

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Guy W. Parker d/b/a ) ASBCA No. 56742  
Parker International )  
)  
Under Contract No. FA8621-04-D-6250 )

APPEARANCE FOR THE APPELLANT: Mr. Guy W. Parker

APPEARANCES FOR THE GOVERNMENT: Richard L. Hanson, Esq.  
Air Force Chief Trial Attorney  
Lt Col Michael J. Farr, USAFR  
Of Counsel  
Maj Jonathan P. Widmann, USAF  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE FREEMAN  
ON THE GOVERNMENT’S MOTION TO DISMISS

Guy W. Parker d/b/a Parker International (Parker) appeals the denial of two claims for payment of invoices (Notice of Appeal at i). The government moves to dismiss the appeal as to one of the claims. The Board, *sua sponte*, has noted probable lack of jurisdiction over the appeal as to the other claim, and has ordered Parker to show cause why the appeal should not be dismissed as to that claim as well. Parker has not shown cause, and for the reasons stated below we dismiss the appeal entirely.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. Effective 22 March 2004, Parker was awarded the captioned contract (hereinafter Contract 6250) to provide as ordered on an annual calendar year basis a software use license, software enhancements and supporting services for the Predator MQ-1 Unmanned Aerial Vehicle Multi-Task Trainer (PMTT) (R4, tab 1 at 1-2, 7). The Contract 6250 Statement of Work (SOW) stated, among other things, that: “The basic effort covers one year of MTT operation and maintenance, and can be renewed for up to four additional one-year periods through the issuance of annual delivery orders by the contracting officer.” (R4, tab 1, attach. 1 at 2) The “total estimated aggregate dollar amount” of the contract base year and four renewal years was \$3,000,000 (R4, tab 1 at 8).

2. Contract 6250 included, among other provisions, the FAR 52.216-22 INDEFINITE QUANTITY (OCT 1995) clause, the FAR 52.233-01 DISPUTES (JUL 2002)

clause, the FAR 52.243-01 CHANGES – FIXED-PRICE (AUG 1987), Alternate III (APR 1984) clause, and an H103 ORDERING PROCEDURES (DEC 2003) clause. The Ordering Procedures clause stated in relevant part:

(a) Performance can be authorized under this contract only by the issuance of individual orders signed by an ASC/YW [Aeronautical Systems Center/Training Systems Product Group] Procuring Contracting Officer (PCO)....

....

(c) A total Price shall be established for each order. If the Contractor exceeds this fixed price, it is at his own risk. Any changes to the price will be issued in writing, will set forth any additional obligation to b[e] incurred by the Government, and shall be signed by the PCO in advance of the Contractor exceeding the price.

(R4, tab 1 at 9, 11, 12)

3. Contract 6250 was issued by the Air Force Material Command (AFMC) Aeronautical Systems Center (ASC). The contracting officer (CO) making the award was Michael L. Grove. (R4, tab 1 at 1) CO Grove also issued Delivery Order No. 0001 under the contract for the PMTT software use license and contractor support services for calendar year 2004 at a firm fixed price of \$300,000 (app. supp. R4, tab 42 at 1-2).<sup>1</sup> In October 2004, CO Grove left ASC/YW, and thereafter did not hold a CO's warrant (*id.*, tab 1).

4. Delivery Order No. 0002 was issued on 13 January 2005 by CO Norma J. Weikert for the PMTT software use license and contractor support services for calendar year 2005 in the total amount of \$313,200 (app. supp. R4, tab 43 at 1-2). Delivery Order No. 0003 was issued on 15 September 2005 by CO Betty W. Clingerman for an upgrade to the PMTT software use license and additional contractor support services for calendar year 2005 in the total amount of \$200,000 (app. supp. R4, tab 44 at 1-2).

5. CO Clingerman's original Certificate of Appointment as a Contracting Officer for the Air Force was issued in 1982. That certificate was terminated and replaced by a new certificate effective 1 July 1992 and remains in effect to date. CO Clingerman's 1 July 1992 Certificate of Appointment contains no special limitations on her authority

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<sup>1</sup> Appellant's submission for the Rule 4 file designates each submitted document as "exhibit." Consistent with our usual practice for the R4 file, we will designate each of these documents as "tab."

and is effective as long as she is assigned to the United States Air Force. (App. supp. R4, tabs 132, 133) Pursuant to 10 U.S.C. § 1724(c)(2), the contracting officer qualification requirements in 10 U.S.C § 1724(a) and (b) do not apply to CO Clingerman.

6. Effective 8 November 2005, the government and Parker entered into bilateral Modification No. P00001 to Contract 6250 updating the government furnished equipment attachment to the contract at no change in contract price. Mr. Parker signed this modification for himself and CO Clingerman signed for the government. (App. supp. R4, tab 45)

7. Effective 27 January 2006, CO Clingerman issued Delivery Order No. 0004 under Contract 6250 for the PMTT software use license and contractor support services through 31 December 2006 at a firm fixed price of \$549,000. Mr. Parker signed a written acceptance of Delivery Order No. 0004 on 26 January 2006. The written acceptance stated that the contractor accepted the order “subject to all of the terms and conditions set forth, and agrees to perform the same.” (R4, tab 2)

8. On 15 February 2006, CO Clingerman sent Parker a letter that stated in relevant part:

SUBJECT: Contract FA8621-04-D-6250, CY06 Last Year  
for Site License...

1. This is to notify you that CY06 is the last year that the government intends to purchase a site license under subject contract. You are therefore cautioned not to do any work outside the scope of the current Delivery Order, D004.

(R4, tab 5)

9. On 18 April 2006, CO Clingerman sent Parker the minutes of a 29 March 2006 meeting at which, among things, a PMTT software upgrade developed by Parker without government direction or participation was discussed. The upgrade was referred to as the Rev 8 Block Upgrade. The forwarding letter stated in relevant part:

[The minutes] are provided to highlight that PMTT Rev 8 Block Upgrade can remain on system for contractor test and integration but cannot be used for training until it's part of current site license. The government does not intend to issue an RFP for the PMTT Revision 8 block Upgrade. In our letter dated 15 Feb 06, you were notified by the government that “CY 06 is the last year that the government intends to purchase a site license per subject contract.” In that letter you

were “cautioned not to do any work outside the scope of the current Delivery Order, D004.”

(R4, tab 6) CO Clingerman also advised Parker that “[a]ny contractual questions may be address[ed] to the undersigned” (*id.*).

10. On 20 October 2006, Parker submitted its invoice SER 0805 in the amount of \$341,550 to the Administrative Contracting Officer (ACO) for a site license for the period 1 April through 22 December 2006 for an upgraded version (OFP 3.6D) of its PMTT software. Parker allegedly installed the upgraded version at two Air Force bases. (R4, tab 10 at 4)

11. In accordance with CO Clingerman’s letter of 15 February 2006, the government did not issue delivery orders under Contract 6250 for calendar years 2007 and 2008.

12. On 2 May 2007, Parker submitted a certified claim for payment of its invoice SER 0805. The claim letter was addressed to the attention of “PCO Michael Grove” at AFMC Headquarters and two ACOs at the Defense Contract Management Agency Dayton. The claim was certified in the form required by the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 605, and expressly requested a contracting officer’s decision on the claim. (R4, tab 10 at 1, 6)

13. On 27 June 2007, CO Clingerman issued a contracting officer’s final decision (COFD) denying Parker’s claim for payment of invoice SER 0805 in its entirety (R4, tab 11). The COFD was received by Parker on 30 June 2007. The COFD advised Parker of its right to appeal the decision to this Board within 90 days of receipt, or in the alternative to the United States Court of Federal Claims within 12 months of receipt of the decision. (*Id.*) There is no evidence of a timely appeal of the COFD by Parker either to this Board or to the Court of Federal Claims.

14. On 19 January 2009, Parker sent a letter with an attached invoice to DFAS (the Defense Finance Accounting Service) and DCMA (the Defense Contract Management Agency) to the attention of ACOs (Administrative Contracting Officers) Schlatter and Johnson and “CO Michael L Grove.” The forwarding letter stated in relevant part:

The eight Predator Training Systems has [sic] been received at Creech AFB, Nellis AFB and Luke AFB. The use of the systems has been paid for CY2004, CY2005, and CY2006. There is a balance for CY2007 and CY2008 of \$1,518,000.00 for this Firm Fixed Price Order due....

I, Guy W. Parker, certify that this invoice SER 9-11 is made in good faith, that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify this invoice on behalf of the contractor. Invoice SER 805 remains unpaid, is not included in this invoice accounting certification data, and shall not be construed as a double invoice entry.

Betty W. Clingerman is not a party to this contract as evidenced in the attached United States District Court Southern District of California Court Order.

(Notice of Appeal, ex. 14 at 1<sup>2</sup>)

15. The SER 9-11 invoice attached to the 19 January 2009 forwarding letter had the same date as the forwarding letter and was addressed to DFAS-CO/NORTH ENTITLEMENT OPER to the attention of ACO Schlatter. The invoice was in the same amount with the same alleged basis as stated in the forwarding letter (Notice of Appeal, ex. 14 at 2).

16. The 19 January 2009 forwarding letter and the 19 January 2009 invoice SER 9-11 did not expressly refer to the CDA or the Disputes clause of the contract, or use the word “claim,” or request a contracting officer’s final decision on the invoice (Notice of Appeal, ex. 14).

17. By letter dated 26 January 2009, ACO Claude W. Armentrout rejected invoice SER 9-11 on the grounds that (i) it was billed against the total estimated price of the contract as to which no funds had been obligated; and that (ii) invoicing must be against individual delivery orders, not the basic contract. The ACO’s letter noted that Delivery Order Nos. 0001 and 0004 had been paid in full, but that there were unbilled balances of \$15,000 and \$30,000 on Delivery Order Nos. 0002 and 0003 respectively for which Parker “may submit properly substantiated invoices.” The ACO’s letter did not state that it was a contracting officer’s final decision, nor did it give notice of appeal rights. (App. supp. R4, tab 3)

18. On 2 February 2009, Mr. Grove replied to Parker’s submission of invoice SER 9-11 to him as follows:

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<sup>2</sup> In *Parker v. Clingerman*, No. 08cv212L (WMc) (S.D. Cal. March 13, 2008), the Court opined that Ms. Clingerman was not a party to Contract 6250. (App. Doc. D24, ex. 4).

Mr. Parker,

As you are aware, I left the Training Systems Product Group (ASC/YW) in October 2004 to accept a position at HQ Air Force Materiel Command. At this point, my Aeronautical Systems Center Contracting Officer's Warrant was no longer valid. I have not held a Contracting Officer's Warrant since October 2004. Therefore, I am not authorized to act on your request.

Any actions related to contract FA8621-04-D-6250 will have to be addressed to the cognizant Administrative Contracting Officer (ACO) or Procuring Contracting Officer (PCO).

(App. supp. R4, tab 1) Parker characterizes the foregoing response as "CO MICHAEL L. GROVE FINAL DECISION 02FEB2009" (*id.*).

19. On 6 February 2009, Parker submitted a Notice of Appeal to the Board which read in pertinent part as follows:

NOTICE OF APPEAL OF PARKER INTERNATIONAL  
(PI)

....

CONTRACT FA8621-04-D-6250 CLOSEOUT  
Deemed Denial of Claim for Invoice 0805 (Exhibit 13 P. 25)  
Denial of Certified Claim for Invoice 0911 (Exhibit 14 P. 27)  
Request for Alternative Dispute Resolution of Requests for  
Equitable Adjustments  
Request for Bilateral SF30 Ratification of a New Contracting  
Officer As May Be Required  
Request for Stay for New Contracting Officer Final Decisions  
As May Be Required

By /s/ Guy W Parker  
Director of Engineering  
14924 Conchos Dr.  
Poway, CA 92064

(Notice of Appeal at i)

20. There is no evidence that any of the “requests” in the Notice of Appeal were submitted as CDA claims for decision by a contracting officer prior to the 6 February 2009 Notice of Appeal.

21. In his document “D24” submitted to the Board on 10 August 2009, Parker states: “ASBCA 56742 is a non-monetary dispute for Claims Requests for Equitable Adjustments that requests a Notice of Termination for Convenience and the appointment of an independent DCMA Termination Contracting Officer based on Public Law 109-364 120 Stat. 2331 § 832 wherein no future delivery orders could be issued after that Congressional Act” (app. doc. D24 at 22). There is no evidence of (i) any such “request” being submitted to the contracting officer as a CDA claim or (ii) a contracting officer’s CDA decision on any such request prior to Parker’s 6 February 2009 Notice of Appeal.

## DECISION

### A. Invoice SER 0805

Parker’s invoice SER 0805 was submitted on 2 May 2007 as a certified claim with an express request for a contracting officer’s decision (SOF ¶ 12). The claim was denied entirely by CO Clingerman in a final decision dated 27 June 2007. The final decision advised Parker of his rights to appeal the decision to this Board within 90 days of receipt, or to the Court of Federal Claims within 12 months of receipt of the decision. There is no evidence in the record of a timely appeal by Parker either to this Board or to the Court of Federal Claims. (SOF ¶ 13)

On 28 July 2009, the Board, *sua sponte*, ordered Parker to show cause why the present appeal on an alleged deemed denial of its claim for SER 0805 should not be dismissed as untimely.<sup>3</sup> Subsequent to this order, Parker has made a number of submissions that, to the extent relevant to the order to show cause, argue that CO Clingerman was not an authorized contracting officer. This argument is without merit. When CO Clingerman issued her 27 June 2007 COFD on Parker’s claim for payment of his invoice SER 0805, she was a warranted contracting officer of the Air Force (SOF ¶ 5). The present appeal from that decision is untimely and we have no jurisdiction thereof.

### B. Invoice SER 9-11

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<sup>3</sup> Parker refuses to accept certified mail (app. doc. D20A at 1, D24 at 1). The order to show cause was sent by both certified and uncertified USPS mail. We regard the certified letter containing the order to show cause as being delivered on 8 August 2009, the date the USPS notice of the letter, with instructions for pick-up or redelivery, was left at Parker’s business address per USPS Track & Confirm.

The government moves to dismiss the appeal as to the denial of invoice SER 9-11 on the ground that the invoice was not a claim under the CDA because it did not include an express request for a contracting officer's final decision. Parker opposes the motion on the grounds that: "A permanent deemed denial occurred due to the 48 C.F.R § 4.101 Procuring Contracting Officer's (PCO) voluntary election to create a void by not providing a bilateral SF30 Modification with equitable adjustment to change the PCO" (app. "RESPONSE TO 20 MAY 2009 MOTION TO DISMISS AND ASBCA BOARD MEMBER CONGRESSIONAL INQUIRY 13 MAY 2009" at 1, 4, 10).

The record on the motion clearly establishes that CO Clingerman has been a duly appointed contracting officer from 1982 to the present time and has performed contracting officer duties on Contract 6250 and the delivery orders issued thereunder since 2005 (SOF ¶ 5). Her signature as contracting officer appears on all of the contractual documents and correspondence in the record originating from the government since that time. Parker cannot credibly claim that he did not know that she had replaced the original contracting officer Mr. Grove. (SOF ¶¶ 4, 6-9, 13) The government had complete discretion in the assignment, substitution and replacement of its contracting officers on Contract 6250. It was not required to modify the contract either by unilateral or bilateral modification to effect such changes. Parker cites no statute, regulation, or contract provision applicable to Contract 6250 to the contrary.<sup>4</sup> At no time has there been a "void" in contracting officer authority to receive and decide CDA claims under or relating to Contract 6250.

The issue for decision on the motion with respect to the claim for invoice SER 9-11 is whether Parker submitted that invoice as a "claim" under the CDA to the contracting officer for a decision. *See* 41 U.S.C. § 605(a). The record is clear that he did not. Neither the invoice itself nor the forwarding letter stated the invoice was a claim under the CDA, nor did either document request a contracting officer's final decision under the CDA, nor was either document addressed to the cognizant procuring activity CO, or to the procuring activity itself. It is further clear from the forwarding letter that the failure to address invoice SER 9-11 to the procuring activity contracting officer (CO Clingerman) was deliberate and taken on the entirely specious and irrelevant ground that she was not "a party" to the contract. Moreover, since this was the first time that the invoice was presented for payment and was not identified by Parker as a CDA claim, ACO Armentrout was correct in treating it as what it purported to be, and not as a CDA claim requiring a final decision. (SOF ¶¶ 14-17)

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<sup>4</sup> In his 26 May 2009 "addition" to his response to the motion to dismiss, Parker includes an "example of SF30 modification to contract change of contracting officer." The example is a modification to a contract awarded by the National Aeronautics and Space Administration (NASA). Whatever may be the NASA practice in modifying contracts for changes of contracting officer, it is irrelevant to Contract 6250 that was awarded by the Air Force.

The appeal is dismissed for lack of jurisdiction.

Dated: 21 September 2009

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MONROE E. FREEMAN, JR.  
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 No. 56742, Appeal of Guy W. Parker d/b/a Parker International, rendered in conformance with the Board's Charter.

Dated:

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