction over an appeal of a unilateral modification.

The facts relevant to the motion are not seriously disputed. Effective 20 November 2003, the Navy awarded Electric Boat Contract No. N00024-04-D-4408, calling for various supplies and services (R4, tab 1 at 1, 3-4, 7-8). Thereafter, by date of 11 February 2005, the parties entered into bilateral Delivery Order No. 00002, for the overhaul and repair of the *U.S.S. Connecticut*, a nuclear submarine (R4, tab 4 at 1). Following a post-award audit, the contracting officer took the position that certain cost elements that were used in the price negotiation were overstated as a result of defective cost or pricing data (R4, tab 6 at 2). By date of 8 June 2006, the contracting officer issued unilateral Modification No. 05 "to reduce the price in accordance with FAR clause 52.215-10, Price Reduction for Defective Cost or Pricing Data (OCT 1997)" by \$740,734

(*id.*). Modification No. 05 did not purport to be a final decision and contained no notification of appeal rights (*id.*). It is undisputed that the contracting officer did not thereafter render a final decision asserting a government claim for the money at issue at any time before this appeal was filed (Electric Boat’s Opposition to the Government’s Motion to Dismiss Without Prejudice or In the Alternative to Stay Proceedings (app. opp’n at 2-3); The Government’s Reply to Electric Boat’s Opposition to the Government’s Motion to Dismiss Without Prejudice or In the Alternative to Stay Proceedings (gov’t reply at 2)).

Following the issuance of Modification No. 05, Electric Boat brought this appeal. In its complaint, Electric Boat alleged that the contracting officer’s unilateral action constituted “final adverse government action” for purposes of our jurisdiction under the Contract Disputes Act, 41 U.S.C. § 601 *et seq.* (compl., ¶ 5). Electric Boat sought to have us conclude that “there was no defective pricing . . . and that [the] unilateral modification . . . is not contractually authorized and is improper, invalid and unlawful” (compl., ¶ 65). After filing its complaint, Electric Boat submitted a certified claim to the contracting officer seeking \$740,734, together with interest under 41 U.S.C. § 611.

The Navy moved to dismiss the appeal without prejudice or, in the alternative, for a stay of proceedings. The premises of the Navy’s motion are that the issuance of the unilateral modification constituted an administrative action that lies outside our Contract Disputes Act jurisdiction, and that Electric Boat failed to seek a contracting officer’s decision before filing the appeal. (The Government’s Motion to Dismiss Without Prejudice Or In the Alternative to Stay Proceedings (gov’t mot.) at 2-3) The Navy’s alternative prayer for a stay is to permit the contracting officer to issue a final decision on the claim (*id.* at 3). Electric Boat opposed the motion. Electric Boat takes the same position as it did in its complaint, asserting principally that we have jurisdiction over the unilateral modification because the modification constituted final adverse government action. Electric Boat also contends that the Navy’s unilateral modification and Electric Boat’s claims are separate and distinct, and that there would be a jurisdictional issue only if the Navy both returned the funds at issue and rescinded the unilateral modification. (App. opp’n at 1-2, 6-7)

Electric Boat has since filed a new appeal, ASBCA No. 55773, together with a complaint in that appeal. Electric Boat alleges in that complaint that ASBCA No. 55773 relates to “the Navy’s denial on December 19, 2006 of [Electric Boat’s] certified claim in the amount of \$740,734, which the Navy withheld under [the] unilateral Modification [No. 05]” (ASBCA 55773 compl., ¶ 1). Electric Boat further alleges that “[t]his is a companion appeal to ASBCA No. 55574, involves the identical issues as that appeal, and is filed in order to obtain a judgment for the withheld funds, together with CDA interest” (*id.*). Consistent with this allegation, in the remainder of its complaint in ASBCA No. 55773, Electric Boat incorporates every paragraph of its complaint in

ASBCA No. 55574, except one, and includes a different prayer for relief (ASBCA 55773 compl., ¶ 3).

We deny the Navy's motion to dismiss, as well as the Navy's alternative motion to stay proceedings. Since the filing of the motion and the alternative motion, the procedural posture of the litigation has changed as a result of the contracting officer's final decision denying Electric Boat's certified claim for the \$740,734 withheld under unilateral Modification No. 05, and as a result of the filing of ASBCA No. 55773. We agree that, as Electric Boat alleges, the latter appeal "involves the identical issues" to those before us in this appeal, except with regard to interest on the withheld funds.

In these circumstances, there is no warrant to address the issues raised by the present motion to dismiss, nor is there good cause to stay this appeal to permit the contracting officer to issue a final decision on the government's defective pricing claim. With the "identical issues" regarding the merits of the defective pricing claim before us in ASBCA No. 55773 following a contracting officer's final decision, there is no evident purpose to be served either to dismissing this appeal now, or by staying it for the issuance of such a decision. The better course is to deny the motion to dismiss and the motion to stay, consolidate the two appeals, and proceed with consideration of the merits.

CONCLUSION

The Navy's motion to dismiss without prejudice, or in the alternative to stay proceedings, is denied. The Board will issue a separate order consolidating this appeal with ASBCA No. 55773.

Dated: 14 June 2007

ALEXANDER YOUNGER
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. 55574, Appeal of Electric Boat Corporation, rendered in conformance with the Board's Charter.

Dated:

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