

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
American Service & Supply, Inc.) ASBCA No. 50606
)
Under Contract No. F34560-94-C-0177)

APPEARANCE FOR THE APPELLANT: Garreth E. Shaw, Esq.
Garreth E. Shaw, PC
San Antonio, TX

APPEARANCES FOR THE GOVERNMENT: COL John M. Abbott, USAF
Chief Trial Attorney
Brady L. Jones, III, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE SCHEPERS
ON THE GOVERNMENT'S MOTION TO DISMISS
FOR LACK OF JURISDICTION

The Government files this motion to dismiss the appeal asserting that appellant's request for payment entitled Invoice No. 1345, filed with the contracting officer after the termination for default of appellant's contract, was a routine request for payment about which there was no dispute at the time it was submitted. The appeal of the termination for default is also before this Board (ASBCA No. 49309). We deny the Government's motion.

FINDINGS OF FACT FOR THE PURPOSES OF THE MOTION

1. On 16 September 1994 appellant was awarded Contract No. F34560-94-C-0177 to furnish all plant, labor, tools, materials, equipment, transportation and incidentals necessary to replace #1 and #3 air compressors in building 3001, Tinker Air Force Base, Oklahoma (the contract). The contract specifications and drawings stated the manufacturer and model of the replacement compressors and their engines, as well as the placement configuration for each. The acquisition was a total small disadvantaged business set-aside. (R4, tab 1)

2. The contract contained FAR 52.249-10 Default (Fixed-Price Construction) (APR 1984) and FAR 52.233-1 Disputes (MAR 1994) which states in part:

(c) "Claim," as used in this clause, means 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, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. A claim arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding \$50,000 is not a claim under the Act until certified as required by subparagraph (d)(2) below. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act. The submission may be converted to a claim under the Act, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

(d)(1) A claim by the Contractor shall be made in writing and submitted to the Contracting Officer for a written decision. A claim by the Government against the Contractor shall be subject to a written decision by the Contracting Officer.

(2)(i) Contractors shall provide the certification specified in subparagraph (d)(2)(iii) of this clause when submitting any claim—

(A) Exceeding \$50,000

3. On 16 May 1995 Modification No. P00001 to the contract was issued (R4, tab 2). Modification No. P00001 increased the size of engine #1, added \$22,000 to the contract amount, and extended the contract performance period 30 days (R4, tab 2).

4. On 15 September 1995 appellant submitted its 5th invoice, No. 1294 dated 12 September 1995 in the amount of \$59,361.79, which stated in part (R4, tab 22):

% complete/39% computed on original subtotal of \$483,668.00	188,630.52
plus 50% of modification for Engine No. 1	11,000.00

5. The cover letter for Invoice No. 1294 stated in part:

Enclosed is a Request for Progress Payment in the amount of \$59,361.79 for delivery of the engine on the first system. As you know, the engine was purchased, tested and delivered to Tinker AFB on or about August 4, 1995. Mr. Rich Estep, the Contracting Officer at that time, stated it would be inspected and a progress payment would be authorized for an additional ten percent (10%) of contract work completed. I was instructed at that time to submit a copy of the manufacturer's invoice and proof of payment with the Progress Payment Request.

Please note that despite several inquiries, the Government inspector has not executed Contract Progress Report ("CPR") indicating inspection and approval of the contract performance sub-element pertaining to delivery of the engine. Thus, I am enclosing a CPR depicting work performance to date and request that you immediately contact the inspector for signature.

American Service and supply [sic] is a small business that relies on progress payments. The instant 40 plus day delay in inspection of contract performance and approval of progress payment unfairly hinders our ability to perform the contract and violates the spirit and intent of contract clause 52.232-27.

6. On 23 September 1995 the contracting officer returned Invoice No. 1294 and advised appellant that the Government disagreed with both the stated percentage completion and appellant's demand for \$11,000 for Engine No. 1 (R4, tab 24). No payment was made.

7. On 14 November 1995 the contract was terminated for default for failure to make progress so as to endanger contract completion (R4, tab 3).

8. During contract performance appellant and the government discussed and disputed several points, which included: whether Modification No. P00001 was the result of defective specifications; whether appellant was obligated by the contract to complete certain testing; the percentage of the contract work completed; and whether delivery of

certain equipment qualified as a work element under the contract and thus should be included within the percentage completion of the progress payments.

9. On 2 July 1996 the Government received appellant's 6th invoice, No. 1345 dated 22 May 1996 in the amount of \$122,243.64, based on alleged 52% completion. This percentage completion included costs of on-site materials and equipment such as Engine No. 1 and Skid No. 1 and related piping. Invoice No. 1345 was certified pursuant to the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, as amended. (R4, tab 33)

10. On 29 July 1996 the contracting officer wrote appellant that the 22 May 1996 invoice was postmarked 27 June 1996, disagreed with the percentage completion claimed, and suggested appellant discuss payment with its surety because all the equipment and materials on site were released to the surety (R4, tab 36).

11. On 6 March 1997 this Board received appellant's notice of appeal. In its appeal and complaint appellant asserted that it filed its claim in the amount of \$122,243.64 with the contracting officer "in or about October 1996," and the appeal was from a deemed denial since the contracting officer failed to issue a final decision (comp. ¶ 31). The Government denied receiving that asserted claim.

12. Appellant could not produce a copy of the claim it contended was filed in or about October 1996, and appellant now asserts that Invoice No. 1345 dated 22 May 1996 in the amount of \$122,243.64 is its claim.

DECISION

The Government filed this Motion to Dismiss for Lack of Jurisdiction on the ground that appellant's Invoice No. 1345 dated 22 May 1996 in the amount of \$122,243.64, certified pursuant to the Contract Disputes Act of 1978, was an undisputed routine request for payment when received by the Government. A routine request for payment must have been in dispute at the time it was submitted to the contracting officer to qualify as a claim. *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1576 (Fed. Cir. 1995) (*en banc*).

Invoice No. 1345 was submitted after the termination for default of this contract, and concerned appellant's right to payments for a specific percentage completion. The percentage completion of the contract and the items which were properly work elements to comprise that percentage were points in dispute during performance of the contract and were in major part the basis of the termination for default (findings 4-9). In light of these facts, Invoice No. 1345 could not be considered a routine request for payment and even if it were, was disputed.

In reaching this determination, we are guided by our appeals court which stated in *Reflectone*, 60 F.3d at 1577:

The government's interpretation of the FAR must fail, as a matter of logic, because it recognizes only two categories of potential claims, undisputed routine requests for payment, which do not satisfy the definition, and disputed non-routine written demands seeking payment as a matter of right, which do. This interpretation ignores a third category, undisputed, non-routine written demands seeking payment as a matter of right. Under the literal language of the FAR, however, the critical distinction in identifying a "claim" is not between undisputed and disputed submissions, but between routine and non-routine submissions.

....

A routine request for payment, . . . for example, a voucher or invoice[,] is submitted for work done or equipment delivered by the contractor in accordance with the expected or scheduled progression of contract performance. Similarly, progress payments are made by the government when the contractor completes predetermined stages of the contract. An REA can hardly be compared to an invoice, voucher or progress payment.

The Government's Motion to Dismiss is denied and the parties are directed to proceed in this appeal in accordance with the previously issued schedule.

Dated: 29 March 2000

JEAN SCHEPERS
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
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. 50606, Appeal of American Service & Supply, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals