

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Kit Pack Company, Inc.) ASBCA No. 53155
)
Under Contract No. DAAE07-96-C-X033)

APPEARANCES FOR THE APPELLANT: Michael A. Hordell, Esq.
Laura L. Hoffman, Esq.
Kilpatrick Stockton LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
MAJ David Newsome, Jr., JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TUNKS
ON GOVERNMENT'S MOTION TO DISMISS

The Government moves to dismiss ASBCA No. 53155 for lack of jurisdiction, alleging that the appeal relates to a premature termination for convenience claim.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

On 30 October 1995, the Government awarded Contract No. DAAE07-96-C-X033 for 407 conversion kits to upgrade Army M113A A3 Armored Personnel Carriers to appellant. At award, the contract price was \$8,911,326.05. On 1 November 1996, the contracting officer terminated the contract for default for failure to deliver, lack of financial resources amounting to repudiation and breach of contract.

On 26 November 1996, appellant filed for bankruptcy under Chapter 11 of the Bankruptcy Code, triggering the automatic stay provisions of 11 U.S.C. § 362.

On 13 January 1997, appellant appealed the termination for default to this Board, where it was docketed as ASBCA No. 50485.

On 25 April 2000, appellant submitted a certified "Request for Equitable Adjustment/Termination for Convenience Claim and Request for Contracting Officer's Final Decision," seeking \$7,334,492 for bad faith/breach of contract. The claim included the following items: (1) off-site inventory (the difference between the total value of the materials for the contract and the value of the materials the Government took from appellant's warehouse); (2) on-site inventory (the difference between the value of the

materials the Government took from appellant's warehouse and the amount of progress payments paid under the contract); (3) wages and other costs ; (4) acceleration costs; (5) delay and disruption costs; (6) cost of performing extra work after termination; (7) lost profit; (8) shutdown costs; (9) bankruptcy expenses; (10) the cost of a warehouse constructed for this contract; and (11) consultants' costs and claim preparation costs. Alternatively, appellant requested \$6,320,525 under an equitable adjustment/termination for convenience theory.

By final decision dated 25 August 2000, the contracting officer denied the claim. Appellant appealed the denial to this Board on 17 November 2000. The claim was docketed as ASBCA No. 53155.

DECISION

The Government moves to dismiss ASBCA No. 53155 for lack of jurisdiction, alleging that the appeal relates to a premature termination for convenience claim.

A termination for convenience claim that has been submitted to the contracting officer may be a valid Contract Disputes Act "claim" and if so, the date of submission establishes the date on which interest begins to run in the event the termination for default is converted to a termination for convenience. *Balimoy Manufacturing Company of Venice, Inc.*, 96-2 BCA ¶ 28,605 and cases cited therein. However, we cannot, as a practical matter, rule on a convenience claim until we have ruled on the propriety of the termination for default. Accordingly, the appeal is dismissed without prejudice insofar as it relates to appellant's termination for convenience claim. The remaining claims are properly before us.

The Government's motion to dismiss is granted in part and denied in part in accordance with the foregoing.

Dated: 13 June 2001

ELIZABETH A. TUNKS
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
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. 53155, Appeal of Kit Pack Company, Inc., rendered in conformance with the Board's Charter.

Dated:

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