

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Parsons-UXB Joint Venture) ASBCA No. 56481
)
Under Contract No. N62742-95-D-1369)

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

Appellant appeals from the denial of its claim under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, for reimbursement of general excise taxes (GET). The government has moved to dismiss the appeal for lack of jurisdiction upon the alternative grounds that the claim is barred by the CDA six-year statute of limitations or that it is contingent and, therefore, fails to state a sum certain. We deny the motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. Appellant is a joint venture of Parsons Infrastructure and Technology Group Inc. (“Parsons”) and UXB International, Inc. (“UXB”) (compl. and answer ¶ 1).

2. On 29 July 1997, the Navy awarded appellant Contract No. N62742-95-D-1369, a cost plus award fee contract for the Unexploded Ordnance Clearance Project at Kaho’olawe Island Reserve, Hawaii. The contract provided that work was to be ordered by task order. (R4, tab 1 at 0001, 0088; mot., material facts ¶ 1)

3. The contract included Federal Acquisition Regulation (FAR) 52.216-7, ALLOWABLE COST AND PAYMENT (AUG 1996) (mot., material facts ¶ 2). This clause provides:

(a) *Invoicing.* The Government shall make payments to the Contractor when requested as work progresses.... The Contractor may submit to an authorized representative of the Contracting Officer, in such form and reasonable detail as the representative may require, an invoice or voucher supported by a statement of the claimed allowable cost for performing this contract.

4. In 1998, the State of Hawaii (“the state”) informed appellant, following a tax audit, that it was liable for additional GET taxes. On 7 December 1998, appellant paid an initial tax assessment of \$24,394.08. (Mot., material facts ¶¶ 4, 13)

5. Appellant contested the additional tax assessment and filed suit against the state in 2000. At some point in time the state also asserted that the joint venture partners were liable for GET taxes. (Mot., material facts ¶¶ 5, 6)

6. On 9 May 2007, the assessments against appellant were settled for the amount of \$1,700,000, which appellant paid to the state on 31 May 2007. On 13 July 2007, assessments against joint venture partner Parsons were settled for the amount of \$2,014,800.48, which Parsons paid to the state on 18 July 2007. Litigation continued with respect to partner UXB’s tax liability for a final assessment by the state of \$3,804,166.66 which has not been paid. (Mot., material facts ¶ 6)

7. On 8 August 2007, appellant submitted Invoice No. 107 seeking payment of \$6,594,213.85 of alleged GET and other costs. The contracting officer rejected the invoice. (Mot., material facts ¶¶ 7, 8)

8. On 31 August 2007, appellant submitted revised Invoice No. 107R (invoice 107R), also seeking payment of \$6,594,213.85, which allocated the claimed costs to individual task orders (mot., material facts ¶ 8).

9. On 7 September 2007, the Navy rejected invoice 107R (app. opp’n, statement of facts ¶ 34).

10. On 27 November 2007 appellant submitted its claim in the amount of \$6,773,742.28. The claim consists of \$6,594,213.85 as previously invoiced plus amounts for GET settlement costs and legal invoices. (R4, tab 291 at 7190) The claim stated:

For the reasons set forth in greater detail below, the JV demands, as a matter of right for breach of contract, payment in the amount of \$6,773,742.28, plus CDA interest. The amount of breach of contract damages represents unreimbursed Hawaiian General Excise Tax (“GET”) costs incurred by the JV under Contract No. N62742-95-D-1369 (the “Contract”) and related legal costs.

(*Id.* at 7098) The claim continued: “the Navy’s failure to make...reimbursement [of the GET costs] in accordance with FAR § 52.216-7 is a breach of the Contract” (*id.* at 7102-03). Under the heading “REQUEST FOR FINAL DECISION,” the claim reiterated that “the Navy’s failure to pay certain GET and related costs is a breach of FAR § 52.216-7 that has caused damage to the JV in the amount of \$6,773,742.28” (*id.* at 7103).

11. By letter dated 21 July 2008, appellant appealed from the deemed denial of the claim. The appeal was docketed as ASBCA No. 56481.

12. The government maintains that appellant had invoiced the Navy for some of the disputed GET costs prior to August 2007, and, indeed, as far back as 1998. It states that “the Navy did not dispute an invoice until 2007” because appellant stopped billing for the costs (gov’t reply at 16).

DECISION

CDA Six-Year Statute of Limitations

The CDA requires that contractor claims “shall be submitted within 6 years after the accrual of the claim.” 41 U.S.C. § 605(a). “[S]ubject to any applicable tolling of the statutory time period, the timely submission of a claim to a contracting officer is a necessary predicate to the exercise of jurisdiction by a court or a board of contract appeals over a contract dispute governed by the CDA.” *Arctic Slope Native Ass’n v. Sec’y of Health and Human Services*, No. 2008-1532, 2009 U.S. App. LEXIS 21361, at *18 (Fed. Cir. Sept. 29, 2009).

FAR 33.201 states:

“Accrual of a claim” means the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some

injury must have occurred. However, monetary damages need not have been incurred.

Here, appellant submitted the claim on 27 November 2007 (SOF ¶ 10). The government argues that the claim accrued by 7 December 1998 when appellant paid the first tax assessment. The government says “[a] reasonably diligent contractor would have submitted the first invoice in 1998.” (Gov’t reply at 13) Appellant responds that the claim accrued in September 2007 when the Navy rejected invoice 107R (opp’n at 1).

Generally, a claim for breach of contract accrues at the time of the breach. *Franconia Associates v. United States*, 536 U.S. 129, 141-42 (2002). As explained in *Franconia*, unless the promisee elects to treat a prior repudiation as a breach, failure by the promisor to perform at the time indicated for performance in the contract establishes the immediate breach. In *Franconia*, the government’s obligation was to accept prepayment of a loan. The Court held that there was no breach until the borrower tendered prepayment and the government refused to accept it. The same principle is applicable here. Appellant claims a breach of the Allowable Cost and Payment clause. That clause provides that “[t]he Government shall make payments to the Contractor when requested as work progresses” (SOF ¶ 3). There was no breach until appellant requested payment and the government rejected the request. Hence, the claim is timely.

Contingent Nature of the Claim

In the claim, appellant “demands, as a matter of right for breach of contract, payment in the amount of \$6,773,742.28, plus CDA interest” (SOF ¶ 10). As of the date of the claim, the state’s assessment of \$3,804,166.66 against partner UXB, which was included in this sum, had not been paid (SOF ¶ 6). The government argues that the Board lacks jurisdiction “due to the contingent nature of this unpaid and disputed assessment against one of the joint venture partners.” (Mot. at 4 n.1)

The government is incorrect. “All that is required is that the contractor submit in writing to the contracting officer a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim.” *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987). Appellant’s claim meets this requirement. It states a sum certain as of the date of submission even though the amount claimed may change in the future as a result of further developments in connection with the dispute with the state.

CONCLUSION

The government's motion to dismiss for lack of jurisdiction is denied.

Dated: 5 November 2009

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I concur

I concur

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

PETER D. TING
Administrative Judge
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. 56481, Appeal of Parsons-UXB Joint Venture, rendered in conformance with the Board's Charter.

Dated:

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