

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Lockheed Martin Corporation) ASBCA No. 55786
)
Under Contract No. N00019-00-C-0480)

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OPINION BY ADMINISTRATIVE JUDGE FREEMAN

Lockheed Martin Corporation (LMC) appeals the alleged denial of a claim for interest on a partial convenience termination settlement. The government contends that the claim was not submitted to the contracting officer in accordance with the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, and moves to dismiss for lack of jurisdiction or, in the alternative, for summary judgment on the merits. LMC opposes both motions and cross moves for “judgment on the pleadings.”¹ We grant the government’s motion to dismiss.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

1. On 14 September 2000, the government and LMC entered into the captioned contract (hereinafter “Contract 0480”) for design, manufacture, test and delivery of operational test program sets, related hardware and data. The total estimated contract price for the base period and five option periods was \$192,790,503. (R4, tab 1 at 1-48) The contract included, among other provisions, the FAR 52.249-2, TERMINATION FOR

¹ On the present record there is only one pleading, LCM’s complaint. The government has deferred its answer pending decision on its motion to dismiss.

CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (SEP 1996) clause and the FAR 52.233-1, DISPUTES (OCT 1995) clause (R4, tab 1 at 109, 111).²

2. Contract line item numbers (CLINs) 0101 through 0107 were base period firm fixed price line items with prices totaling \$8,274,827. CLINs 0108 through 0117 were base period line items with quantities and prices “to be negotiated.” (R4, tabs 4-6) On 24 January 2002, the government issued a stop work order on CLINs 0101 through 0117 (R4, tab 11). On 19 February 2002, the government issued a notice of partial termination for convenience of those CLINs (R4, tab 13).

3. Bilateral Modifications Nos. P00017 and P00020, effective on 12 March and 8 April 2002 respectively, reduced the deliverable quantities under CLINs 0101 through 0107 to zero and “de-obligated” \$3,567,594 of the funds obligated for CLIN 0101 (R4, tab 3 at 1, 3-5, tab 5 at 1-2). Prior to the stop work order and partial termination notice, no quantities or prices had been negotiated, and no funds had been obligated, for the performance of CLINs 0108 through 0117.

4. On 10 July 2002, LMC submitted its settlement proposal for the termination of CLINs 0101 through 0117. The proposed gross settlement amount was \$4,113,693. After deducting the \$1,861,651 in “Performance Based Milestone Payments” for work performed before the stop work order, the net payment requested was \$2,252,042. (App. supp. R4, tab 27 at 5, 8, 11) At this time, there were still sufficient funds obligated for CLINs 0101 through 0107 (\$2,845,582) to pay the net payment requested.

5. Bilateral Modifications Nos. P00027 and P00030, effective 17 July and 24 September 2002 respectively, de-obligated an additional \$2,240,000 from CLINs 0101 and 0103 (R4, tab 6 at 1, 6, tab 7 at 1, 3). These de-obligations left a remaining balance of \$605,582 in obligated funds for CLINs 0101 through 0107. By letter dated 23 September 2002, LMC advised the government that its agreement to de-obligate funds “does not . . . waive the Government’s obligations for payment to the contractor once the final settlement is reached” (app. supp. R4, tab 34 at 1).

6. On 17 October 2002, Lockheed submitted its final revised termination settlement proposal. The proposed gross settlement amount was \$4,115,940 (app. supp. R4, tab 35 at 2, 3). On 5 February 2003, LMC accepted a government settlement offer of

² The Disputes clause mandated by regulation at the time Contract 0480 was awarded was the FAR 52.233-1, DISPUTES (DEC 1998) clause. 48 C.F.R. §§ 33.215, 52.233-1 (1999). For purposes of this appeal, the relevant terms of the clause specified in the contract are the same as in the mandated clause.

a gross settlement amount of \$3,992,102 with a net settlement payment of \$2,115,114.³ LMC's acceptance letter included the following statement:

Acceptance of this offer may be subject to US Code Title 31 "Antideficiency Act" due to insufficient funds remaining on the contract F-14 CLINs 0101 through 0117. Therefore, upon submittal of our final invoice, prompt payment in accordance with FAR 52.232-25 is requested.

(App. supp. R4, tab 38 at 1)

7. On 12 March 2003, LMC asked the government whether it would receive the net settlement payment "this month" (app. supp. R4, tab 39). On 23 April 2003, the government told LMC: "Let's give the comptroller another week" (app. supp. R4, tab 40). When no payment was forthcoming, LMC by letter dated 29 May 2003 advised the government that it "hereby asserts its right to interest against the subject claim." However, on the same date, LMC rescinded this letter at the government's request and on the government's assurance that "the issue is being worked." (App. supp. R4, tab 41 at 4-6)

8. On 12 June 2003, LMC submitted an invoice for a partial payment in the amount of the remaining obligated funds (\$605,582) for the terminated items (app. supp. R4, tab 42 at 3-6). This amount was paid leaving an unfunded balance due LMC of \$1,509,532 on the agreed net settlement amount.

9. On 21 November 2005, LMC submitted to the contracting officer a "request" for payment of this balance, plus interest "TBD," but estimated as \$194,145.34 for the period 5 February 2003 through 30 November 2005 (R4, tab 21). On 19 January 2006, the contracting officer replied to this request as follows:

NAVAIR continues to work diligently with the Comptroller to obtain funds for [the settlement]. However, to date the funds have not been received. Your request for interest on this matter under FAR 33.208 is not applicable since this was a settlement as a result of a Termination for Convenience of the Government, not a claim. Please refer to FAR 49.112-2(d) for information concerning interest under settlements.

(R4, tab 22)

³ The net payment amount was the gross settlement amount (\$3,992,102) less the milestone payments (\$1,861,651) less payment for sale of residual inventory (\$15,337).

10. With the balance due on the termination settlement still unfunded, LMC by letter to the contracting officer, dated 6 September 2006, noted the 3½ year delay in payment and stated:

Accordingly, [LMC] demands that the Government pay the outstanding balance, \$1,509,532, immediately. If NAVAIR is unable to pay and fulfill its legal obligations, please notify [LMC] in writing so that [LMC] can pursue other legal options to resolve this long-standing matter.

[LMC] reserves the right to submit a claim or seek other relief available under the law for the damages incurred to date and may resubmit its termination claim with a Contract Disputes Act certification.

(R4, tab 23)

11. On 19 September 2006, the funding to pay the balance due was approved by the Assistant Secretary of the Navy (Financial Management and Comptroller) (R4, tab 24). On 2 and 3 November 2006, the government and LMC representatives respectively signed Modification No. P00083 to Contract 0480. The stated purpose of this modification was: “to execute the final settlement agreement between [LMC] . . . and U.S. Government for the partial termination for convenience of . . . CLINs 0101-0107 defined under P00017.” (R4, tab 9 at 1-2) Modification No. P00083 added a new CLIN to the contract for payment of the \$1,509,532 balance due and concluded with the following provision:

5. As of the effective date of this modification, and in consideration of the provisions of this modification, Lockheed Martin Simulation, Training and Support (LMSTS) hereby waives, releases and forever discharges the Government from any and all obligations, claims, liabilities, debts, costs, attorney fees or responsibilities of any nature whatsoever, known or unknown arising from matters relating directly to RADCOM F-14 CLINS 0101, 0102, 0103, 0104, 0105, 0106, and 0107. The Government recognizes Lockheed Martin’s reservation of rights to pursue a claim for interest associated with the time period for payment of the \$1,509,532, however any such claim shall not include interest accrual after the effective date of this contract modification. Lockheed Martin has 90 days, commencing upon the date of execution of this modification, within which to file its claim

for interest. After the 90th day, Lockheed Martin agrees that its reservation of rights to pursue a claim for interest on the amount of \$1,509,532 is hereby waived, and it releases and forever discharges the Government from any claim for interest. Other than this identified reservation of rights for a claim for interest within the identified time period, this release is complete and final, and no other rights are reserved under this modification, and any and all rights shall be deemed to have been waived.

(R4, tab 9 at 2-3)

12. On 10 January 2007, LMC received payment of the \$1,509,532 provided for in Modification No. P00083 (app. opp'n at 5). On 31 January 2007, LMC appealed to this Board "the final decision of the U.S. Naval Air Systems Command procuring contracting officer . . . which is embodied in Modification No. P00083 to the subject contract, dated 2 November 2006."

13. LMC's First Amended Complaint in this appeal contains six Counts. Count I is for CDA interest on its alleged "certified termination for convenience claim." Counts II through VI are for alleged breaches of contract arising out of the government's delay in fully funding the agreed termination settlement amount. The interest claimed in Count I and the breach damages claimed in each of Counts II through VI are all in the amount of \$260,147.92.

14. LMC does not allege, and the record on the motion does not show, that a certified claim in a sum certain was submitted to the contracting officer under the CDA for interest or for breach damages in connection with the delayed payment of the net termination settlement amount for CLINs 0101 through 0107.

DECISION

The jurisdictional prerequisites for an appeal to this Board require (i) that the contractor must have submitted a proper claim under the CDA requesting a decision by the contracting officer, and (ii) that the contracting officer must either have issued a decision on the claim, or have failed to issue a final decision within the required time period. *England v. Sherman R. Smoot Corp.*, 388 F.3d 844, 852 (Fed. Cir. 2004) The term "claim" is not defined in the CDA, but a CDA monetary claim is defined in the Disputes clause of the contract as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain." 48 C.F.R. § 52.233-1(c) (1999) Furthermore, the CDA itself requires that any monetary claim in excess of \$100,000 be certified in the form prescribed in the Act. 41 U.S.C. § 605(c)(1).

The government moves to dismiss on the ground that “appellant’s complaint does not allege that it filed any claim with the Government” (gov’t mot. at 3). The issue raised by the government’s motion is not one that might be resolved by an amendment to the pleading. It is not disputed that a claim in a sum certain was not submitted to the contracting officer under the CDA for interest or breach damages in connection with the delayed payment of the agreed net termination settlement amount for CLINs 0101 through 0107. (SOF ¶ 14)

LMC opposes the motion to dismiss on the grounds that (i) its termination settlement proposal ripened into a CDA claim when the government failed to make payment by 20 March 2003, (ii) Modification No. P00083 was a contracting officer’s decision that “expressly denied [LMC’s] recovery of CDA interest,” and (iii) LMC’s notice of appeal of that decision was timely (app. opp’n at 7-9). We find no merit in LMC’s first two contentions and the third is irrelevant. A convenience termination settlement proposal “ripens” into a CDA claim when there is an impasse in the negotiation of the settlement amount and the contracting officer issues a unilateral determination as expressly required by the Termination for Convenience clause of the contract. An appeal to the Board of that unilateral determination is also expressly provided by the clause. *James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1543-44 (Fed. Cir. 1996) In LMC’s case, the termination settlement amount was agreed upon by the parties, there was no unilateral determination of that amount by the contracting officer, and the Termination clause of the contract does not provide for an appeal to the Board where a lack of government funding prevents payment of the agreed amount. (SOF ¶¶ 6, 12) 48 C.F.R. § 52.249-2 (1999).

LMC may have a claim for government breach of paragraph (f) of the Termination clause which provides that where the parties have reached agreement on the amount of the termination settlement, “[t]he contract shall be modified, and the contractor paid the agreed amount.” 48 C.F.R. § 52.249-2(f) (1999). Unlike a dispute over the settlement amount, a claim for breach of the payment obligation is not a matter for which the Termination clause provides for a contracting officer’s determination and a right of the contractor to appeal that determination. The breach claim must be asserted in accordance with the CDA and the contract Disputes clause which states that: “Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved under this clause.” 48 C.F.R. § 53.233-1(b) (1999).

We do not consider LMC’s settlement proposal as having ripened into a CDA claim. Nor do we consider that any of LMC’s subsequent requests that the agreed settlement amount be paid were CDA claims as defined in the Disputes clause. Moreover, even if we did so consider them, Modification No. P00083 did not “embody” a contracting officer’s decision on any claim. It was a bilateral modification (*i.e.* mutual agreement of the parties) that incorporated into the contract the agreed settlement

amount, a general release by LMC of all other claims, known and unknown, with respect to the termination, and an exception to that general release for a claim “for interest associated with the time period for payment of the \$1,509,532.” The modification did not deny that interest claim. It expressly recognized LMC’s right to pursue it if submitted within the agreed 90 day time limit from execution of the modification. In accordance with the CDA and the Disputes clause of the contract, pursuit of the claim required LMC to submit the claim first for decision by the contracting officer. LMC did not do so.

The Board has no jurisdiction over the appeal, and we therefore do not reach the other motions of the parties. The appeal is dismissed.

Dated: 10 December 2007

MONROE E. FREEMAN, JR.
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

PETER D. TING
Administrative Judge
Acting 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. 55786, Appeal of Lockheed Martin Corporation, rendered in conformance with the Board's Charter.

Dated:

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