

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
)  
Qatar International Trading Co. ) ASBCA No. 55518  
)  
Under Contract No. F38604-05-M-R425 )

APPEARANCES FOR THE APPELLANT: Robert H. Koehler, Esq.  
Jennifer S. Zucker, Esq.  
Patton Boggs LLP  
McLean, VA

APPEARANCES FOR THE GOVERNMENT: Col Neil S. Whiteman, USAF  
Chief Trial Attorney  
Col Timothy J. Cothrel, USAF  
Deputy Chief Trial Attorney  
Capt Christy J. Kisner, USAF  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE WILSON  
ON THE GOVERNMENT'S MOTION TO DISMISS

The government has filed a motion to dismiss contending that the Board lacks jurisdiction because the contractor's claim is premised on a tort independent of the contract. Appellant opposes the motion. We hold that there is a sufficient nexus between the alleged tort and the contract to substantiate the Board's jurisdiction over the appeal.

FINDING OF FACTS FOR PURPOSES OF THE MOTION

1. On 1 February 2005, the United States Air Force (the government) awarded Contract No. F38604-05-M-R425 to Qatar International Trading Co. (QIT) for "Thuraya Phone Service" including all material, labor, equipment, and administration to provide satellite phone services. The contract performance period ran from 1 February 2005 to 30 September 2005 and included two financial limitations. First, the contract contains Federal Acquisition Regulation (FAR) 52.213-3, NOTICE TO SUPPLIER (APR 1984), which reads as follows:

This is a firm order ONLY if your price does not exceed the maximum line item or total price in the Schedule. Submit invoices to the Contracting Officer. If you cannot perform in exact accordance with this order, WITHHOLD

PERFORMANCE, and notify the Contracting Officer immediately, giving your quotation.

Secondly, the entire contract was restricted by an aggregate not to exceed “NTE” amount of \$25,000.00. Under the contract, there were five active phone numbers provided by QIT to the government including: (88216) 6666-4714, (88216) 6666-4731, (88216) 6666-4733, (88216) 6666-4735, and (88216) 6666-4736. (R4, tabs 1, 2)

2. Also relevant is the following FAR clause appearing in full text in the contract:

52.212-4 CONTRACT TERMS AND CONDITIONS—  
COMMERCIAL ITEMS (FEB 2002)

....

(d) Disputes. This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613). Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal or action arising under or relating to this contract shall be a dispute to be resolved in accordance with the clause at FAR 52.233-1, Disputes, which is incorporated herein by reference. The Contractor shall proceed diligently with performance of this contract, pending final resolution of any dispute arising under the contract.

....

(g) Invoice. (1) The Contractor shall submit an original invoice.... An invoice must include --

(i) Name and address of the Contractor;

(ii) Invoice date and number;

(iii) Contract number, contract line item number and, if applicable, the order number;

(iv) Description, quantity, unit of measure, unit price and extended price of the items delivered;

....

(2) Invoices will be handled in accordance with the Prompt Payment Act (31 U.S.C. 3903)....

....

(i) Payment. Payment shall be made for items accepted by the Government that have been delivered to the delivery destinations set forth in this contract. The Government will make payment in accordance with the Prompt Payment Act (31 U.S.C. 3903) and OMB prompt payment regulations at 5 CFR part 1315....

....

(j) Risk of loss. Unless the contract specifically provides otherwise, risk of loss or damage to the supplies provided under this contract shall remain with the Contractor until, and shall pass to the Government upon:

(1) Delivery of the supplies to a carrier, if transportation is f.o.b. origin; or

(2) Delivery of the supplies to the Government at the destination specified in the contract, if transportation is f.o.b. destination.

....

(l) Termination for the Government's convenience. The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this

purpose. This paragraph does not give the Government any right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

....

(o) Warranty. The Contractor warrants and implies that the items delivered hereunder are merchantable and fit for use for the particular purpose described in this contract.

(p) Limitation of liability. Except as otherwise provided by an express warranty, the Contractor will not be liable to the Government for consequential damages resulting from any defect or deficiencies in accepted items.

(R4, tab 1 at 4-6)

3. Pursuant to this clause, QIT was responsible for submitting invoices to the government for payment in accordance with the Prompt Payment Act (R4, tab 2 at 4-5). The invoices submitted for the months of February to June 2005 indicated fairly consistent usage with a low of \$496.27 during March and a high of \$2,067.98 for June (R4, tabs 3-6, 9). However, on 18 July 2005, the government received notice from QIT that July usage, thus far, totaled more than \$100,000. There were no specifics as to which phone numbers were generating the usage. (R4, tab 7) In a memo for record dated 20 July 2005, the contracting officer wrote that a QIT representative informed him that the calls were being generated by one phone number, (88216) 6666-4735; however, no other information was available (R4, tab 8). By 1 August 2005, the contracting officer was notified that the phone usage had increased by \$80,000 since the earlier discussions of July (R4, tab 10).

4. On 1 August 2005, bilateral contract Modification No. P00001 terminated the contract for convenience. The description of the termination reads as follows:

The purpose of this modification is to cancel Thuraya cell phone service for (88216)6666-4714, (88216)6666-4731, (88216)6666-4733, (88216)6666[-] 4735, (88216)6666-4736, effective immediately. Canceling said service terminates the Government's liability to pay for any future cell phone charges to these accounts. It does not de-obligate any of the Not To Exceed funds, totaling \$25,000, as obligated by the purchase order. These funds remain viable until which time that QIT invoices for the months of 1 February 2005 thru

1 August 2005. If Thuraya cell phone bills for 1 February 2005 thru 1 Aug 2005 eclipse the funds already obligated on this purchase order, and are determined to be valid and proper, then payment shall be remitted under FAR 52.233-1. At which time that QIT receives payments for said months, another modification to this contract shall finalize the termination.

(R4, tab 11)

5. Service continued to the contracted satellite phones until 7 August 2005 (R4, tab 21).

6. On 21 August 2005, QIT provided the government with an invoice for the month of July which totaled \$222,347.34. The itemization indicates that the same few numbers were called, in a serial manner<sup>1</sup> for virtually 24 hours a day during the month beginning on 14 July 2005. At various times the calls overlapped for extended periods. (R4, tab 13) For example, on 19 July 2005 at 04:46:06 a 30:07 minute call was placed to the phone number 681501505. One minute later on 19 July 2005 at 04:47:18, a 30:06 minute call was placed to the same phone number. These phone calls were charged to the contract at \$616.36 and \$614.32, respectively, even though the two calls are concurrent for nearly 28 minutes<sup>2</sup>. (R4, tab 13 at 16)

7. On 22 August 2005, the government returned to QIT the five Thuraya cell phones leased under the contract (R4, tab 14).

8. Following an investigation by the Air Force Office of Special Investigations, the government questioned the validity of the calls on the invoice and denied payment to the contractor until the validation issue was resolved (R4, tabs 15-16, 19).

9. By invoice to the government dated 13 October 2005, QIT requested \$97,553.95 for Thuraya phone service from 31 July 2005 at 05:06:07 to 7 August 2005 at 20:34:25. Again, the cost was based upon continuous phone usage, virtually 24 hours a day, with frequent concurrent calls placed to one of only 17 different phone numbers during that period. At times, two calls occurred simultaneously to the same number. Also of note is the fact that 10 of these numbers were sequential beginning with 239 292 260 and ending with 239 292 269. (R4, tab 21)

---

<sup>1</sup> Successive numbers were dialed, for example: 239-292-260, 239-292-261, 239-292-262, and so on, as a computer might generate.

<sup>2</sup> Appellant's supplier, Qtel, opined that the overlapping calls could be possible due to the phone's call forwarding and call waiting features which would allow the caller to place more than one phone call at a time (R4, tab 20).

10. Both the government and the contractor's supplier of phone service, Thuraya, investigated the phone service and determined that the majority of the calls were placed to Sao Tome and Wallis and Futuna Islands (R4, tabs 20, 22).

11. The contracting officer reviewed the QIT invoices and determined that of the \$319,901.29 billed, the government's liability under the contract was only \$1,006.27 (R4, tabs 23, 24).

12. By letter dated 30 November 2005, QIT submitted a certified claim for \$319,901.29 (R4, tab 29). The contracting officer issued a final decision on 29 April 2006 denying the claim except for \$1,006.27 which was determined to be official usage on the contract (R4, tab 30). From the final decision, QIT filed its timely appeal with this Board on 24 July 2006.

13. Following initial discovery, appellant submitted exhibits as part of its response to the government's motion to dismiss (Exs. A-1 to A-11). The government investigated misuse of the satellite telephones. Part of the investigation focused on whether the government's two contractor linguists placed any of the suspicious phone calls, or could have participated in the 'cloning'<sup>3</sup> of the phone (Ex. A-1 at 3-6). While the government's investigation concluded that the government did not make the calls, this conclusion was based on a lack of evidence (*id.* at 5-6). The investigation also revealed that there was no accountability for the phones, thus it was possible that someone could take and use the phones without anyone's knowledge (*id.* at 3-38).

### DECISION

The government has moved to dismiss this appeal on the basis that this Board lacks subject matter jurisdiction, arguing that there is no contractual basis for the claim, but instead it sounds in tort. The government maintains that the vast majority of the phone services for which it was billed, did not originate from government authorized users, but were the result of "cloning." The government explains that each cellular phone has a unique pair of identifying numbers: the electronic serial number (ESN) and the mobile identification number (MIN) and that these can be captured and duplicated onto any wireless phone which then acts as a clone of the original. The phone calls made from the cloned phone are then attributed and improperly billed to the original phone. The government concedes that "when QIT filed its appeal, disputed questions regarding this

---

<sup>3</sup> Cell phones have a unique factory-set electronic serial number (ESN) and telephone number (MIN). A cloned phone is one that is reprogrammed to use the ESN and MIN of the original phone; however, the cellular phone system cannot distinguish the calls of the original phone from those of the clone, and the legitimate phone user gets billed for the cloned calls. (Exs. G-1 to G-5)

contract existed” (gov’t mot. at 9). However, once discovery revealed that the calls were generated by third-party tortfeasors, the government contends that it had no contractual obligation to pay the contractor for those calls, nor does the Board have jurisdiction to address the appeal.

Appellant counters that “the Board does have jurisdiction because the jurisdictional facts establish that Appellant’s claim for the payment of satellite phone service charges sounds in contract due to the Government’s breach of both its expressed and implied contractual obligations concerning the satellite phones services provided by QIT.” While appellant does not dispute “that a third party apparently captured the satellite phone number which resulted in the continuous satellite services, Appellant does not agree that the satellite phone number was ‘cloned’...or that the third party was not aided and abetted by USAF civilian employees.” Specifically, appellant argues that any misuse was accomplished as a result of the government’s failure to safeguard the satellite phones. Further, once QIT learned of the continuous use of the satellite services it notified the government promptly, but because of government inaction in terminating the contract, the misuse continued unabated until the government terminated the contract. (App. opp’n at 1, 2 n.1)

The Board’s jurisdiction is limited “to decid[ing] any appeal from a decision of a contracting officer of the Department of Defense [or other designated agencies] relative to a contract made by that department or agency.” 41 U.S.C. § 607(d). Where the basis of the claim lies in an independent tort rather than a contract between the government and a contractor, the Board lacks jurisdiction to hear and decide the appeal. *Qatar International Trading Co.*, ASBCA No. 55533, 08-1 BCA ¶ 33,829; *L&M Thomas Concrete Co.*, ASBCA Nos. 49198, 49615, 98-1 BCA ¶ 29,560 at 146,538. However, where there is a sufficient nexus between the alleged tort and the contract, the Board maintains jurisdiction to decide the appeal. In at least one decision, the necessary nexus to the contract was demonstrated by connecting the tortious activity to a specific contractual obligation imposed upon the respondent. *See Home Entertainment, Inc.*, ASBCA No. 50791, 99-1 BCA ¶ 30,147. In that decision we held that the government’s “alleged failure to perform its duty to repair and maintain the premises in accordance with ¶ 2(a) of the contract, [thus] causing damage to appellant’s property, is a contract claim over which we have jurisdiction.” *Id.* at 149,137.

This dispute arose regarding whether the government has an obligation to make payment for invoiced calls generated by phone numbers assigned to satellite phones delivered to the government under its contract with appellant. Appellant contends that the government has breached its contractual duty to pay for all calls originating from active phone numbers delivered under the contract. To the extent it is the government’s defense, not the contractor’s claim that introduces the concept of tortious conduct into this litigation, we have jurisdiction. The contract must be examined to determine which

party bears the risk of “unauthorized”<sup>4</sup> calls. The argument that the calls were made by third-party tortfeasors does not convert appellant’s contract claim into a tort matter that would divest the Board of jurisdiction over the instant appeal.

To the extent that appellant alleges negligence by the government to avoid the “not-to-exceed” provisions of the contract we find that there is a sufficient nexus between the contract and the alleged tort to justify our jurisdiction to adjudicate the appeal.<sup>5</sup>

The government’s motion to dismiss is denied.

Dated: 12 August 2008

---

OWEN C. WILSON  
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

---

<sup>4</sup> We note that the contract does not define “unauthorized” calls. It apparently is a term solely within the government’s control.

<sup>5</sup> This opinion does not deal with the impact of the “not-to-exceed” provisions on any potential recovery by appellant.

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. 55518, Appeal of Qatar International Trading Co., rendered in conformance with the Board's Charter.

Dated:

---

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