

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -- )  
)  
Gold Tree Technologies, Inc. ) ASBCA Nos. 54158, 54159  
)  
Under Contract Nos. N00600-02-M-1171 )  
N00600-02-M-1363 )

APPEARANCE FOR THE APPELLANT: Patrick C. Hyde, Esq.  
Denver, CO

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.  
Navy Chief Trial Attorney  
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Fleet & Industrial Supply Center,  
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Washington, DC

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

The Department of the Navy (DON) moves to dismiss these appeals for lack of jurisdiction, asserting that the claim set forth in appellant's second amended complaint is fundamentally different than the claim submitted to the contracting officer.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

The DON awarded appellant Contract Nos. N00600-02-M-1171 (the -1171 contract) and N00600-02-M-1363 (the -1363 contract) for Oracle consulting services on 21 February and 25 March 2002 respectively. The services were required in connection with an upgrade of the DON's LIFelines Services Network and Marine Corps News (LSN/MCN) program. At the time the contracts were awarded, appellant was certified as a HUBZone small business concern (SBC) and an 8(a) Small Disadvantaged Business (SDB) by the Small Business Administration (SBA) (ASBCA No. 54158, R4, tabs 1, 2; ASBCA No. 54159, tabs 1, 2).

The -1171 contract called for 134 hours of consulting services at \$185 per hour and had a ceiling price of \$24,790 (ASBCA No. 54158, R4, tab 7 at 3). The -1363 contract called for 405 hours of consulting services at \$185 per hour for a contract price of \$74,925 (ASBCA No. 54159, R4, tab 12 at 3) Neither contract contained a provision

for an option year or a provision requiring the DON to establish a mentor-protégé program for appellant (ASBCA No. 54158, R4, tab 7; ASBCA No. 54159, R4, tab 12).

The Scope of Effort for the contracts was similar and provided, in part, as follows (for contract –1363):

The LSN/MCN system architectural environment shall encompass an Oracle 9i platform . . . including components and applications associated with the Oracle 9iAS and 9iDB product line. The hardware . . . includes Sun Microsystems Enterprise Servers and Dell-Intel Servers. Oracle Consulting services are needed to initiate the implementation of a production environment . . . . [C]onsulting services shall include . . . technical services and guidance to the . . . project team . . . .

(ASBCA No. 54158, R4, tab 7 at 3; ASBCA No. 54159, R4, tab 12 at 3) The Scope of Effort did not specify which version of Oracle 9i would be used. *Id.*

Shortly after award, appellant issued purchase orders to the Oracle Corporation (Oracle) for nearly all the hours required by the contracts (ASBCA No. 54159, R4, tab 41; app. PO #52 dated 22 February 2002, Oracle letter dated 25 March 2002 (Bd. corr. file)).

Neither the –1171 nor the –1363 contract included FAR 52.219-14 LIMITATIONS ON SUBCONTRACTING (OCT 1987). The DON added the clause to the contracts by unilateral modifications on 4 April 2002 (ASBCA No. 54158, R4, tab 17; ASBCA No. 54159, R4, tab 17). FAR 52.219-14 provides, in part, as follows:

By submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract in the case of a contract for—

(a) *Services (except construction)*. At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern.

On 27 March and 5 April 2002, the Department of the Interior (DOI) awarded Contract Nos. NBCHP020071 (the –0071 contract) and NBCHC020038 (the -0038 contract) to appellant for Oracle consulting services for the DON's LSN/MCN program. Contract -0038 included FAR 52.219-14. The Scope of Effort for the DOI contracts was similar to that in the –1171 and –1363 contracts. The price of the –0038 contract was

\$273,060, and the price of the –0071 contract was \$24,790. The –0038 contract included an option for an additional year of consulting services. The option required services for version II of Oracle 9i (ASBCA No. 54159, R4, tab 56).

Appellant did not provide 50 percent of the services for the DON contracts as required by FAR 52.219-14 (ASBCA No. 54159, R4, tab 50). However, appellant was allowed to complete the contracts and was paid \$24,235 for the –1171 contract and \$74,925 for the –1363 contract (ASBCA No. 54158, R4, tab 126; ASBCA No. 54159, R4, tab 125).

On 18 December 2002, appellant submitted certified claims\* to the DON and DOI, which stated, in part, as follows:

1. Section 8(a) and . . . FAR 52.219-14 and FAR 52.219-17 require[d] that GTT retain for a GTT W-2 employee 51% of the . . . amount billed, [including] the . . . first year option contract;
2. GTT [is entitled] to add an ‘upcharge’ of 15% [for] each item . . . invoiced . . . ;
3. GTT [is entitled] to allocate costs of business to the government for . . . overhead and A&E . . . ;
4. GTT [is entitled] to . . . lost profits for breach of contract specifying in writing in the base contract and first year option contract for specific amounts to be paid to the Section 8(a) small business contractor;
5. GTT [is entitled] to recover] losses for breach of contract . . . [for] the government’s interference with [its] contractual [relationship] with Oracle . . . ;
6. The government and Oracle failed to assure [sic] that GTT. . . was prepared to [install Oracle 9i Version II] as required by the first year option . . . ;
7. The government and Oracle . . . fraudulently and negligently circumvented GTT’s contract rights to be trained by Oracle [so] that [it] would be qualified to perform the first option year contract involving the latest Oracle 9i Version II software . . . ;
8. GTT . . . [did not] receiv[e] . . . training [in] Oracle 9i Version II software depriving GTT . . . of the ability to offer its services in future contracts . . . ;

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\* We have examined appellant’s 15 July 2002 letter and determined it does not qualify as a claim under the CDA (Bd. corr. file).

9. GTT [is entitled to] los[t] profits . . . caused by [the government's] material breach of contract and interference with . . . GTT and Oracle in the performance of their contracts;
10. GTT [is entitled to] los[t] costs of doing business during the option year which the government was contractually obligated to give to GTT . . . ;
11. [The government in conjunction with Oracle] . . . intended to circumvent GTT's bargained for rights to learn the [Oracle 9i] Version II software . . . ;
12. Loses [sic] based upon equitable estoppel;
13. Fraud and misrepresentation by the government in entering into and administering [the] contracts;
14. [Interest]
15. Attorney's fees for bad faith material breach of contract.

A sum certain with respect to any agency, contract or claim cannot be determined from the claim. (ASBCA No. 54158, R4, tab 116; ASBCA No. 54159, R4, tab 115)

Neither the DON nor the DOI contracting officer issued a final decision. On 7 April 2003, appellant appealed the deemed denial of its claims to the Department of the Interior Board of Contract Appeals (IBCA) and the Armed Services Board of Contract Appeals (ASBCA) (ASBCA No. 54158, R4, tab 124; ASBCA No. 54159, R4, tab 123). The IBCA dismissed the appeals for lack of jurisdiction on the grounds that there were fraud allegations not cognizable under section 605 of the Contract Disputes Act, 41 U.S.C. §§ 601-13.

Appellant filed a complaint at the ASBCA on 30 June 2003. The complaint intertwined claims relating to the DON and DOI contracts. The DON filed its answer on 8 August 2003. On 11 September 2003, we directed appellant to separate the DON claims from the DOI claims. Appellant filed its first amended complaint on 28 October 2003. The DON moved to dismiss on 24 November 2003, alleging that we lacked jurisdiction to decide the appeal because the claim set forth in the first amended complaint was a fundamentally different claim than the claim submitted to the contracting officer. On 27 February 2004, the Board struck the first amended complaint and directed appellant to submit a complaint relating to the DON contracts.

Appellant filed a second amended complaint on 31 March 2004, stating a sum certain. Paraphrased, the second amended complaint contained the following counts:

I. The DON breached its contracts by having DOI award contracts for the same services. Alternatively, the DON failed to ensure that appellant complied with FAR 52.219-14.

II. The DON breached its contracts by failing to include any payment provisions for supplies.

III. The DON's procurement of Oracle consulting services through DOI was in bad faith.

IV. The DON breached its contracts by using appellant as an illegal "pass through" in violation of FAR 52.219-14.

V. The DON failed to assist appellant as required by FAR 52-219.17 and 52.219-19, failed to provide specified software and interfered with appellant's contractual relationship with Oracle, resulting in a cardinal change to the contract.

VI. The DON breached the contracts by "intentionally or negligently misrepresent[ing] the existence and applicability" of the 50 percent requirement.

VII. The DON misrepresented appellant's contractual obligations under the 8(a) program.

VIII. The DON intentionally interfered with appellant's contractual relationship with Oracle.

IX. Appellant is entitled to "special damages."

X. The contracts should be rescinded on the grounds of illegality, misrepresentation and oppression.

### DECISION

In order to be a proper claim under the Contract Disputes Act, 41 U.S.C. § 605(a) and FAR 33.201, a claim for the payment of money must state a sum certain. *Essex Electro Engineers, Inc. v. United States*, 960 F.2d 1576, 1581-82 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 953 (1992); *Eaton Contract Services, Inc.*, ASBCA Nos. 52888 *et al.*, 02-2 BCA ¶ 32,023 at 158,266-67. Appellant's 18 December 2002 submission to the contracting officer did not comply with this requirement. Accordingly, it was not a

proper claim, and we do not have “deemed denial” jurisdiction pursuant to 41 U.S. C. § 605(c)(5).

Moreover, in determining whether we have jurisdiction to decide a claim that is amended on appeal, we look to see if it is within scope of the claim that was submitted to the contracting officer. If the amended claim presents new theories and new damages relating to or resulting from the same operative facts, it is not a new claim, even if first alleged on appeal. However, if an amended claim presents new claims not involving the same operative facts and not previously submitted to the contracting officer, the Board lacks jurisdiction to decide the unsubmitted claims. 41 U.S.C. § 605(a); *Lockheed Martin Librascope Corporation*, ASBCA No. 50508, 00-1 BCA ¶ 30,635 at 151-249.

Appellant’s second amended complaint appears to contain substantial new claims that do not involve the same operative facts that gave rise to the original claim and which have not been submitted to the contracting officer. The gist of the claim submitted to the contracting officer was that the DON failed to award appellant the option year and failed to provide a mentor-protégé program, neither of which provision was included in the DON contracts. The second amended complaint alleges that the DON used appellant as an illegal “pass-through” in violation of FAR 52.219-14; that the DON had DOI award contracts for Oracle consulting services in order to prevent appellant from performing the work; that the work awarded under the DOI contracts was part of the DON contracts; and that the DON failed to include any payment provisions for supplies in the contracts. These claims are fundamentally different than the claims submitted to the contracting officer.

Accordingly, the DON’s motion to dismiss for lack of jurisdiction is granted.

Dated: 13 January 2005

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ELIZABETH A. TUNKS  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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

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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 Nos. 54158, 54159, Appeals of Gold Tree Technologies, Inc., rendered in conformance with the Board's Charter.

Dated:

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