

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
Guy W. Parker d/b/a )  
Parker International ) ASBCA No. 56928  
 )  
Under Contract No. FA8621-04-D-6250 )

APPEARANCE FOR THE APPELLANT: Mr. Guy W. Parker

APPEARANCES FOR THE GOVERNMENT: Richard L. Hanson, Esq.  
Air Force Chief Trial Attorney  
Maj Jonathan P. Widmann, USAF  
Jeffrey P. Hildebrant, Esq.  
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

Guy W. Parker d/b/a Parker International (hereinafter “Parker”) appeals the deemed denial of certified claims in the total amended amount of \$2,067,000 under the captioned contract (hereinafter “Contract 6250”) (notice of appeal (NOA) at 1; compl. at 17). The government has filed a Motion to Dismiss (Partial) and for Summary Judgment. Appellant has filed an opposition.<sup>1</sup> There are no genuine issues of material fact on the Statement of Facts below, and on those facts we grant the government’s motions.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. Effective 22 March 2004, Parker and the government entered into Contract 6250. The contract was a bilateral negotiated agreement. The government agency responsible for the contract was the United States Air Force (USAF), Air Force Material Command (AFMC), Aeronautical Systems Center (ASC). The contract required Parker to provide as ordered on an annual calendar year (CY) basis a software site use license,

---

<sup>1</sup> Parker’s opposition concludes with statements that “ASBCA 56928 is required to be dismissed *nostra sponte*” and that “this contractor remands ASBCA 56928 to the House of Representatives for continuing resolution” (app. opp’n at 19). By letter dated 16 November 2009, the Board asked Parker whether he intended by these statements a dismissal under Board Rule 30 so he could seek a remedy in the House of Representatives. Parker replied on 21 November 2009 that “the ASBCA Rule 30 offer is declined.” (Bd. corr. file)

software enhancements and supporting services for the Predator MQ-1 Unmanned Aerial Vehicle Multi-Task Trainer (hereinafter “PMTT”). (R4, tab 1 at 1-2, 9)<sup>2</sup>

2. Contract 6250 was signed for the “United States of America” by contracting officer (CO) Michael L Grove (R4, tab 1 at 1).<sup>3</sup> In October 2004, CO Grove took a new assignment and did not have a CO’s warrant thereafter (app. supp. R4, tab 1). CO Betty Clingerman was assigned as contracting officer to Contract 6250 in September 2004 (app. supp. R4, tab 131). At that time, CO Clingerman had been an authorized contracting officer since 25 January 1982. Her current Certificate of Appointment as a Contracting Officer of the United States is Certificate No. ASC-92-298 issued by the Assistant DCS, Contracting, on 1 July 1992. (App. supp. R4, tabs, 132, 133). The prefix “ASC” on the certificate number is the abbreviation for the Aeronautical Systems Center which was the Contract 6250 contracting agency (SOF ¶ 1).

3. The Contract 6250 Schedule contained three contract line items which read in relevant part as follows:

0100 CONTRACTOR SUPPORT SERVICES

....

The contractor shall provide support services in accordance with Attachment 1 Statement of Work dated 01 January 2004....

....

0200 SITE LICENSE

....

The contractor shall provide one software site license in accordance with the Statement of Work, Attachment

---

<sup>2</sup> The claims in this appeal arise under the same contract and involve many of the same facts as in *Guy W. Parker d/b/a Parker International*, ASBCA No. 56742, 09-2 BCA ¶ 34,260, *appeal docketed*, No. 10-1153 (Fed. Cir. January 13, 2010) (hereinafter “*Parker I*”). Accordingly, we have adopted the Rule 4 file, including appellant’s supplements, in *Parker I* as the Rule 4 file in the present appeal with such further supplements as the parties have submitted.

<sup>3</sup> The CO signing for the United States of America is not a party to the contract but an agent of one of the contracting parties.

1, dated 01 January 2004...and Attachment 7  
End-Users License Agreement....

....

#### 0300 MTT SOFTWARE ENHANCEMENTS

....

The contractor shall provide software enhancements,  
as ordered by the Government in accordance with  
Attachment 1 Statement of Work dated 01 January  
2004....

(R4, tab 1 at 2)

4. Contract Attachment 1, Statement of Work (SOW), included the following relevant provisions:

1.1 **Scope**....The basic effort covers one year of MTT operation and maintenance, and can be renewed for up to four additional one-year periods through the issuance of annual delivery orders by the contracting officer.

1.2 **Background**. The eight Predator MTTS...were developed through mixed government and private commercial funding. [Air Force] Detachment 1...manufactured and maintains the hardware components of the operational MTTs. Parker International (PI) provided the system design, system software, integration, test, verification, and training dataset development. ...The MTT software was developed with mixed government and contractor funds, and the government does not own the data rights to all software. The contractor shall provide the government with the opportunity to negotiate purchase of these data rights at the completion of the contract.

....

2.1 **Software License**. The contractor shall provide a one-year license to the government for use of all MTT software developed at contractor expense. This license shall permit the software to be operated on all delivered MTTs, and

used as described in the End User License Agreement (EULA). The software license shall be unilaterally renewable by the government in one-year increments for the life of the contract, in accordance with the contract.

....

**3.2 Government-Furnished Equipment.** The government will provide the contractor access to government-owned MTT equipment to the extent required to meet the requirements of the contract.... The government will retain custody and will be responsible for the maintenance of this equipment. The contractor shall be responsible for the proper use of this equipment, and will report any problems to the Project Officer at the earliest opportunity.

(R4, tab 1 at 26, 28, 29, 32)

5. Contract Attachment 7, End-Users License Agreement (EULA), included the following relevant provisions:

**1.0 Legitimate Use of Licenses**

The only legitimate use of the licenses for the Predator Training System is student instruction, emergency training, continuation training, distributed mission operations, and mission rehearsals.... Use of the Predator Training System by other contractors to propose, survey, derive, and/or engineer a baseline for future procurement activities or future funding activities is prohibited....

**1.1 Conflict Resolution**

...Reasonable efforts should be made to resolve controversies through [Alternative Dispute Resolution] prior to the submission of a claim. At the request of either party, delays impacting the program or contractor shall be resolved by ADR.

(R4, tab 1 at 64)

6. Contract Attachment 8, Contractor Requirements, Conditions and Assumptions, included the following relevant provision:

### **1.15 Liabilities for Government Furnished Property**

Government furnished property will be preserved as prescribed when it was received and in accordance with the manner the contractor would preserve its own property of a similar kind. *At the conclusion of the contract, the contractor will return government furnished property in the condition as it was received inclusive of any normal ware [sic] and tear.*

The government shall provide a schedule of government furnished property. [Emphasis added]

(R4, tab 1 at 65, 70)

7. Contract 6250 was an indefinite quantity contract that incorporated by reference the FAR 52.216-22, INDEFINITE QUANTITY (OCT 1995) clause. That clause stated in relevant part:

(a) This is an indefinite-quantity contract for the supplies or services specified, and effective for the period stated, in the Schedule. The quantities of supplies and services specified in the Schedule are estimates only and are not purchased by this contract.

(b) Delivery or performance shall be made only as authorized by orders issued in accordance with the Ordering clause....

(R4, tab 1 at 11)

8. The H103 ORDERING PROCEDURES (DEC 2003) clause of the contract stated in relevant part:

(a) Performance can be authorized under this contract only by the issuance of individual orders signed by an ASC/YW [Aeronautical Systems Center/Training Systems Product Group] Procuring Contracting Officer (PCO)....

....

(c) A total Price shall be established for each order. If the Contractor exceeds this fixed price, it is at its own risk. Any changes to the price will be in writing, will set forth any additional obligation to b[e] incurred by the Government, and

shall be signed by the PCO in advance of the Contractor exceeding the price.

(R4, tab 1 at 9)

9. The contract also incorporated by reference the FAR 52.233-1, DISPUTES (JUL 2002) clause. Paragraph (g) of that clause states as follows:

(g) If the claim by the Contractor is submitted to the Contracting Officer or a claim by the Government is presented to the Contractor, the parties, by mutual consent, may agree to use alternative dispute resolution (ADR). If the Contractor refuses an offer for ADR, the Contractor shall inform the Contracting Officer, in writing, of the Contractor's specific reasons for rejecting the offer.

(R4, tab 1 at 12)

10. Delivery orders for the software use license and supporting services were issued by the government and performed by Parker for CYs 2004, 2005 and 2006 (app. supp. R4, tabs 42, 43, 48). Delivery Order (DO) 0004 for the CY 2006 license and services was executed for the government by CO Clingerman. The software use license fee under DO 0004 was \$455,400 and the supporting services fee was \$93,600. (App. supp. R4, tab 48 at 1-3)

11. On 15 February 2006, CO Clingerman sent Parker a letter that stated in relevant part:

SUBJECT: Contract FA8621-04-D-6250, CY06 Last Year for Site License...

This is to notify you that CY06 is the last year that the government intends to purchase a site license under subject contract. You are therefore cautioned not to do any work outside the scope of the current Delivery Order, D004.

(R4, tab 5)

12. By letter dated 18 April 2006, CO Clingerman told Parker that a software upgrade that he had developed and installed on the PMTT systems without direction by the government "cannot be used for training." She further told him that "[t]he government does not intend to issue an RFP for the PMTT Revision 8 block Upgrade,"

and reminded him that “CY 06 is the last year that the government intends to purchase a site license per subject contract.” (R4, tab 6)

13. Notwithstanding CO Clingerman’s 18 April 2006 letter, Parker on 20 October 2006 submitted for payment invoice SER 0805 in the amount of \$341,550 for alleged government use of his software upgrade for the period 1 April through 22 December 2006 (R4, tab 10 at 4).

14. In an affidavit dated 12 December 2006, the Air Force Predator training squadron commander at Creech Air Force Base (AFB) stated that use of the PMTT systems for training would be discontinued on 31 December 2006, that there was insufficient storage space for those systems at Creech AFB, and that “I am aware that secure storage space is available at Luke Air Force Base.” There was nothing in this affidavit indicating that Parker was requested or authorized to remove the government-owned PMTT hardware from Creech AFB and store it in its own facility. (Compl. at 82)

15. In accordance with CO Clingerman’s 15 February and 18 April 2006 letters to Parker, the government did not issue any delivery order under Contract 6250 for a PMTT software use license or supporting services after CY 2006. At midnight on 31 December 2006, Parker’s PMTT software “timed-out” and could not be used for training until the license was renewed (gov’t mot., attachs. 2, 3 at 13).

16. At sometime in early January 2007, Parker entered Creech AFB and removed to his own facility six of the eight PMTT hardware sets on the pretext that he was preserving government-furnished property pending instructions from the government as to where it should be sent (gov’t mot, attach. 3 at 8-10).

17. By letter to Parker dated 12 February 2007, CO Clingerman demanded return of the six PMTT hardware sets that Parker had removed from Creech AFB (R4, tab 9). Mr. Parker ignored this demand. As of 24 September 2009, Parker had still not returned the sets (gov’t mot., attachs. 4-7).<sup>4</sup>

18. On 2 May 2007, Parker submitted a certified claim for payment of its invoice SER 0805.<sup>5</sup> The claim letter made no request for ADR, and concluded with the sentence

---

<sup>4</sup> On 11 September 2008, the government sued Parker in Federal District Court for return of the sets, plus compensatory and punitive damages (gov’t mot., attach. 4). On 24 September 2009, the District Court granted a government motion for summary judgment (gov’t mot., attach. 7).

<sup>5</sup> The claim was addressed to two Administrative Contracting Officers and “PCO Michael Grove”. Mr. Grove was no longer the PCO, and had not been since

“Please render your decision by Friday June 1, 2007.”<sup>6</sup> (R4, tab 10 at 1) On 27 June 2007, CO Clingerman issued a COFD denying the claim entirely. The COFD expressly stated that it was a COFD and included notice of Parker’s appeal rights at paragraph 10. Parker received the COFD on 30 June 2007. (R4, tab 11)

19. Parker did not appeal the 27 June 2007 decision. However, on 6 February 2009, he appealed an alleged “deemed denial” of his invoice SER 0805 claim. In that appeal (*Parker I*), Parker contended that CO Clingerman was not an authorized contracting officer and her 27 June 2007 COFD was a nullity. The Board, *sua sponte*, ordered Parker to show cause why the appeal as it related to SER 0805 should not be dismissed as untimely. On the Board’s order, Parker had a full and fair opportunity to litigate, and the parties actually litigated, the issue of CO Clingerman’s authority. Our determination that CO Clingerman was a duly authorized contracting officer was essential to our decision dismissing that aspect of the appeal as untimely. *Parker I* at 169,282.

20. On 4 April 2009, Parker submitted four monetary claims for equitable adjustments in the total amount of \$1,518,000 and one non-monetary claim on Contract 6250 with a demand for a COFD or in the alternative “Contract Attachment #7 ¶ 1.1 Mandatory Alternative Dispute Resolution” (NOA at 1, 22-23, 26). There is no evidence of a response by the government to Parker’s request for ADR.

21. The claims submitted on 4 April 2009 were as follows: Claim 1: \$341,550 “for USAF elected use of Block Upgrade D April-Dec 2006”; Claim 2: \$455,400 in each of CYs 2007, 2008 “for USAF use of MTT-003 and MTT-005”; Claim 3: “Contractor obligation, by contract, to provide negotiation for purchase of system data rights”; Claim 4: \$78,450 to “De-manufacture the eight Predator Training Systems and return of property”; and Claim 5: \$93,600 in each of CYs 2007 and 2008 for “administration costs not anticipated” (NOA at 26).

22. On 27 April 2009, Parker re-submitted the 4 April 2009 claims with an additional non-monetary claim (“Termination for Convenience and Appointment of TCO”). Parker added amounts of \$455,400 and \$93,600 for CY 2009 to claims 2 and 5

---

October 2004. (*See* SOF ¶ 2 above). The claim was referred to the current PCO, CO Clingerman, for decision.

<sup>6</sup> Parker alleges that he requested ADR on 29 January 2007, citing a 29 January 2007 “Program Management Status Report.” The only reference to ADR in that report is in the context of an apparent rejection of ADR by the Department of Justice for Parker’s suits in the United States Court of Federal Claims. There is nothing in the 29 January 2007 document constituting a request for ADR on the 2 May 2007 claim to the contracting officer for payment of Invoice SER 0805. (App. supp. R4, tab 60)

respectively, resulting in an increased total amount of \$2,067,000 for the monetary claims. He certified the claims in accordance with the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 605. The 27 April 2009 claims were designated by Parker as a “Settlement Proposal with Demand for Final Decision.” (R4, tab 12 at 1, 5, 8, 10)

23. On 7 July 2009, CO Clingerman issued a COFD denying all of the monetary claims in Parker’s 27 April 2009 submission (gov’t mot., attach. 8). The 7 July 2009 COFD was delivered to Parker at his address of record on 8 July 2009 (*id.* at 11).

24. On 29 August 2009, Parker appealed the “deemed denial” of his 4 April 2009 “certified Claims for Equitable Adjustments” (NOA at 1). The appeal was docketed as ASBCA No. 56928. On 5 September 2009, Parker filed his complaint. The complaint included amounts as updated in the 27 April 2009 monetary claims, and we construe ASBCA No. 56928 as encompassing an appeal from the denial of those claims.

25. Parker’s claims as pleaded in his complaint, totaling \$2,067,000, are the following:

Claim 1: \$341,550 for “USAF elected use of Block Upgrade D April-Dec 2006. The USAF was provided an option to use licensed Block C or to license Block D. The USAF elected to use unlicensed Block D from 01APR2006-28DEC2006.” (Compl. at 11);

Claim 2: \$455,400 in each of the years CY 2007, CY 2008, and CY 2009 for use of PMTT-003 and PMTT-005 “by other contractors to propose, survey, derive and/or engineer a baseline for future procurement activities or future funding activities that is prohibited by Contract Attachment 7” (*id.*);

Claim 3: “\$78,450 disassembly of the eight Predator Training Systems. This claim returns to this contractor the system, hardware, and software data rights the government did not purchase in 1998...The disassembly of the components, thereafter retained by this contractor, separates this contractor’s property [from] the government’s property. The 1998 parts cost for all 8 systems was, in total, under \$72,000.” (*Id.*);

Claim 4: \$93,600 in each of the years CY 2007, CY 2008 and CY 2009 for “administration costs not anticipated at mutual negotiation and contract signature” (*id.*). These costs are further explained as: “The supplies/services to emergency move and preserve eight tons of equipment in accord with Contract Attachment # 8 ¶ 1.15 Liabilities” (compl. at 15);

Claim 5: An unspecified amount for breach of an alleged contract requirement to provide ADR on request for the foregoing monetary claims (compl. at 16).

## DECISION

### A. The Government Motion to Dismiss (Partial)

The government moves to dismiss Parker's Claim 1 on the ground of *res judicata* citing our decision in *Parker I* (gov't mot. at 17). Claim 1 in the 4 and 27 April 2009 submissions and in the complaint on appeal is identical to the claim for payment of invoice SER 0805 that Parker submitted for a COFD on 2 May 2007. The claim for invoice SER 0805 was denied by CO Clingerman's COFD on 27 June 2007. (SOF ¶¶ 13, 18, 21, 24) Parker did not file a timely appeal from that decision, but on 6 February 2009 appealed in *Parker I* a "deemed denial" of the claim. In *Parker I*, Parker had a full and fair opportunity to litigate the issue of CO Clingerman's authority, the parties actually litigated that issue, and our determination that she had the authority to issue the 27 June 2007 COFD was essential to our dismissal of that part of the appeal as untimely. (SOF ¶ 19) Under well-established principles of issue preclusion, Parker is not entitled to litigate that same issue again. RESTATEMENT (SECOND) OF JUDGMENTS § 20(a)(1) and cmts. b, c, § 27 and cmt. d (1982); *In re Freeman*, 30 F.3d 1459, 1465-68 (Fed. Cir 1994). Accordingly, the government's motion to dismiss the present appeal as to Claim 1 is granted.

### B. The Government's Motion for Summary Judgment

The government moves for summary judgment on Parker's Claims 2 through 5. Summary judgment will be given where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one which may make a difference in the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). While the moving party has the burden of establishing the absence of genuine issues of material fact on issues as to which it will bear the burden of proof at hearing, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986), conclusory assertions by the non-moving party do not raise a genuine issue of material fact. *Chum Hooper T/A Eye4Sports*, ASBCA No. 56755, 09-2 BCA ¶ 34,211 at 169,122.

In Claim 2 Parker alleges that the government violated his rights in CYs 2007, 2008 and 2009, by making the PMTT-003 and PMTT-005 hardware available to other contractors "to propose, survey, derive and/or engineer a baseline for future procurement activities" (SOF ¶ 25). Parker's contention that the government used these PMTTs to improperly assist other contractors is a mere conclusory assertion without a shred of supporting evidence. We grant the government's motion for summary judgment as to Claim 2.

In Claim 3 Parker alleges that disassembly of the eight PMTT hardware sets "returns to this contractor the system, hardware and software data rights the government

did not purchase in 1998” (SOF ¶ 25). Contract 6250 expressly described the PMTT hardware as “government-owned MTT equipment,” and included no provision granting Parker “system, hardware and software data rights” in the equipment, or subjecting that equipment to the Attachment 7 EULA or any other limited use license agreement. The contract recognized that “the government does not own the data rights to all software,” but gave Parker no right to disassemble the hardware sets. (SOF ¶¶ 1, 3-5) The government’s motion for summary judgment on the appeal as to Claim 3 is granted.

Claim 4 is for Parker’s alleged costs of storing the six government-owned PMTT hardware sets that he removed from government custody at the completion of the contract and retained for at least 2 ½ years after the government demanded their return (SOF ¶¶ 16, 17). Parker alleges that he was authorized by the training squadron commander to remove the six PMTT hardware sets from the Air Force Base and store them in his own facility (compl. at 15). There is not a scintilla of evidence supporting this allegation. Parker also contends that he was authorized to remove and store those sets by the provision in ¶ 1.15 of Attachment 8 to the contract that the contractor preserve government-furnished property as it would preserve its own property (*id.*). The cited provision, however, also required the contractor to return the government-furnished property “[a]t the conclusion of the contract.” The contract was completed on 31 December 2006. Parker’s contention that removal of the six PMTT hardware sets from the Air Force Base at the completion of the contract was necessary to preserve them from some unspecified danger is frivolous. The government’s motion for summary judgment denying the appeal as to Claim 4 is granted.

Claim 5 is for alleged breach of the ADR provisions of Contract 6250. This claim was not submitted in the 4 April or 27 April 2009 claim submissions to the contracting officer. It was asserted for the first time in the 5 September 2009 complaint on appeal. (SOF ¶¶ 21, 22, 25) A claim cannot properly be raised for the first time in the pleadings before the Board. *Consolidated Defense Corp.*, ASBCA No. 52315, 03-1 BCA ¶ 32,099 at 158,668. Accordingly, the appeal as to Claim 5 is dismissed for lack of jurisdiction.

The appeal is dismissed for lack of jurisdiction as to Claims 1 and 5. It is denied on the merits as to Claims 2, 3 and 4. This decision disposes of the appeal in its entirety.

Dated: 5 April 2010

---

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

---

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. 56928, Appeal of Guy W. Parker d/b/a Parker International, rendered in conformance with the Board's Charter.

Dated:

---

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