

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Systems Integrated) ASBCA No. 54439
)
Under Contract Nos. N00014-88-C-6035)
)
N00014-89-C-6021)
)
N00014-90-C-6031)

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OPINION BY ADMINISTRATIVE JUDGE DELMAN
ON PARTIAL MOTION TO DISMISS FOR LACK OF JURISDICTION

The Department of the Navy has filed a motion to dismiss this appeal, in part, for lack of jurisdiction. Systems Integrated (SI or appellant), has filed an opposition to this motion.¹ In brief, the Navy contends that we lack jurisdiction over the portion of appellant's claim seeking reimbursement for tangible personal property and equipment costs in excess of target cost ceilings under the subject contracts on the grounds that appellant transferred this property to a different contract, which contract was then transferred/novated to a third party.

¹ SI has also been known as Systems Analysis and Integration, Inc. However, the subject contracts were awarded to SI, the certified claim was filed by SI and the appeal was taken in this name. Accordingly, we shall consider SI as the appellant herein.

FINDINGS OF FACT FOR PURPOSES OF MOTION

1. The Department of the Navy, Naval Ocean Research and Development Activity at Stennis Space Center, Mississippi (Navy or government) awarded Contract No. N00014-88-C-6035 (Contract No. 6035) to appellant on 22 September 1988 (R4, tab 1). Under this research and development type contract, appellant was to perform work described in its proposal for the design and development of an integrated data archival and processing system on a cost-reimbursement, fixed fee basis (compl., ¶ 15). The contract, as awarded, contained the LIMITATION OF FUNDS (LOF) clause, FAR 52.232-22 (APR 1984) (R4, tab 1 at SYSR0000014). Per Modification No. P00017, the LIMITATION OF COST (LOC) clause, FAR 52.232-20 (APR 1984) was added to the contract (R4, tab 2 at SYSR0000025-27). Appellant performed under this contract. Appellant's final report to the government was dated May 1993 (R4, tab 13 at SYSR0000434).

2. The Navy awarded Contract No. N00014-88-C-6021 to appellant on 26 May 1989 (R4, tab 3). The contract number was changed by Modification No. P0001 to N00014-89-C-6021 (Contract No. 6021). Under this research and development type contract, appellant was to perform work described in its proposal for the design and development of a portable multi-channel acoustic data collection and processing system on a cost-reimbursement, fixed fee basis (compl., at ¶ 4). The contract, as awarded, contained the LOF clause, FAR 52.232-22 (APR 1984) (R4, Tab 3 at SYSR0000075). Per Modification No. P00011, the LOF clause was deleted and the LOC clause, FAR 52.232-20 (APR 1984), was added to the contract (R4, Tab 4 at SYSR0000093-94). Appellant performed under this contract. According to appellant, it delivered its final report to the government in May 1993 (compl., ¶ 9).

3. The Navy awarded Contract No. N00014-90-C-6031 to appellant on or about 7 September 1990 (Contract No. 6031) (R4, tab 5 at SYSR0000115). Under this research and development type contract, appellant was to perform work described in its proposal for the design and development of a modular, multi-platform performance assessment, prediction and simulation system on a cost-reimbursement, fixed fee basis (compl., ¶ 27). This contract contained the LOF clause, FAR 52.232-22 (APR 1984). (R4, tab 5 at SYSR0000129) Appellant performed under the contract. According to appellant, it delivered its final report to the government in May 1993 (compl., ¶ 32).

4. The Navy awarded Contract No. N00014-92-C-6009 (Contract No. 6009) to appellant on 7 August 1992. This was another cost-plus-fixed-fee contract for research and development work similar to that performed by appellant under Contract Nos. 6035, 6021, and 6031. (Resp. mot. at 3) According to the government, Contract No. 6009 included, as Attachment 1, certain test equipment apparently purchased on the

government's account under the above three contracts, described as "government furnished special test equipment." (Resp. mot., ex. 1, last 3 pages)

5. By agreement dated 6 November 1992, appellant sold its government services division to Alliant Techsystems, Inc. (Alliant) (resp. mot., ex. 6). Insofar as pertinent, the assets purchased by Alliant were identified as follows:

1.1 Asset Purchase. Subject to the terms and conditions set forth in this Agreement, the Buyer will purchase from the Seller, and the Seller will sell, transfer, assign, convey and deliver to the Buyer on the Closing Date . . . all of the Seller's right title and interest in and to the assets used in or useful for the operation of the Business (the "Purchased Assets") including, without limitation, the following:

(a) inventories . . . related to the Business either located with customers, at the Facility or ordered by Systems for delivery to the Facility or in transit to customers of the Business as of the Closing Date (the "Inventory"), the Inventory as of October 31, 1992, being identified on Schedule 1.1(a) hereto;

(b) to the extent permitted by law and as described in Schedule 1.1(b) hereof, all accounts and other receivables and other assets related to the Business;

(c) all tangible personal property, including but not limited to customer lists, office equipment, computers, and other related equipment ("Personal Property") owned by the Seller and used in the Business (other than "Systems Excluded Property" defined in Section 1.1.1(a) below), as listed on Schedule 1.1(c) hereto;

(d) *all contracts*, licenses and agreements with third parties or with selected employees of Systems pertaining to the Business (all such contracts together herein the ("Contracts"), *as listed on Schedule 1.1(d) hereto* ([sic] *in a separate section of such Schedule shall be listed "Government Contracts" as hereinafter defined in Section 3.1.1 and any government-owned equipment involved in such contracts*); . . . [Emphasis added]

(Resp. mot., ex. 6 at 2) As indicated, the agreement listed appellant's contracts that were to be sold/transferred to Alliant. Contract No. 6009 was listed as one of these contracts. Contract Nos. 6021, 6031, and 6035 were not listed. (Resp. mot., ex. 6, schedule 1.1(d))

6. After Alliant's purchase of the above assets, Contract No. 6009 was novated to Alliant (resp. mot., ex. 10).² The record does not contain any novation agreements for Contract Nos. 6021, 6031, and 6035.

7. By letter to the government dated 21 October 1993, Alliant stated as follows:

The equipment inventoried for contracts N00014-88-C-6035, N00014-89-C-6021, and N00014-90-C-6031 are being transferred to contract N00014-92-C-6009 by authority of contract N00014-92-C-6009 Attachment Number 1. Additionally, a DD Form 1149 and equipment list are submitted with DD forms 1662 for the purpose of transferring the equipment.

(Resp. mot., ex. 7)

8. On 21 April 1998, the government and appellant discussed the status of a number of appellant's open contracts, including Contract Nos. 6021, 6031, and 6035. The administrative contracting officer (ACO) confirmed the status of these contracts by letter to appellant dated 22 April 1998 (R4, tab 15 at SYSR0000450).

9. By letter dated 6 October 1999, the ACO advised appellant as follows:

On April 21, 1998 you advised you would be requesting additional funds to cover cost overruns on the following contracts:

N00014-89-C-6021
N00014-88-C-6035
N00014-90-C-6031

We have not received any correspondence from your company evidencing pursuit of additional funding. We

² Alliant signed the novation agreement on 15 April 1993. Appellant signed the agreement on 7 July 1993. The government also signed it, but the date of execution is not evident from the face of the agreement.

would like to close these contracts as soon as possible. Please provide status.

(R4, tab 15 at SYSR0000451) The record contains no written response from appellant to this letter.

10. The government requested final vouchers from appellant to close out Contract Nos. 6021, 6031, and 6035. By letter to the ACO dated 20 June 2001, appellant replied as follows:

During our DCAA overhead claim audit of 90, 91 and 92, it came to my attention that there were significant cost overruns on the three referenced contracts: C-6021, C6031 [sic] and C-6035. Systems Integrated is in the process of pursuing reimbursement of these cost overruns.

....

Closing the contracts while actively pursuing cost reimbursements, we feel, would not be in the best interest of the Company. Therefore, SI hereby requests a one-year extension for closing the referenced contracts. We feel this extension will give SI adequate time to ascertain whether a reimbursement claim is plausible.

(Resp. mot., ex. 8)

11. By letter to the government dated 7 June 2002, appellant requested payment of \$1,184,507, reflecting claimed actual costs that exceeded the target cost ceilings under the three subject contracts. Appellant itemized these costs as follows:

<u>Contract</u>	<u>Target Cost</u>	<u>Actual Costs</u>	<u>Overrun Amount</u>
88-C-6035	\$ 1,211,165	\$1,326,689	\$ 115,524
89-C-6021	\$ 1,289,222	\$1,720,654	\$ 436,432
90-C-6031	\$ 3,951,615	\$4,589,166	\$ 637,551
92-C-6009	\$14,945,987	\$ 741,002	\$N/A (Novated 1994)
		TOTAL	\$1,184,507 ³

³ Appellant made a math error in adding the overrun amounts. The claimed overrun should be \$1,189,507.

(R4, tab 7) These additional costs included direct labor, material/other direct costs (including costs of personal property and equipment) and indirect costs from these contracts (R4, tab 11 at SYSR0000243). According to the government, appellant's requested equipment costs included the equipment purchased on the government's account — the government furnished special test equipment (finding 4) — that was transferred to appellant's Contract No. 6009 and subsequently novated to Alliant. By letter dated 31 July 2002, SI certified this letter as a claim under the Contract Disputes Act (R4, tab 9). Appellant revised the claim by letter dated 24 April 2003, in the amount of \$1,177,842 (R4, tab 11).

12. By letter dated 26 June 2003, the contracting officer declined to increase the contract target cost ceilings, citing, among other things, the LOF clause and SI's failure to timely notify respondent of the cost overruns under the clause (R4, tab 12).

13. Appellant replied by letter dated 22 July 2003, disagreeing with a number of the government's contentions. Appellant requested final action on its claim no later than 30 days from the date of its letter. (R4, tab 13)

14. On 2 September 2003, the contracting officer issued a decision denying appellant's claim (R4, tab 14). Appellant sought reconsideration and met with the contracting officer. By letter to SI dated 5 November 2003, the contracting officer again denied appellant's claim (R4, tab 16). On 26 November 2003, appellant filed a timely appeal with the Board (R4, tab 18).

15. In the subject motion, the Navy contends that we lack jurisdiction over the personal property/equipment portion of appellant's claim under the subject contracts on the grounds that the property was transferred to Contract No. 6009, which was subsequently novated to Alliant pursuant to the sale of appellant's government services division.

DECISION

Insofar as pertinent, the CDA provides as follows, 41 U.S.C. § 602(a):

[T]his chapter applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of Title 28) entered into by an executive agency for—

- (1) the procurement of property, other than real property in being;
- (2) the procurement of services;

- (3) the procurement of construction, alteration, repair or maintenance of real property; or,
- (4) the disposal of personal property.

Specifically, the CDA grants the boards of contract appeals the jurisdiction to decide any appeal of a contracting officer's decision related to such contracts, 41 U.S.C. § 607(d).

The subject contracts were entered into by an executive agency for the procurement of property or services, *i.e.*, for the design and development of the systems described herein. Appellant was awarded these contracts, performed under these contracts and filed the subject claim under these contracts. The contracting officer issued a decision on the claim, and appellant timely appealed the decision to this Board. The claim relates to performance and payment under the contracts. There is no evidence to suggest that appellant no longer exists as a corporate entity. *Compare Triad Microsystems, Inc.*, ASBCA Nos. 52726, 52839, 01-2 BCA ¶ 31,438. Nor is there any evidence to show that these three contracts were novated to Alliant or to any other third party. *Compare Sensors, Data, Decisions, Inc.*, ASBCA No. 29386, 85-3 BCA ¶ 18,471.

We conclude we have jurisdiction over all elements of this contract dispute in this appeal. Assuming, for purposes of this motion, that appellant transferred the equipment for which it now seeks cost reimbursement to Alliant, we believe that the transfer has no bearing upon the parties' contractual rights and responsibilities regarding the costs under the three contracts in issue. Whether appellant may recover the costs depends upon the terms and conditions of the contracts and the parties' actions thereunder. We have jurisdiction to adjudicate these matters under the CDA.

The government's motion is denied.⁴

Dated: 5 April 2005

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

⁴ At this early stage, the record provides us with an unclear picture of the circumstances under which appellant purchased or otherwise obtained the equipment, the costs for which it now seeks reimbursement. This may become relevant in future proceedings, but for reasons stated it has no bearing on our jurisdiction under the CDA.

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. 54439, Appeal of Systems Integrated, rendered in conformance with the Board's Charter.

Dated:

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