

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Dual, Inc.) ASBCA No. 53827
)
Under Contract No. F33657-93-C-0046)

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

This appeal arises from a contracting officer (CO) final decision (COFD) on a contractor termination for convenience settlement proposal (TFCSP). The government has moved to dismiss the appeal for lack of jurisdiction on the basis that appellant failed to submit to the CO for final decision matters alleged in its complaint and amended complaint. Appellant opposes the motion arguing that it submitted certified claims to the termination CO (TCO) and that he decided those claims.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. The United States of America, acting through a CO of the U.S. Air Force (the government), awarded Contract No. F33657-93-C-0046 (the contract) on 7 June 1994, with an effective date of 2 May 1994. The award was by way of a tripartite agreement pursuant to § 8(a) of the Small Business Act, as amended (codified at 15 U.S.C. § 637(a)) signed by the CO, for the U.S. Small Business Administration, and for Dual, Inc. (Dual, the contractor, or appellant). Work under this services contract involved development, production, and delivery of a flight crew training system for a radar system under a program known as "Joint Stars." The contract included firm fixed price and cost plus award fee contract line items. (R4, tab 3)

2. The contract incorporated by reference the following relevant standard contract clauses: FAR 52.233-1 DISPUTES (DEC 1991); FAR 52.249-4 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (SERVICES) (SHORT FORM) (APR 1984); and FAR 52.249-8 DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984). The contract also included FAR 52.219-17 SECTION 8(a) AWARD (FEB 1990) tailored to the government activity administering the contract. (*Id.*)

3. By a COFD dated 29 April 1999, the CO terminated the contract “in its entirety for default of the contractor” (TFD). The TFD was further effected by unilateral Modification No. P00037 to the contract (mod P37) dated 3 May 1999, which purported to invoke FAR 52.249-6 TERMINATION (COST REIMBURSEMENT) (MAY 1986) and relied on FAR 52.249-8, the default provision of the contract. (App. supp. R4, tabs A23-24; R4, tab 6)

4. Between 3 May and 4 June 1999, the government offered to resolve the TFD by way of “a no-cost conversion/settlement” that would be administered pursuant to FAR 52.249-2 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (version of clause not specified) and FAR 52.249-6. Dual rejected the offer. Following rejection of the offer, the government notified Dual in a memorandum dated 4 June 1999 that a unilateral TFC pursuant to the above-cited standard FAR clauses would be issued on or before 11 June 1999. (R4, tab 7 at 1)

5. On 8 June 1999, with an effective date of 10 June 1999, the CO issued unilateral mod P38 that converted the TFD to a TFC pursuant to FAR 52.249-2 and FAR 52.249-6 (app. supp. R4, tab A33).

6. Appellant submitted an “interim” TFCSP dated 1 September 1999 seeking payment of \$2,968,369 (R4, tab 11). The contractor did not request a CO final decision on TFC costs in connection with the interim TFCSP.

7. The TCO did not agree with the costs listed in the interim TFCSP. Instead, he initiated his own evaluation, a Defense Contract Audit Agency (DCAA) audit, and a technical evaluation by Air Force officials. (R4, tabs 12-15)

8. By letter dated 5 November 1999 to the DCAA, copy furnished to the TCO, Dual asserted that the administrative CO (ACO), prior to the TFD, had improperly interfered with the contractor’s “funding institution” and had notified that entity of the impending TFD. According to appellant, those actions and others cut off Dual’s cash flow and, based on further actions by the funding institution, caused a NASA contractor to terminate a subcontract with appellant. Appellant contended that the NASA contractor and the government were negotiating an arrangement whereby the NASA contractor would “replace” Dual on the contract work under the contract at issue here. Dual characterized the ACO’s

actions as “retaliatory” in response to earlier complaints by Dual concerning the previous CO and ACO and were “intended to force [Dual] out of existence.” (R4, tab 16)

9. Dual continued to provide supporting and explanatory data to the government concerning the interim TFCSP. Government officials continued their collection and analysis of information related to the TFC and costs. (R4, tabs 18-23, 27)

10. On or about 21 December 1999, DCAA issued an audit report which addressed appellant’s interim TFCSP. The audit report included input from the contractor. DCAA also provided separate information to the TCO for the purpose of preparing a negotiation position with respect to the TFC. A supplemental audit report was issued on or about 31 January 2000. It also contained input from Dual. (R4, tabs 25-26, 28)

11. Appellant submitted to the TCO a “final” TFCSP by letter dated 29 April 2000. The letter requested a partial payment but did not demand a COFD. The final paragraph of the letter, in pertinent part, states:

We appreciate your past assistance and cooperation regarding past partial payment requests and solicit similar attention to this application for partial payment. As incredible as it may seem, it is now clear that the improper termination of DUAL’s [Joint Stars] contract was part of a deliberate campaign to destroy [Dual] and “prevent DUAL from ever getting another Government contract”. It is necessary to view this settlement proposal from this perspective. . . .

(R4, tab 33)

12. A “revised final” TFCSP dated 18 May 2000 and supporting documents were submitted to the TCO seeking payment of \$7,523,390.70. Proposal documents signed by appellant’s president and dated 18 May 2000, included Standard Form (SF) 1435, SETTLEMENT PROPOSAL (INVENTORY BASIS) and SF 1437, SETTLEMENT PROPOSAL FOR COST-REIMBURSEMENT TYPE CONTRACTS. These two documents included standard pre-printed certifications. Among other assertions in the supporting documentation were matters related to withheld payments, interest on late payments, profit, indirect overhead expense pool costs, severance pay, bonus costs, facilities costs, relocation costs, delay costs, TFC settlement expenses, subcontractor settlement costs, employee medical insurance costs, costs related to 401(k) accounts, personnel life insurance costs, costs related to a pre-award protest, and other direct costs that accrued after termination. In the cover letter and attachments to the revised final TFCSP Dual alleged that the government provided false information to a member of Congress in connection with late payments and/or money withheld, engaged in contract administration efforts designed to bar Dual from obtaining favorable treatment under government contracts, and that the termination

was wrongful. Appellant sought an additional partial payment but did not request a final COFD. (R4, tabs 37-38)

13. The DCAA requested additional information and Dual continued to provide data in connection with an audit of the revised final TFCSP. The audit report related to appellant's revised final TFCSP was issued on or about 10 August 2000. A technical evaluation of the revised final TFCSP, prepared by Air Force officials, was issued on or about 11 August 2000. The TCO thereafter undertook an evaluation of the revised final TFCSP, the audit report, and the technical evaluation. He expressed a willingness to consider contractor-prepared rebuttals of the audit report and of the technical evaluation. Appellant supplied additional information to the TCO, including a rebuttal dated 6 December 2000 to the technical evaluation and a response dated 7 December 2000 to the audit report. Dual's documentation dated 7 December 2000 included no claim certification since it was, in the government's words "an attempt to further negotiations following a Government audit." Appellant continued to request a negotiated settlement. The parties prepared to negotiate. (App. supp. R4, tabs A36, A38; R4, tabs 44-51, 53-54; gov't mot., Slemons affidavit, ¶ 2; app. opp'n, Dual declaration, ex. 1 at 2, 7; gov't reply to opp'n at 1)

14. The TCO and Dual representatives met for discussions on 11-12 July 2001. Each party made certain concessions in the previous exchanges of information and/or during discussions. The concessions were contingent on finalization of a mutually agreeable settlement. By letter dated 27 July 2001, the TCO offered to "settle the contract," that is, to resolve all remaining issues arising under or related to the contract, "as is." He defined that offer to mean that the government would forego recouping alleged overpayments and Dual would drop its requests for additional payments over and above the payments already disbursed under the contract by the government. The TCO allowed appellant a final opportunity to submit additional information and said his offer was valid until the close of business on 16 August 2001. He cautioned: "concessions have been made in an attempt to settle this matter. A unilateral determination may be for a lesser amount." In an attached document, the TCO explained his position as to "[e]ach element of cost" based on Dual's proposal and the auditor's "finding." (R4, tab 56 at 1) The TCO's attached position paper, at the outset, referenced appellant's final TFCSP dated 1 May 2000, revised final TFCSP dated 18 May 2000, and Dual's rebuttal dated 7 December 2000 to the DCAA audit report. (R4, tab 56)

15. By e-mail to the TCO dated 16 August 2001, appellant asserted in relevant part that "all requested information has been previously provided and has been reviewed and audited." "Dual . . . rejects your settlement offer. We are awaiting your unilateral settlement determination . . ." (R4, tab 57 at 1) As of 16 August 2001, the parties reached an impasse regarding Dual's revised final TFCSP dated 18 May 2000.

16. By undated unilateral mod A7, forwarded to Dual under a letter dated 7 March 2002, the TCO determined the "GROSS SETTLEMENT" amount for the contract.

Comparing that amount with the sum of “all unliquidated partial or progress payments previously made to the Contractor or its assignee and all unliquidated advance payments (with any interest),” amounts due for applicable property disposal credits, and “all other amounts due the Government under this Contract . . .” the TCO calculated that appellant was indebted to the government in the amount of \$431,247. According to relevant modification language, “(\$431,247.00) . . . together with sums previously paid, constitutes payment in full and complete settlement of the amount due the Contractor for the complete termination of the contract and all other demands and liabilities of the Contractor and the Government under the contract” (R4, tab 58 at 2-3)

17. In a COFD dated 8 March 2002, the TCO cited amounts set forth by Dual in its rebuttal dated 7 December 2000. However, the COFD also referred to the rationale for the decision as explained in attachments to the COFD. Those attachments provided discussion related in part to Dual’s interim TFCSP dated 1 September 1999, revised final TFCSP dated 18 May 2000, rebuttal dated 7 December 2000, and DCAA audits. Tables in the attachments summarized the amounts requested in appellant’s various submittals, amounts questioned in the audits, and amounts allowed by the TCO in his COFD. Specific categories of costs addressed included, among others, labor costs, interest on late payments, severance costs, bonus costs, facility lease costs, relocation costs, delay costs, protest costs, indirect costs, fee or profit, costs to prepare and supplement the TFCSP as well as other settlement costs, and vendor or subcontractor settlements. (R4, tab 59)

18. By letter dated 5 June 2002 and the attached Notice of Appeal, hand-delivered to the Board on that date, counsel for appellant appealed to the Board from the COFD. Counsel noted that “[t]he amount in dispute is up to approximately \$7,500,000,” a reference to the amount set forth in the revised final TFCSP. The Board assigned docket No. 53827 to appellant’s claim for TFC costs. Later, the Board assigned separate docket No. 53889 to the government’s claim for return by Dual of the alleged overpayment (\$431,247). (Finding 12; Board correspondence file) The Board consolidated the appeals for filing purposes.

19. In its complaint and amended complaint, as relevant here, appellant summarized its interim TFCSP dated 1 September 1999, its final TFCSP dated 29 April 2000, its revised final TFCSP dated 18 May 2000, the DCAA audit dated 10 August 2000, and Dual’s “response to the audit report” dated 7 December 2000 (compl. ¶¶ 5-6). The complaint and amended complaint further averred a pattern of improper motives and unreasonable contract administration by Air Force officials on this and another contract that Dual alleged led to the terminations (compl. ¶¶ 14-18, 18A, 19-34, 36, 38-39). Dual asserted questionable administration of the TFC by the Air Force and by the Defense Contract Management Agency (successor contract administration agency) that was said to have greatly increased the contractor’s termination settlement expenses, delayed payments to Dual, and resulted in an incorrect COFD (compl. ¶¶ 40-49). Concerning termination costs and expenses, appellant averred entitlement to employee related expenses, interest on late and withheld

payments, severance payments, lease and relocation expenses, delay costs, protest costs, indirect costs, profit, termination settlement expenses, and subcontractor costs (compl. ¶¶ 50-63). All of these cost categories are addressed in Dual's revised final TFCSP dated 18 May 2000 and the COFD dated 8 March 2002 (findings 12, 17).

20. Appellant, after submission of the government's motion to dismiss, provided to the TCO a supplemental certification dated 2 August 2002, signed by the contractor's president. The certificate referred to Dual's revised final TFCSP dated 18 May 2000 as "the Claim." The language used in the certificate, as pertinent here, is substantially identical with language required by the Disputes provision of the contract (finding 2; app. opp'n, Battocchi declaration, exhibit 1 at 2) and the Contract Disputes Act of 1978, as amended (the CDA), 41 U.S.C. § 605(c)(1).

DECISION

Appellant presented to the TCO an interim, a final, and a revised final TFCSP in response to the government's actions under the contract and pursuant to provisions of the contract cited by the government as authority for those actions. The revised final TFCSP included SF 1435 and SF 1437 with pre-printed certifications. The parties analyzed and evaluated the interim TFCSP and the revised final TFCSP. Negotiations based on the revised final TFCSP followed but reached impasse on 16 August 2001. On that date, Dual rejected the TCO's settlement offer and requested that the TCO make his unilateral determination, *i.e.*, his final decision. (Findings 1-7, 9-15, 20)

On 16 August 2001, Dual's revised final TFCSP, initially submitted for the purposes of negotiation, ripened into a certified claim. *See James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1543-45 (Fed. Cir. 1996) (certification on SF 1436); *Rapid Movers & Forwarders Co.*, ASBCA No. 48194, 98-1 BCA ¶ 29,339 at 145,884-85 (certification on SF 1436).

The TCO issued a unilateral modification and a final decision that considered all costs and expenses to which he determined the contractor was entitled and all payments made by the government under the contract. The net result was a deficit. The TCO demanded that appellant make up the deficit by returning money to the government. Dual appealed from that decision. (Findings 16-18)

Initially the government argues in its motion to dismiss for lack of jurisdiction that Dual alleges matters in its complaint and amended complaint that were not submitted to the TCO for a final decision. The government further contends that the TCO, in his COFD, considered Dual's rebuttal dated 7 December 2000 to the government's evaluations but did not consider the contractor's revised final TFCSP dated 18 May 2000. In its reply brief, the government sums up the basic issue in its motion as "whether a subsequent termination settlement proposal [the 7 December 2000 rebuttal by Dual], substantially different from

the one submitted on Government forms [the 18 May 2000 revised final TFCSP], after negotiation, remains the ‘claim’ for purposes of the [CDA]” (gov’t reply br. at 1). Thus, the essence of the government’s argument is that appellant’s 18 May 2000 revised final TFCSP was not a claim because it had been the subject of negotiations and the 7 December 2000 submittal was not a claim because it was uncertified, the parties were still negotiating, and appellant had further revised its proposal costs from its earlier submittals.

The government’s motion misses the legal and factual consequence of what occurred from 18 May 2000 forward. The claim is Dual’s revised final TFCSP dated 18 May 2000. While not a claim when initially submitted, it ripened into a claim, consistent with Dual’s intent, when the parties reached impasse in their negotiation of the TFC costs and expenses. (Findings 15, 18, 20)

The government accurately asserts that the TCO’s final decision stated, in part, that it was issued in response to appellant’s 7 December 2000 submittal and that the submittal was not certified. However, the government’s focus on that submittal alone is misplaced and incomplete. The TCO also considered the full range of convenience termination costs and expenses in arriving at the gross settlement figure from which the TCO calculated the net amount allegedly due the government. (Findings 13, 16-17) Logically and arithmetically, there was no way to determine a final figure due under the convenience termination without considering all costs and expenses to which appellant was entitled (or not).

The government seems to suggest that by negotiating and making contingent concessions from the revised final TFCSP dated 18 May 2000, that appellant abandoned that submittal in favor of the 7 December 2000 rebuttal as a new, uncertified TFCSP. We are aware of no rule of law that stands for the proposition that unsuccessful negotiations after submittal of a request for payment or a claim somehow constitutes abandonment of the previous request or claim. Indeed, authority suggests the opposite. *See Ellett*, 93 F.3d at 1543-45; *Rapid Movers*, 98-1 BCA at 145,885.

The facts also fail to establish that appellant abandoned its 18 May 2000 revised proposal or that the TCO thought so at the time. The TCO, following release in August 2000 of a DCAA audit and a technical evaluation, both based on the revised final TFCSP dated 18 May 2000, informed appellant that he would consider any rebuttal by Dual to those evaluations. In his 27 July 2001 position memorandum, the TCO acknowledged receipt of the 18 May 2000 proposal and recognized that the 7 December 2000 rebuttal responded, for the purposes of settlement, to the DCAA audit of the 18 May 2000 proposal. Finally, in the attachment to his final decision, the TCO summarized the payments requested in appellant’s various submittals, the amounts questioned in the audits and the TCO’s position on the amounts requested. (Findings 13-14, 17) We conclude that the TCO was able to follow appellant’s termination settlement proposal through its several revisions and did not understand the 7 December 2000 rebuttal to be a separate, stand-alone, uncertified, termination settlement proposal.

In the initial motion document, the government contended that there are factual allegations in appellant's complaint and amended complaint that have not been submitted to the TCO for decision. Specifically, the government takes issue with the allegations of government misconduct in ¶¶ 14-34, 36, and 38-49 of the complaint and amended complaint and with all twelve counts of relief sought in the complaint (cost categories). The government argues that appellant is trying to obtain breach of contract damages that were not raised in its termination settlement proposal. Appellant argues that all of the complaint's counts were presented to the TCO in appellant's settlement proposal and that its complaint is not making a breach of contract claim. Appellant contends that the allegations of bad faith and deliberate delay on the part of the government in the complaint are relevant to explaining and supporting certain of the cost categories.

The facts show that all of the cost categories raised in appellant's complaint, as amended, were covered in the revised final TFCSP dated 18 May 2000 and were addressed by the TCO in his final decision. While the assertions of government misconduct arguably could support a breach of contract claim, there is nothing in the complaint, as amended, to indicate that appellant is seeking anything other than convenience termination costs that had previously been presented to the TCO. (Findings 8, 11-12, 17, 19) There is no demand in the complaint for breach of contract damages.

Narrative averments in the complaint, as amended, describe alleged misconduct on the part of government officials that, if true, may serve to explain appellant's convenience termination costs. Such matters are properly before the Board in that context. *See Consolidated Defense Corporation*, ASBCA No. 52315, 03-1 BCA ¶ 32,099 at 158,669. Although the complaint, as amended, presents details not included in the 18 May 2000 TFCSP, that proposal, to ripen into a claim, was not obliged to set forth each and every allegation that might support the convenience termination costs. A valid claim must give the contracting officer adequate notice of the basis and amount of the claim but need not provide detailed evidence of the alleged operative facts. *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1565 (Fed. Cir. 1995); *Fru-Con Construction Corp.*, ASBCA No. 53554, 02-1 BCA ¶ 31,729 at 156,757. Here, the convenience termination settlement proposals and related documents gave the TCO adequate notice of the basis and amount of appellant's claim, including alleged government misconduct. (Findings 8, 11-12) No new claim was raised in the complaint, as amended.

The government notes that appellant's TFC claim is separate from the government's claim for return of the alleged overpayment. It asserts that the COFD decided only the government's claim, not Dual's claim. As explained above, we disagree. However, assuming for the sake of argument that the government is correct, the contractor's appeal from the COFD provides the jurisdictional basis for ASBCA No. 53889, the appeal from the government's claim. (Findings 17-18) If the TCO did not issue a COFD on the 18 May 2000 revised final TFCSP, then the notice of appeal is from a deemed denial of appellant's

claim, thereby providing the Board with jurisdiction regarding ASBCA No. 53827. 41 U.S.C. § 605(c)(5).

The government's motion to dismiss for lack of jurisdiction is denied. The Board has proper subject matter jurisdiction.

Dated: 14 May 2004

STEVEN L. REED
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. 53827, Appeal of Dual, Inc., rendered in conformance with the Board's Charter.

Dated:

DAVID V. HOUBE
Acting Recorder, Armed Services
Board of Contract Appeals