

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
JRS Management) ASBCA No. 57238
)
Under Contract No. DAAB08-96-C-0002)

APPEARANCE FOR THE APPELLANT: Ms. Jacqueline Sims
Owner

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Army Chief Trial Attorney
MAJ John C. Dohn, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE FREEMAN
UNDER RULE 12.3

JRS Management (JRS) appeals the denial of its claim for an alleged government breach of the captioned contract, and has requested the Rule 12.3 accelerated procedure. The government requests dismissal of the appeal on grounds of statutes of limitations and *laches*. The cited statutes of limitations are not applicable to this contract, but considering the request to dismiss for *laches* as a motion for summary judgment, we grant the motion and deny the appeal.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 23 September 1995, the government awarded JRS the captioned contract (hereinafter "Contract 0002") to provide consumer affairs/financial assistance program (CA/FAP) services at Fort Monmouth, New Jersey (R4, tab 1 at 9, 13). The term of the contract was a base term of one year from 1 October 1995 through 30 September 1996 with options exercisable by the government for two successive years thereafter. The contract included, among other provisions, the FAR 52.217-9, OPTION TO EXTEND THE TERM OF THE CONTRACT (MAR 1989) clause. (R4, tab 1 at 9, 13-14, 39)

2. JRS hired Ms. Jill Bakke to perform the CA/FAP services at Ft. Monmouth under Contract 0002. In July 1996, Ms. Bakke received a commendation certificate from the Army for her work (R4, tab 1 at 43). On or about 1 October 1996, the government exercised the first year option. On 7 August 1997, the contracting officer notified JRS that the second year option would not be exercised. This notice stated in relevant part:

You are advised that the second option year beginning 1 Oct 97 through 30 Sep 98 to provide services of Consumer Affairs/Financial Assistance against subject contract will not be exercised.

Due to financial constraints and a decrease in military population, Consumer Affairs/Financial Assistance and Consumer Affairs/Budget Counselor are being consolidated into one program.

A new acquisition has been synopsisized and the solicitation will be forwarded to you.

(R4, tab 1 at 45)

3. On 14 August 1997, the government issued Request for Proposal (RFP) DAAB08-97-R-0028 (hereinafter "RFP 0028") for performance of the CA/FAP services at Ft. Monmouth for a base year beginning 1 October 1997 with options exercisable by the government for three successive years thereafter (ex. A-3 at 1, 7-8). The RFP performance work statement (PWS) was substantially the same as the PWS in Contract 0002 except for deletion of the requirements for professional certification and a utility deposit waiver program.

4. JRS submitted a proposal for the contract solicited by RFP 0028, but on 25 September 1997 its proposal was found unacceptable by the contracting officer for failure to provide required documentation that the person proposed by JRS to perform the contract (Ms. Bakke) would in fact be available to perform the work if JRS was awarded the contract. JRS protested this finding to the Comptroller General. On 10 November 1997, the Comptroller General found that the contracting officer had acted reasonably and properly in rejecting the JRS proposal and denied the protest. (Ex. A-5)

5. Contract 0002 expired on 30 September 1997 when the first option year ended and the second year option was not exercised. The successor contract solicited by RFP 0028 was awarded to Ms. Bakke. (R4, tab 1 at 3)

6. On 29 April 2010, more than 12 years after the conclusion of Contract 0002, JRS submitted its present claim for lost profits in the amount of \$6,481.62 for the government's decision not to exercise the second year option in Contract 0002. JRS alleges that this was a breach of contract because "there was intent on the part of Fort Monmouth to steer JRS Management's contract for [CA/FAP services] to JRS Management's employee, Jill Bakke" and that this action was "an arbitrary abuse of discretion." (R4, tab 1 at 1, 4)

7. By final decision dated 20 May 2010, the contracting officer denied JRS' claim on the ground that "you have not established that the government abused its discretion or acted in bad faith in not exercising the option" (R4, tab 2). This appeal followed.

8. In its complaint on appeal, JRS alleged the following as the basis for its claim that failure to exercise the final option year was a bad faith, arbitrary abuse of discretion:

On August 7, 1997, Fort Monmouth indicated that option year two of the contract would not be exercised because financial constraints and a decrease in military population had caused Fort Monmouth to consolidate into one program, the positions of Consumer Affairs/Financial Assistance and Consumer Affairs/Budget Counselor.

However, no such consolidation of the Consumer Affairs/Financial Assistance and the Consumer Affairs/Budget Counselor ever occurred. Instead, Fort Monmouth promptly began the process of procuring a new contract for Consumer Affairs/Financial Assistance services by synopsisizing in the Commerce Business Daily, RFP DAAB08-97-R-0028, just one day after Fort Monmouth notified JRS Management that option year two of the contract would not be exercised. Fort Monmouth then issued RFP DAAB08-97-R-0028 on August 14, 1997, just one week after JRS Management was notified that option year two would not be exercised.

When Fort Monmouth notified JRS Management that it would not be exercising option year two of the contract, Fort Monmouth had already prepared the synopsis and the solicitation for RFP DAAB08-97-R-0028, and Fort Monmouth knew that no such consolidation of the Consumer Affairs/Financial Assistance and the Consumer Affairs/Budget Counselor had occurred, nor was it planned.

The legal definition of "bad faith" is: "intentional dishonest act by not fulfilling legal or contractual obligations, misleading another, entering into an agreement without the intention or means to fulfill it, or violating basic standards of honesty in dealing with others."

After providing exemplary service for two years, Fort Monmouth provided JRS Management with fraudulent and untruthful

reasons for not exercising the second option year, so that Fort Monmouth could do the following:

(a) Solicit new proposals for the very same Consumer Affairs/Financial Assistance services provided by JRS Management under [Contract 0002].

(b) Award a contract for Consumer Affairs/Financial Assistance services to JRS Management's employee, Jill Bakke, effectively "cutting out the middleman" (JRS Management).

The Boards of Contract Appeals have found that an award of damages for unexercised option years is appropriate, if the contractor proves that the decision not to exercise the option "was a product of bad faith or so arbitrary and capricious as to be an abuse of discretion." [Citation omitted]

Fort Monmouth was intentionally dishonest, and fabricated reasons for not exercising the final option year of JRS Management's contract. Fort Monmouth's actions represents [sic] a bad faith and arbitrary abuse of discretion, which deprived JRS Management of the profits it expected to earn during the second option year of the contract.

(Compl. at 3-4)

9. Beginning with the second paragraph of JRS' stated basis for its claim of bad faith quoted above, the government answer to the factual allegations of bad faith therein states:

Because Appellant failed to prosecute its alleged claim for nearly 13 years, the Government currently is unaware of any retained records about this matter and is therefore unable to either admit or deny this allegation.

(Answer at 12-16)

10. The contracting officer who issued the final decision on the JBS claim of bad faith has described by affidavit her attempts to locate the government's records related to that claim as follows:

2. In my attempt to locate any files related to JRS Management's claim under contract number DAAB08-96-C-0002, I personally searched known contract file storage areas and databases. This

contract was worked on a Base Ops contract writing system that was replaced in 1999 by the Procurement Desktop Defense (PD2) database. Base Ops maintained a hard file storage room distinct from other CECOM file rooms. The content of that database and file facility cannot be located and were presumably destroyed in accordance with regulations. Additionally, I looked through the PADDs database, which was not designed to hold Base Op contracts, and failed to find the contract.

3. I also asked two people, JoAnn Botwinick and Linda Colatrella, to search in what is left of the post 1999 Base Ops database. Both Joann Botwinick and Linda Colatrella searched the Procurement Desktop Defense (PD2) database. Their searches failed to find the alleged contract or any information regarding the alleged contract.

4. Finally, I asked the team collecting all hard copies of files from the CECOM Contracting Center floor, in preparation of the BRAC closing of Fort Monmouth, to see if they had the contract. No one on the team could locate the contract file or any information regarding the contract.

5. *None of my efforts produced any records relating to the referenced appeal such that I am not able to adequately respond to Appellant's allegations.* (Emphasis added)

(R4, tab 3)

11. JRS offers no explanation for the 12-year delay from the alleged accrual of its bad faith claim to its submission to the contracting officer. JRS offers no evidence that the government records of the transactions at issue are available, or that the government has otherwise not been prejudiced by the delay.

DECISION

The government requests dismissal of the appeal on the grounds that the claim is barred by (i) the 6-year statute of limitations in the Contract Disputes Act of 1978 (CDA) at 41 U.S.C. § 605(a),¹ (ii) the 6-year statute of limitations in the Tucker Act at 28 U.S.C. § 2501,² and (iii) *laches* (amended answer at 1-3).

¹ The CDA statute of limitations at 41 U.S.C. § 605(a) states in relevant part: “Each claim by a contractor against the government relating to a contract...shall be submitted within six years after the accrual of the claim.”

The 6-year statute of limitations in the CDA for the submission of claims to the contracting officer was added to that statute by Section 2351(a) of the Federal Acquisition Streamlining Act of 1994 (FASA) (Pub. L. No. 103-355, § 2351(a), 108 Stat. 3322 (1994)). Section 10001(b)(2)(A)(2) of the FASA provided that any amendment made by this Act shall apply to contracts in effect on October 1, 1995 “to the extent and in the manner prescribed in the final regulations....” 108 Stat. 3404. The final regulations at FAR 33.206(a) state in relevant part: “This 6-year time period does not apply to contracts awarded prior to October 1, 1995.” Contract 0002 was awarded to JRS on 25 September 1995 (SOF ¶ 1). Accordingly, the JRS claim for breach of that contract is not barred by the CDA 6-year statute of limitations on submission of claims.

The government argues that the Tucker Act 6-year statute of limitations is also applicable to this Board because the CDA at 41 U.S.C § 607(d) states: “[T]he agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims” (amended answer at 2-3). We do not agree. The Tucker Act 6-year statute of limitations does not apply to claims under the CDA including those brought in the Court of Federal Claims. *See Pathman Construction Co. v. United States*, 817 F.2d 1573, 1580 (Fed. Cir. 1987); *LaCoste v. United States*, 9 Cl. Ct. 313, 314-15 (1986); *Z.A.N. Co. v. United States*, 6 Cl. Ct. 298, 303 (1984).

Laches is “the neglect or delay in bringing suit to remedy an alleged wrong, which taken together with lapse of time and other circumstances, causes prejudice to the adverse party.” *A.C. Aukerman Co. v. R.L. Chaides Construction Co.*, 960 F.2d 1020, 1028-29 (Fed. Cir. 1992) (*en banc*). The JRS 12-year delay in submitting the present claim to the contracting officer is not disputed, and no explanation for that delay is offered by JRS. While the Tucker Act and CDA statutes of limitations on claim submission do not directly bar the JRS claim, they do provide guidance as to what a reasonable time is for such submissions. The 12-year delay in the submission of the JRS claim is double the 6-year limit in both statutes and with no explanation for that delay, we find it unreasonable. *See Ahmed S. Al-Zhickrulla Est.*, ASBCA No. 52137, 03-2 BCA ¶ 32,409 at 160,428-29 (*laches* found for a 7-year inexcusable delay); *Rudolf Bieraeugel, Stahl-und Metallbau, GmbH*, ASBCA No. 47145, 95-1 BCA ¶ 27,536 at 137,220 (*laches* found for a 10-year inexcusable delay).

The affidavit of the contracting officer who denied the bad faith claim for lack of proof establishes that no government records of the transaction at issue could be found and that in the absence of such records the government had no way of checking the accuracy of the factual allegations constituting the bad faith claim. The affidavit is not disputed by any

² The Tucker Act statute of limitations at 28 U.S.C. § 2501 states in relevant part: “Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.”

credible evidence and is sufficient to establish prejudice to the government resulting from JRS' inordinate delay in submitting the claim. (SOF ¶¶ 10-12)

Considering the request to dismiss for *laches* as a motion for summary judgment there are on this record no genuine issues of material fact and the government is entitled to judgment as a matter of law. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir 1987).

Dated: 4 October 2010

MONROE E. FREEMAN, JR
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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. 57238, Appeal of JRS Management, rendered in conformance with the Board's Charter.

Dated:

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