

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
SUFU Network Services, Inc.) ASBCA No. 55948
)
Under Contract No. F41999-96-D-0057)

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OPINION BY ADMINISTRATIVE JUDGE JAMES
ON RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION
AND APPELLANT'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT

This appeal (*SUFU III*) arises from a claim submitted by appellant in January 2007 under the same non-appropriated funds instrumentality (NAFI) contract that was the subject of two prior appeals: ASBCA No. 54503, 04-1 BCA ¶ 32,606, 04-2 BCA ¶ 32,714, *recon. denied*, 04-2 BCA ¶ 32,788 (*SUFU I*), and ASBCA No. 55306, 06-2 BCA ¶ 33,444, 07-1 BCA ¶¶ 33,485, 33,535 (*SUFU II*), familiarity with which is assumed. The claim is for Front-Desk Patching at Rhein Main and Spangdahlem/Bitburg.

On 15 October 2007 respondent moved to dismiss ASBCA No. 55948 for lack of jurisdiction as untimely under section 7 of the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 606. The government's brief asserted three arguments in support of the motion: (1) it received appellant's *SUFU III* claim after a 21 June 2005 "final payment" under the contract; (2) appellant's delay in submitting the present claim severely prejudiced respondent under the "Doctrine of Laches"; and (3) its claim is speculative and unsupported by any documentation. On the same date the government filed its

answer including an affirmative defense that appellant's claim was released as a result of Modification No. 5 (Mod. 5).

Appellant, on 26 October 2007, opposed respondent's motion and cross-moved for partial summary judgment on each of the arguments in the motion, and on 9 November 2007 moved for partial summary judgment on respondent's affirmative defense set forth in its answer that Mod. 5 constituted an accord and satisfaction that released appellant's front-desk patching claim.

Respondent's 19 November 2007 response to appellant's 26 October 2007 motion, while admitting that the CDA is inapplicable to this NAFI contract, pursued its three arguments described above. On 21 November 2007 appellant replied thereto. Respondent's 5 December 2007 letter to the Board withdrew "its Affirmative Defense of Release (called 'Accord and Satisfaction' by the plaintiff [sic] in its brief) outlined in its Answer as filed on 15 October 2007." The Board interprets such withdrawal as with prejudice to respondent.

STATEMENT OF FACTS (SOF) FOR THE PURPOSES OF THE MOTIONS

1. Contract No. F41999-96-D-0057 (the contract) included a Disputes clause that provided in pertinent part:

a. Except as otherwise provided in this contract, any dispute or claim concerning this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall state his decision in writing and mail or otherwise furnish a copy of it to the Contractor. Within 90 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Armed Services Board of Contract Appeals

(Compl. & answer, ¶¶ 5)

2. The contract's FAR 52.243-1, CHANGES-FIXED PRICE-ALT I (AUG 1987) clause did not explicitly address constructive changes and provided in ¶ (c):

The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if the [CO] decides that the facts justify it, the [CO] may receive and act upon a proposal submitted before final payment of the contract.

(*SUFI II*, 06-2 BCA at 165,772, SOF 1)

3. According to respondent, on or about 10 June 2005, SUFI submitted its final invoice under the contract in the amount of \$82,747.19, which respondent paid on 21 June 2005 (gov't br. at 4). Respondent's 25 July 2006 "Opposition to SUFI's Motion for Partial Summary Judgment" in *SUFI II* included a 24 July 2006 declaration of CO Edith Hollins-Jones, who stated in pertinent part:

2. I signed . . . the Partial Settlement Agreement [PSA] on 1 April 2005.

3. Under the [PSA], SUFI was paid . . . \$2,275,000.00

. . . .

7. The NAF paid \$2,275,000.00 on 1 June 2005.

8. SUFI did not submit written or verbal notice of any constructive changes to me prior to the final payment of \$2,275,000.00. To my knowledge, last payment to SUFI in the amount of \$82,747.19 was paid 21 June 2005 (Reference invoice # 109900000120051506, dated 15 Jun 2005, for the period of 1 May 2005 through 31 May 2005 phone bill) there were no payments to SUFI after the \$82,747.19 was paid.

4. Appellant's 12 January 2007 claim for Front-Desk Patching at Rhein Main and Spangdahlem/Bitburg in *SUFI III* alleged that in late 2006 depositions, the front desk supervisor of Rhein Main lodging disclosed that front desk attendants patched guests to the DSN or base operator in 2004-2005, and the general lodging managers at Rhein Main and Spangdahlem/Bitburg stated that they did not prohibit or instruct attendants not to perform such patching. The amount of the claim was \$2,344,045.02 plus interest. (Compl. & answer, ¶¶ 8, ex. A at 2; app. opp'n at 9)

5. Appellant's claim for Front-Desk Patching at Rhein Main and Spangdahlem/Bitburg is "virtually identical" to its Front Desk Patching claim in ASBCA No. 55306, which the CO denied in its entirety on 17 April 2006 (compl. & answer, ¶¶ 13).

6. On 17 May 2007 the CO returned appellant's 12 January 2007 claim for Front-Desk Patching at Rhein Main and Spangdahlem, which he had received on 18 January 2007, asserting only, "It is untimely" (compl. & answer, ¶¶ 15, ex. B).

7. On 22 May 2007 appellant filed a notice of appeal and amended complaint at the ASBCA from the contracting officer's (CO) foregoing rejection of appellant's claim, which was docketed as ASBCA No. 55948.

8. Respondent's answer in ASBCA No. 55948 stated, *inter alia*:

AFFIRMATIVE DEFENSES

Appellant's claims were released when the issue of patching first came up and was addressed through Modification 5 to the contract dated 9 June 1995 requiring in-room access to DSN base prefixes including the base operator. Defendant [sic, meant appellant] unreasonably delayed filing this claim. Due to the extended length of time that has passed and lack of records maintained by either party, the Air Force's ability to defend itself has been severely prejudiced and the Doctrine of Laches applies. The original contract began in May 1996 (para. 4 of complaint). Appellant's claims are made for periods beginning in 1997 through 2005, but plaintiff was aware of the problems from the beginning (see Modification 5 to the contract) and blocked calls to the DSN operator. The lack of any documented evidence in support of this appeal is apparent from the Appellant's use of the KMC [Kaiserslautern Military Community] records to extrapolate guesses as to alleged damages suffered at Rhein-Main AFB and Spangdahlem AFB. (page 2 para. 4 attachment B to complaint) [sic]

WHEREFORE, Respondent asks that Appellant's complaint be dismissed as having failed to state a claim for which relief may be granted, and that the remainder of Appellant's appeal is [sic] denied in its entirety.

DECISION

I. Jurisdiction.

Appellant filed its notice of appeal to this Board on 22 May 2007, five days after the CO returned appellant's *SUFI III* claim as untimely on 17 May 2007 (SOF ¶¶ 6-7). The Board has authority to entertain an appeal from a CO's refusal to issue a final decision on a NAFI contractor's claim. *See Mid-America Officials Association, ASBCA* No. 38678, 89-3 BCA ¶ 22,231 at 111,775 (NAFI contract's Disputes clause provided Board jurisdiction when CO's failure to render a decision amounted to a denial of the claim). We hold that the Board has jurisdiction to entertain this appeal, and deny respondent's motion to dismiss for lack of jurisdiction.

II. Cross-Motions for Partial Summary Judgment

Since respondent has withdrawn its affirmative defense of release (accord and satisfaction), what remains are the issues of final payment, laches and whether appellant's claim is speculative and unsupported. None of these issues affects the jurisdiction of this Board to entertain this appeal. Therefore, we treat respondent's motion as for partial summary judgment. Appellant has cross-moved for partial summary judgment on the same issues. Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *FED. R. CIV. P. 56(c); Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

A. Final Payment

In *SUFI II*, 06-2 BCA at 165,778-79, with respect to respondent's affirmative defense of lack of notice of constructive changes before "final payment," based on CO Hollins-Jones' declaration that "SUFI did not submit written or verbal notice of any constructive changes to me prior to the final payment of \$2,275,000.00" (*see* SOF ¶ 3) that occurred on 1 June 2005, we held:

With respect to the issue of lack of notice of constructive changes, the FAR 52.243-1, Changes-Fixed price Alt I (Aug 1987) clause . . . did not expressly address constructive changes. . . .

. . . .

Appellant cites ASBCA precedents holding that the predecessor to the 52.243-1 . . . clause . . . did not require

notice of constructive changes within thirty days. . . .
Respondent does not cite authority to the contrary.

Even where a Changes clause expressly requires written notice of constructive changes within a specified period of time, lack of such notice does not *ipso facto* bar recovery therefor, but the government must prove that it was prejudiced by such lack of notice. [Citations omitted.]

. . . .

Moreover, even when such prejudice is proven, it does not bar recovery, but rather increases the contractor's burden of persuasion of the constructive change claim. [Citations omitted.] . . . Here, there is no showing of prejudice beyond the CO's [Henson] conclusory affidavit described above, which we do not deem sufficient to bar appellant's claims or defeat its motion.

. . . Finally, we do not construe payment of the amounts due under the PSA for the existing telephone system and good will a final payment for purposes of the contract's Changes clause, when both parties understood and agreed in the PSA that SUFI's claims were in process. Accordingly, appellant is entitled to judgment as a matter of law on this issue.

The \$2,275,000 "final payment" for the sale of SUFI's telephone system and good will in *SUFI II* and the \$82,747.19 "final payment" for SUFI's May 2005 phone bill in the instant appeal both arose in connection with appellant's interim performance from 1 April through 31 May 2005 under the PSA. Therefore, we apply our *SUFI II* holding on this final payment issue to respondent's present defense. Accordingly, on this issue respondent's motion is denied and appellant is entitled to judgment on this issue as a matter of law.

B. Laches

As stated in *Systems Integrated*, ASBCA No. 54439, 05-2 BCA ¶ 32,978 at 163,380:

In order to establish laches, the government must show that a contractor delayed the filing of its claim for an unreasonable

and inexcusable length of time from the point it knew or reasonably should have known of its claim, and that this delay resulted in prejudice or injury to the government [citing *A. C. Aukerman Co. v. R. L. Chaides Construction Co.*, 960 F.2d 1020, 1032 (Fed. Cir. 1992)].

As stated in [Wright, Miller & Kane], FEDERAL PRACTICE AND PROCEDURE § 2734 at 265 (3d ed. 1998):

[A] claimant's motion for summary judgment should be denied when any defense presents significant fact issues that should be tried [footnote omitted].

Respondent's laches defense raises the fact issues of when appellant first should have known of its front-desk patching claim for Rhein Main and Spangdahlem/Bitburg, considering its knowledge in early 1999 of front-desk patching at the KMC (*SUFII*), and whether the passage of time from early 1999 to 17 January 2007 prejudiced respondent by the unavailability or impaired memory of its witnesses and the lack of records to corroborate appellant's claim (gov't br. at 5-7, resp. at 4-5). Appellant disputes each of those facts, asserting that it first knew about front-desk patching at Rhein Main/Spangdahlem in late 2006, neither party kept records of Rhein Main/Spangdahlem front-desk activities, and the depositions of respondent's personnel at that time show that it was not prejudiced by unavailable witnesses or impaired memories (app. opp'n at 9-12). These issues must await a hearing for resolution. Neither party has shown that it is entitled to judgment on its motion.

C. Whether Claim is Speculative and Unsupported

If respondent's contention that appellant's claim is "speculative and unsupported by any documentation" (gov't br. at 7) is intended to justify the CO's refusal to decide the claim, such contention is invalid. A claim must allege sufficient facts to inform the CO of the basis for government liability; evidence to prove damages is not needed. Considering the "virtually identical" front-desk patching claim in *SUFII* (SOF ¶ 5), appellant's claim allegations apprised the CO of the operative, causal facts of government liability.

If however respondent's contention goes to the merits of the claim, the present appeal record does not permit us to decide whether appellant's alleged facts are sufficient to substantiate the dollar amount of its claim. Therefore, we deny both parties' motions for partial summary judgment on this issue.

CONCLUSION

We deny respondent's motion to dismiss for lack of jurisdiction and for partial summary judgment on its defenses designated in its motion. We grant appellant's motions for partial summary judgment on the affirmative defenses of release or accord and satisfaction and final payment, and deny its motion on the issues of laches and speculative and unsupported nature of its claim.

Dated: 9 January 2008

DAVID W. JAMES, JR.
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. 55948, Appeal of SUFI Network Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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