

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
AM General, LLC) ASBCA No. 57662
)
Under Contract No. DAAE07-01-C-S001)

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OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY
ON MOTION OPPOSING DISMISSAL OF ASBCA No. 57662
AS IT RELATES TO BAE SYSTEMS' SPONSORED CLAIM

On 20 July 2012, appellant AM General and the U.S. Army jointly advised the Board that they had entered into a Settlement Agreement regarding the claims at issue in ASBCA Nos. 57662 and 57777, which are not consolidated, and requested that the Board approve a Stipulated Order of Voluntary Dismissal with Prejudice. On that same day,

BAE Systems Survivability Systems LLC (BAE Systems) submitted a letter to the Board objecting to the settlement of ASBCA No. 57662, advising that it was a subcontractor and supplier to AM General, that the appeal was taken from the denial of a claim sponsored by AM General on its behalf, that it was a real party in interest, and that it had not been informed or consulted regarding the settlement and stipulation for dismissal of ASBCA No. 57662. It requested that the Board not act on the dismissal until related issues had been fully explored. Later in the day, BAE Systems requested an opportunity to file a supplemental statement of its position.

The Board scheduled a conference call with counsel for AM General, the Army and BAE Systems during which a briefing schedule was established. BAE Systems submitted a "Motion Opposing Dismissal of ASBCA No. 57662 as it Relates to BAE Systems' Sponsored Claim" to which AM General and the Army jointly responded. BAE Systems then requested leave to reply to the response, which was jointly opposed by AM General and the Army as unnecessary. Having considered the matter, the request of BAE Systems for leave to submit a reply is GRANTED. The motion is now fully briefed and at issue.

Background

The claim in ASBCA No. 57662 arises under a Federal Acquisition Regulation (FAR) Part 12 commercial item contract, No. DAAE07-01-C-S001 (the S001 contract), awarded to AM General by the U.S. Army Tank Automotive and Armament Command (TACOM) on 6 November 2000 for the manufacture of High Mobility Multi-Purpose Wheeled Vehicles (HMMWVs) (R4, tab 1). After the HMMWVs had been manufactured by AM General, they were delivered to BAE Systems as government-furnished property under a separate commercial item contract, No. DAAE07-00-C-S019, to be "up-armored" with armor parts BAE Systems had designed and built (compl. ¶¶ 17-22).

Beginning in 2005, AM General and TACOM entered into a series of modifications to the S001 contract pursuant to which enhanced armor parts necessitated by Operation Iraqi Freedom and Operation Enduring Freedom were incorporated into the AM General HMMWV manufacturing process (compl. and answer ¶ 4; BAE mot., ex. 3). Thereafter, AM General issued purchase orders to BAE Systems for the design and provision of these enhanced armor parts which were added to the S001 contract via contract modification (compl. and answer ¶ 25).

Based upon the following determination, the contracting officer did not obtain certified cost and pricing data for parts supplied to AM General by BAE Systems during 2005, 2006 and 2007:

Commerciality – These Armor/Frag[mentation] Kits have been determined to be Non-Commercial Items. However,

Cost or Pricing Data was not acquired as the items are considered to be a [sic] Minor Modifications to a Commercial Item. FAR 15.403-1(c)(3)(ii)(B), states “for acquisitions funded by DoD, NASA, or Coast Guard, such modifications of a commercial item are exempt from the requirement for submission of cost or pricing data provided the total cost of all such modifications under a particular contract action does not exceed the greater of \$500,000 or 5 percent of the total price of the contract.” This action does not exceed 5% of the total Contract Price.

(BAE mot., ex. 3 at 4) The exemption relied upon by the contracting officer is derived from Section 818 of the Ronald Reagan National Defense Authorization Act for Fiscal Year (FY) 2005, enacted 28 October 2004, Pub. L. No. 108-375, § 818 (2004), which modified The Truth in Negotiations Act (TINA), 41 U.S.C. § 2306a(b)(3), by providing that the submission of cost or pricing data was not required for “noncommercial modifications” of commercial items if the cost was not expected to exceed \$500,000 or five percent of the total price of the contract, whichever was greater. Section 818 was implemented by FAR 15.403-1(c)(3)(ii). (Compl. and answer ¶¶ 10-12)

By a letter dated 12 April 2007 to AM General, the TACOM contracting officer advised that the exemption would no longer apply to the armor parts items for proposed FYs 2008, 2009, and 2010. He explained that, although the items were still considered to be minor modifications to a commercial item, the projected value exceeded five percent of the total projected value of the contract. He further advised that he was preparing a modification to the S001 contract to insert the required FAR Part 15 contract clauses. (R4, tab 12) AM General objected to the determination and the contracting officer requested a waiver of the requirement for submission of certified cost and pricing data, which was issued under FAR 15.403-1(c)(4) by the Head of the Contracting Authority for FY 2008 (BAE mot., ex. 3 at 4). The waiver was subsequently found to be inappropriate by the Deputy Assistant Secretary of the Army, following which AM General and the Army negotiated an “Armor Reopener Supplier Clause” to the S001 contract that allowed a downward only adjustment to the contract price after certified cost and pricing data for the armor parts was audited by the Defense Contract Audit Agency (DCAA) (*id.* at 5).

Bilateral contract Modification No. P01300, dated 20 September 2007, incorporated interim negotiated prices because certified cost and pricing data furnished by BAE Systems had not been audited. It also incorporated the “Reopener” clause and the following FAR clauses pertaining to FAR 15.403-4, REQUIRING COST OR PRICING DATA (10 U.S.C. 2306a AND 41 U.S.C. 254b), namely: FAR 52.215-10, PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA (OCT 1997); FAR 52.215-12, SUBCONTRACTOR COST OR PRICING DATA (OCT 1997); FAR 52.215-15, PENSION ADJUSTMENTS AND ASSET REVERSIONS (OCT 2004); FAR 52.215-18, REVERSION OR

ADJUSTMENT OF PLANS FOR POSTRETIREMENT BENEFITS (PRB) OTHER THAN PENSIONS (JUL 2005); and FAR 52.215-19, NOTIFICATION OF OWNERSHIP CHANGES (OCT 1997). Also incorporated was Department of Defense FAR Supplement (DFARS) clause 252.215-7002, COST ESTIMATING SYSTEM REQUIREMENTS (DEC 2006). (R4, tab 63 at 8 of 9) Bilateral contract Modification No. P01466, dated 11 April 2008, established new FY 2008 and 2009 interim prices and also included a "Reopener" clause and established a methodology for arriving at fair and reasonable prices (R4, tab 114; compl. ¶ 32).

Although AM General and the Army failed to reach agreement on pricing or new terms and conditions for deliveries, AM General continued to fulfill TACOM's orders for armored vehicles and BAE Systems continued to supply armored parts to AM General during 2008 through 2010 (compl. and answer ¶ 36). By a letter dated 1 July 2010, the contracting officer advised AM General that it had developed its price position relative to the BAE Systems' armor parts prices, quantified what appeared to be substantial overcharges, and established reductions in unit prices for vehicles that had not yet been delivered (R4, tab 265). On 9 July 2010, the contracting officer issued unilateral Modification No. P01974 itemizing what appeared to be the quantum of what TACOM viewed as overcharges and establishing reduced vehicle unit prices to be used by AM General for deliveries until an equitable amount for BAE Systems armor material costs was negotiated (R4, tab 268).

On 15 February 2011, AM General and BAE Systems entered into a Confidentiality and Common Interest Agreement (aff. of Richard C. Johnson, co-counsel for BAE Systems (Johnson aff.), ex. A-9 at 2, ¶ 1). Paragraph 5 thereof, "Termination of the Agreement," provides that if either party reaches a settlement with the government, it must so notify the other party within one business day and the agreement will automatically terminate as of the notification date (joint resp., ex. A).

On 11 March 2011, AM General, as the prime contractor, for and on behalf of BAE Systems, submitted a certified claim to the contracting officer requesting a final decision interpreting and adjusting the terms and conditions of the S001 contract as follows:

The inclusion of the Reopener Clauses and FAR clauses 52.215-10, 52.215-12, 52.215-15, 52-215-18, 52.215-19, and DFARS 252.215-7002 in the Contract via Modifications P01300 and P01466 was unlawful because they are based upon the Contracting Officer's determination that submission of cost or pricing data was required for the armor items supplied by BAE Systems to AM General, which determination was erroneous, contrary to statute and regulation, arbitrary and capricious, beyond the authority of the Contracting Officer, and therefore invalid. Accordingly,

these clauses are unenforceable for the benefit of the Government, and the Contract should be reformed to delete them in their entirety.

(BAE mot., ex. 2 at 2) AM General and BAE Systems collaborated in the drafting of the non-monetary sponsored claim (Johnson aff. ¶ 1 and exs. A-1, A-2).

The contracting officer issued a final decision on 9 May 2011 finding:

Based on the facts and supporting rational found in the sections above, I find that the inclusion of the Reopener Clauses and FAR clauses 52.215-10, 52.215-12, 52.215-15, 52.215-18, 52.215-19 and DFARS clause 252.215-7002 was lawful and valid. The Contracting Officer's determination that the items supplied by BAE to [AM General] constitute a non-commercial modification to the HMMWV and that the prices of the kits exceeded five percent (5%) of the total price of the contract were appropriate. Accordingly, the clauses referenced in this claim are enforceable and will remain as terms and conditions of the contract.

(BAE mot., ex. 3 at 10)

A timely appeal was filed with the Board on 23 June 2011 and docketed as ASBCA No. 57662. BAE Systems collaborated with AM General in filing the appeal and twice proposed an Authorization Agreement to formalize their collaboration with respect to the sponsored claim and appeal and which would have given BAE Systems veto power over all filings in this appeal, presumably including the request for approval of the Stipulated Order of Voluntary Dismissal with Prejudice that BAE Systems now opposes. BAE systems also proposed that AM General "not enter into a settlement without BAE consent." AM General declined to enter into the proposed agreements. (Johnson aff. ¶¶ 2 through 4, and exs. A-6 through A-10) Nevertheless, BAE Systems and its counsel have shouldered a major share of the legal efforts to prosecute the appeal (Johnson aff. ¶ 6).

According to BAE Systems, a determination by the Board in ASBCA No. 57662 that the armor parts were commercial items would relieve AM General from repricing its prime contract and simultaneously resolve claims between AM General and BAE Systems pending since 2009 in Indiana state court litigation (*AM General LLC v. BAE Systems, Inc., et. al.*, Case No. 71D07-0907PL00195) (BAE mot. at 2). In that litigation AM General alleges it was entitled to reduce the prices paid to BAE Systems in 2008-2010 retroactively in the event TACOM reduced the price of contract S001 under the Reopener clause and BAE Systems' counterclaim alleges that AM General breached

contractual obligations and misappropriated trade secrets with respect to the armor parts it had supplied to AM General (Johnson aff., ex. A-9 at 1).

AM General and TACOM engaged in negotiations pursuant to which they “determined that it [was] in their best interests to settle the matters in dispute in ASBCA Appeal Numbers 57662 and 57777 and the matter of the price reduction due for 2008, 2009 and 2010 deliveries under the Contract without further litigation” (BAE mot., ex. 1 at 4). The Settlement Agreement was executed by AM General on 18 July 2012 and by the contracting officer on 19 July 2012 (*id.* at 9). BAE Systems received notice of the settlement and the joint request for a voluntary dismissal with prejudice on 20 July 2012 and immediately notified the Board that it did not agree to the stipulation of dismissal.

The Positions of BAE Systems and AM General/Army

BAE systems asks the Board to deny the joint request of AM General and the Army for entry of a Stipulated Order of Voluntary Dismissal with Prejudice to the extent it pertains to the sponsored non-monetary appeal in ASBCA No. 57662, to rule that AM General may not rescind its sponsorship of the appeal in ASBCA No. 57662 and that BAE Systems may continue to prosecute the appeal. It asserts that the settlement is “manifestly unfair” because it resulted from secret negotiations between AM General and the Army, was not consented to by BAE Systems, includes findings “transparently designed” to advance the position of AM General in state court litigation against BAE Systems, and improperly gives the Army a contingent interest in AM General’s prevailing in the state court litigation. It contends that it is a party in interest, that the settlement requires its consent, that the Board has the right and the duty to look behind the settlement agreement to determine whether it is fair to the parties and affected third parties, and that AM General is estopped from withdrawing its nominal sponsorship of the appeal.

The joint response of AM General and the Army reminds us that the Board’s jurisdiction is limited to the prime contractor, the party in privity with the government, and that the authority to settle and seek voluntary dismissal of an appeal before the ASBCA, even a sponsored appeal, lies with the prime contractor and the government. It asserts that BAE Systems’ status as a real party in interest ended when AM General executed the Settlement Agreement, which terminated AM General’s sponsorship of the appeal, but that even if it did not end, that status would not give BAE Systems the right to challenge the settlement or the voluntary dismissal. The joint response finds no authority for the Board to review the settlement agreement and points out that AM General twice refused to enter into Authorization Agreements with BAE Systems that would have given BAE Systems veto power over filings in this appeal and that it also refused to agree that it would not enter into a settlement without BAE Systems’ consent. Finally, it takes issue with the suggestion that there was something inappropriate about the settlement, responding that disagreement with the results of the government’s review and audit of the

cost and pricing data submitted by BAE Systems does not provide a jurisdictional basis for this appeal to continue.

BAE Systems' reply asserts that AM General has not revoked its sponsorship, that the "Confidentiality and Common Interest Agreement" is irrelevant to the sponsorship issue, that its claim is distinct from AM General's claim, that the improper inclusion of factual findings in the Settlement Agreement has been compounded, the provisions of which may even be illegal, and that the Board should accept jurisdiction for the limited purpose of determining whether privity exists between TACOM and BAE Systems.

Discussion

This appeal is sponsored by AM General for and on behalf of BAE Systems, its subcontractor. BAE Systems asserts that it is a real party in interest, citing a number of Board cases: *Lockheed Aircraft Corp., Lockheed-Georgia Co. Div.*, ASBCA No. 10453, 67-1 BCA ¶ 6356 at 29,440, *rev'd on other grounds, Lockheed Aircraft Corp., Lockheed-Georgia Co. Div. v. United States*, 193 Ct. Cl. 86 (1970); *Hughes Aircraft Co.*, ASBCA No. 30144, 90-2 BCA ¶ 22,847 at 114,747; *General Dynamics Corp.*, ASBCA No. 39866, 91-2 BCA ¶ 24,017 at 120,265; and *Boeing Co.*, ASBCA No. 33881, 92-1 BCA ¶ 24,414 at 121,866. It also cites *Owens-Corning Fiberglas Corp. & Polytron Co. v. United States*, 190 Ct. Cl. 211, 238 (1969) and *Erickson Air Crane Co. of Washington, Inc. v. United States*, 731 F.2d 810, 814 (Fed. Cir. 1984). While these cases generally acknowledge sponsored claims and recognize the subcontractor is a real party in interest in the litigation, none of them addresses, much less confers, the rights to which BAE Systems asserts it is entitled.

Rather, as clearly stated by the Court in *Erickson*:

A party in interest whose relationship to the case is that of the ordinary subcontractor may prosecute its claims only through, and with the consent and cooperation of, the prime, and in the prime's name.

713 F.2d at 814. This is so because the Board's jurisdiction derives from the Contracts Disputes Act (41 U.S.C. §§ 7101-7109) which gives the right to appeal a contracting officer's final decision to the prime contractor only, and not to the subcontractor. *See Technic Services, Inc.*, ASBCA No. 38411, 89-3 BCA ¶ 22,193 at 111,651. The government consents to be sued only by those with whom it has privity of contract and "the no-privity rule is synonymous with a finding that there is no express or implied contract between the government and a subcontractor." *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1550 (Fed. Cir. 1983).

BAE Systems urges the Board to exercise “inherent authority” to examine the settlement agreement to ensure that the dismissal will not effectuate improper conduct, particularly where the rights of a third party are affected (BAE mot. at 7). It looks to FED. R. CIV. P. 23, regarding class actions, and FED. R. CIV. P. 41, relating to voluntary dismissal, as support for its argument. While it is true, as BAE Systems asserts, that the Board uses the Federal Rules of Civil Procedure as a guide in procedural matters, the rules cited by BAE Systems lend no support for its position.

First, because this is not a class action, we do not consider the protections established for members of a FED. R. CIV. P. 23 class to be applicable to BAE Systems, a subcontractor to AM General under its prime contract with TACOM. Next, we believe that the provisions of FED. R. CIV. P. 41(a)(1)(A)(ii), requiring that a stipulation of dismissal be signed by all parties, have been satisfied because the only proper parties under the CDA to this appeal are AM General and the Army, both of which have signed the stipulation of dismissal. That BAE Systems may have gratuitously entered an appearance in this appeal does not change its subcontractor status. Further, the requirement in FED. R. CIV. P. 41(a)(2) that an action be dismissed “on terms that the court considers proper” applies to circumstances in which only the plaintiff (appellant) has requested the dismissal, not where both parties seek dismissal as they have here.

Apart from a Louisiana state court decision, the cases relied upon by BAE Systems for the proposition that we must ensure that a settlement is fair to third parties involved either class action members, intervenors, or bankruptcy creditors. Of more significance, however, is the fact none of the cases cited arose under the CDA, which strictly limits our jurisdiction to contract disputes between the government and prime contractors. *Johnson Controls*, 713 F.2d at 1550-52; *Winter v. FloorPro, Inc.*, 570 F.3d 1367, 1371 (Fed. Cir. 2009) (CDA jurisdiction does not include subcontractors that are third-party beneficiaries of the contract).

Thus, the Board is not the forum in which to litigate, and we do not address, BAE Systems’ contentions that the settlement (1) is somehow improper because it blocks BAE Systems’ attempt to obtain a determination by the Board that the armor parts were commercial items, (2) allegedly gives TACOM an inappropriate (and, as expanded by BAE Systems’ reply at 4, “perhaps even illegal[] under Federal Appropriations Law”) contingent interest in the outcome of the Indiana litigation, while at the same time shielding AM General from any further liability, and (3) allegedly includes language that is unsupported by the facts (BAE mot. at 12-15). We do note, however, that AM General and the Army appear to take considerable issue with these contentions, responding that “[t]he Settlement Agreement was executed at arm’s length and after careful deliberation by both the Government and AM General” (joint resp. at 8).

BAE Systems’ next argument is that AM General is estopped from withdrawing its sponsorship of BAE Systems’ claim. It relies upon *Mabus v. General Dynamics C4*

Systems, Inc., 633 F.3d 1356, 1359 (Fed. Cir. 2011), which requires the following elements of proof:

- (1) [M]isleading conduct, which may include not only statements and actions but silence and inaction, leading another to reasonably infer that rights will not be asserted against it; (2) reliance upon this conduct; and (3) due to this reliance, material prejudice if the delayed assertion of such rights is permitted.

It asserts that AM General misled it into believing it would be permitted to seek resolution of the issue of the commerciality of its armor parts when AM General sponsored its claim, that it relied upon Am General's representations and spent thousands of hours and two million dollars pursuing its claim in partnership with AM General, and that it will be prejudiced if AM General withdraws its sponsorship because it will lose its ability to resolve the issue of the commerciality of its parts (BAE mot. at 17-18). AM General and the Army jointly respond that BAE Systems participated in this appeal with the full knowledge that AM General could settle with the government and dismiss the appeal without BAE Systems' involvement or consent.

Estoppel is an equitable defense. *A.C. Aukerman Co. v. R.L. Chaides Construction Co.*, 960 F.2d 1020, 1028 (Fed. Cir. 1992). Here, it appears that BAE Systems is relying upon equitable estoppel as an affirmative challenge to the proposed dismissal of ASBCA No. 57662. That aside, the record fully supports the position of AM General and the Army that BAE Systems was not misled by AM General, but rather was fully aware that AM General might settle this appeal. While the Confidentiality and Common Interest Agreement may be irrelevant to AM General's sponsorship of BAE Systems' claim, as BAE Systems asserts, it is relevant to the issue of estoppel. Indeed, paragraph 5 of the Confidentiality and Common Interest Agreement specifically anticipates a settlement by one of the parties and includes a one-day notice provision to the other party. Moreover, AM General refused to agree that it would not enter into a settlement without BAE Systems' consent and also refused to enter into an Authorization Agreement with BAE Systems that would have given BAE Systems veto power over all filings in this appeal, presumptively including a motion to dismiss based upon settlement.

Finally, and as an alternative argument, BAE Systems attempts to demonstrate cause for the Board to accept jurisdiction for the limited purpose of determining whether it had privity of contract with TACOM in its own right. See *Keith L. Williams*, ASBCA No. 46068, 94-3 BCA ¶ 27,196 at 135,551 (Board has inherent authority to determine if there is an implied-in-fact contract). An implied-in-fact contract requires proof of (1) mutuality of intent, (2) consideration, (3) an unambiguous offer and acceptance, and (4) actual authority on the part of the government representative. *City of Cincinnati v.*

United States, 153 F.3d 1375, 1377 (Fed. Cir. 1998). It is readily apparent to us from the record presented that BAE Systems cannot satisfy these elements of proof.

Rather, BAE Systems has proceeded throughout performance of the S001 contract as a subcontractor to AM General, providing enhanced armor parts pursuant to purchase orders issued by AM General for at least six years without ever asserting it had privity of contract with the Army. After the contracting officer issued Modification No. P01974, which itemized what the Army considered to be overcharges and established interim reduced vehicle unit prices until an equitable adjustment relating to BAE Systems parts could be negotiated, BAE Systems and AM General entered into a Confidentiality and Common Interest Agreement. This was followed by a collaborative effort between BAE Systems and AM General pursuant to which the 11 March 2011 sponsored claim was submitted to the contracting officer and an appeal taken from its denial. BAE Systems twice proposed an Authorization Agreement with AM General for formalizing their collaboration efforts. In the face of a record that so clearly reflects BAE Systems' status as a subcontractor, the various factors identified in BAE Systems' reply brief to support its contention that we should retain jurisdiction do not persuade us that there is any valid reason to do so.

Conclusion

For the reasons stated, we deny the motion of BAE Systems Opposing Dismissal of ASBCA No. 57662 as it Relates to BAE Systems' Sponsored Claim.

Dated: 17 September 2012



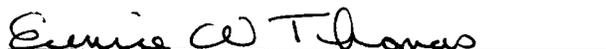
CAROL N. PARK-CONROY
Administrative Judge
Armed Services Board
of Contract Appeals

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. 57662, Appeal of AM General, LLC, rendered in conformance with the Board's Charter.

Dated:

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