

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Raytheon Missile Systems) ASBCA No. 58011
)
Under Contract No. N00019-99-D-1016)

APPEARANCES FOR THE APPELLANT: Paul E. Pompeo, Esq.
Dominique L. Casimir, Esq.
Steffen G. Jacobsen, Esq.
Arnold & Porter LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: E. Michael Chiaparas, Esq.
DCMA Chief Trial Attorney
Douglas R. Jacobson, Esq.
Trial Attorney
Defense Contract Management Agency
Bloomington, MN

OPINION BY ADMINISTRATIVE JUDGE MELNICK ON APPELLANT'S MOTION
TO DISMISS FOR LACK OF JURISDICTION

Raytheon Missile Systems (Raytheon) has appealed a contracting officer's final decision that asserted a government claim for over \$17 million. The claim arose from Raytheon's alleged violation of its disclosed Cost Accounting Standards (CAS) accounting practices. Because the government's claim was untimely and therefore invalid, the appeal is dismissed for lack of jurisdiction.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

For the purpose of deciding this jurisdictional matter, we find the following facts to be either uncontroverted or otherwise supported by the record:

1. Because it is a government contractor subject to the CAS, at the end of 1998, Raytheon submitted a CAS Disclosure Statement to the Defense Contract Management Agency (DCMA) that would be effective 1 January 1999 (supp. R4, tabs 100, 105). That statement excluded certain Raytheon subcontract costs from application of the full burden of Raytheon's overhead rates. Such subcontracts would not receive [redacted]* burden.

* This Opinion is redacted for publication at the request of the parties and in accordance with the Board Protective Order.

The only burden they would receive would be [redacted]. Raytheon characterized the subcontracts receiving this reduced or special burden as “Major Subcontracts.” (Supp. R4, tab 100 at 1042) Later in 1999, by letter dated 18 June, Raytheon submitted an amended CAS Disclosure Statement to the DCMA Divisional Administrative Contracting Officer (DACO) proposing to expand its definition of major subcontracts to broaden the group receiving special burden. It stated the new revision would also be effective as of 1 January 1999. (Supp. R4, tab 105; gov’t resp. to app. request to admit 1)

2. On 14 May 1999, prior to Raytheon proposing expansion of its definition of major subcontracts, the Naval Air Systems Command (NAVAIR) awarded Raytheon Contract No. N00019-99-D-1016 (the ReMan 1 contract), a letter contract to remanufacture Tomahawk missiles (R4, tab 1). On 20 July 1999, Raytheon submitted a price proposal as part of the negotiations to definitize the ReMan 1 contract. It also communicated that it was executing a subcontract with Lockheed Martin Corporation for the acquisition of certain items. The proposal was reviewed by personnel from NAVAIR, the Defense Contract Audit Agency (DCAA), and a DCMA price analyst. (R4, tab 3) The price analyst issued a report, dated 26 July 1999, discussing his examination of different components of Raytheon’s proposal. In the report, he explained that he had requested Raytheon to break down a markup factor it had applied to material, which revealed that Raytheon had applied [redacted] overhead [redacted] to its material. (*Id.* at 137, 139) On 4 August 1999, Raytheon and NAVAIR reached agreement on a firm-fixed price for the ReMan 1 contract of \$374,920,811, and on 13 October 1999, the government paid the first invoice on that contract (R4, tab 3 at 153, tab 23 at 298).

3. In 2005, the same DCMA price analyst performed a second review of the price data submitted by Raytheon in 1999 for the ReMan 1 contract to determine whether Raytheon had treated its Lockheed Martin subcontract as a major subcontract subject to special burden. His 26 August 2005 report found that Raytheon had fully burdened its Lockheed Martin proposed pricing. (R4, tab 3) He observed that a July 1999 Raytheon worksheet attached to his 26 July 1999 price report had showed that Raytheon’s proposed markup factor included a weighted [redacted] burden rate and a weighted [redacted] rate (*id.* at 121, 142). The analyst concluded that because Raytheon’s “major subcontract items [were] not burdened with [redacted] burden nor [redacted],” it was “clear that [Raytheon] did not propose these items as major subcontract material.” Similarly, he found that it appeared that Raytheon’s final negotiated pricing included both [redacted] burden and [redacted], and therefore the Lockheed Martin subcontract was not priced as a major subcontract. (*Id.* at 122)

4. On 3 April 2006, DCAA issued a draft condition statement, alleging that Raytheon’s 20 July 1999 ReMan 1 price proposal applied full burden to its Lockheed Martin subcontract costs. Thus, Raytheon had failed to comply with the expanded special burden practices for major subcontracts that it had allegedly made effective as of 1 January 1999. DCAA concluded that Raytheon’s “failure...resulted in increased cost

paid by the Government” by “caus[ing] a significant increase to the contract price” (R4, tab 4 at 155). The report relied upon Raytheon’s 20 July 1999 price proposal, the price analyst’s 26 August 2005 report, and other materials generated in 1999 relied upon by that report. The cover letter sought a written reaction from Raytheon by 28 April. (R4, tab 4) Raytheon responded on 14 July 2006, stating that it did not concur and that the alleged noncompliance had no cost impact (R4, tab 5). DCAA then issued an audit report on 22 September 2006, relying upon the same materials as the draft statement to confirm its conclusions. It concluded the alleged noncompliance had a \$9.2 million impact upon the contract. (R4, tab 6 at 193)

5. On 13 October 2006, the DACO issued an Initial Determination of CAS noncompliance to Raytheon that was based upon the conclusions of the audit report. Raytheon was given 60 days to comment. (R4, tab 8) Several communications followed, culminating in Raytheon’s 14 May 2009 position that its application of full burden to its Lockheed Martin subcontract resulted in a net decrease to all government contracts for the period of calendar years 2000-2002 (R4, tabs 9-18). DCAA evaluated that proposal and declared it to be inadequate in a report issued 28 June 2011 (R4, tab 21).

6. On 29 November 2011, the DACO issued a final decision, finding Raytheon had failed to follow its revised accounting practice disclosures. It asserted that Raytheon’s 20 July 1999 price proposal applied [redacted] overhead to its ReMan 1 contract’s Lockheed Martin subcontract material costs, causing financial harm to the government. It sought \$10,157,000, plus \$6,885,884 in interest. (R4, tab 22) Raytheon appealed that decision to the Board on 24 February 2012.

DECISION

Raytheon seeks a declaration that we lack jurisdiction over the government’s claim because it is time barred under the Contract Disputes Act (CDA). The relevant provision of that act, 41 U.S.C. § 7103(a)(4)(A), requires a contract claim to be “submitted within 6 years after the accrual of the claim.” Because we lack jurisdiction over an appeal from an untimely claim, we have deemed Raytheon’s motion to be for dismissal of the appeal for lack of jurisdiction (Bd. corr. ltr. dtd. 5 September 2012). *The Boeing Co.*, ASBCA No. 57490, 12-1 BCA ¶ 34,916 at 171,672. In deciding the motion we have presumed undisputed facts to be true. However, disputed jurisdictional facts have been subjected to our fact-finding based upon a review of the record. *Inchcape Shipping Servs.*, ASBCA No. 57152 *et al.*, 10-2 BCA ¶ 34,578 at 170,475-76.

The government contends that, under *Lockheed Martin Corp.*, ASBCA No. 57525, 12-1 BCA ¶ 35,017, Raytheon bears the burden of proving the government’s claim is untimely. By advocating in response to Raytheon’s motion that its decision is valid the government is effectively the proponent of our jurisdiction and therefore bears the burden of proving it under these circumstances. *See Cedars-Sinai Medical Ctr. v. Watkins*, 11

F.3d 1573, 1584 (Fed. Cir. 1993) (holding that, once challenged, the proponent of jurisdiction bears the burden of proving facts sufficient to support jurisdiction); *Aries Marine Corp.*, ASBCA No. 37826, 90-1 BCA ¶ 22,484 at 112,847. *Lockheed Martin* did not abrogate this longstanding principle.

Given the CDA's six year limitation, to be timely the government's 29 November 2011 claim could not have accrued before 29 November 2005. A claim accrues under the CDA when "all events, that fix the alleged liability...and permit assertion of the claim, were known or should have been known." Some injury must have occurred; however "monetary damages need not have been incurred." FAR 33.201; *see Boeing*, 12-1 BCA ¶ 34,916 at 171,672. The events fixing liability should have been known when they occurred unless they can be reasonably found to have been either concealed or "inherently unknowable" at that time. *See Holmes v. United States*, 657 F.3d 1303, 1317-20 (Fed. Cir. 2011) (holding that the "knew or should have known" test is interchangeable with the "concealed or inherently unknowable" test, which includes a reasonableness component); *Ingrum v. United States*, 560 F.3d 1311, 1314-15 n.1 (Fed. Cir. 2009); *Young v. United States*, 529 F.3d 1380, 1384 (Fed. Cir. 2008); *Martinez v. United States*, 333 F.3d 1295, 1319 (Fed. Cir. 2003) (en banc). An example of an inherently unknowable event would be the delivery of the wrong fruit tree, where the wrong is not knowable until the tree bears fruit later. *Japanese War Notes Claimants Ass'n of the Philippines, Inc. v. United States*, 373 F.2d 356, 359 (Ct. Cl. 1967).

We examine the legal basis of the claim to determine when the alleged liability would have been fixed. *Gray Personnel, Inc.*, ASBCA No. 54652, 06-2 BCA ¶ 33,378 at 165,475. According to the claim, Raytheon's liability arises from its 20 July 1999 ReMan 1 price proposal's application of [redacted] overhead rates, in other words full burden, to its Lockheed Martin subcontract material costs in contravention of its revised disclosure statement's expansion of special burden, effective 1 January 1999. It also alleges these events caused injury to the government. (SOF ¶ 6) Thus, the claim makes clear that the events fixing the government's alleged liability occurred in 1999, long before 29 November 2005.

Raytheon also disclosed sufficient facts to the government in 1999 to conclude it should have known about the claim at that time. On 18 June, Raytheon notified the DACO of its proposal to expand the application of special burden to a broader group of major subcontracts and that it would be retroactively effective as of 1 January (SOF ¶ 1). On 20 July, Raytheon submitted the ReMan 1 price proposal that, according to DCMA's price analyst, showed that the Lockheed Martin subcontract was not priced as a major subcontract and therefore not receiving special burden (SOF ¶¶ 2-3). Accordingly, to the extent the government now claims that the expanded special burden was effective on 1 January 1999, and that the Lockheed Martin subcontract should have received special burden under that expanded definition, Raytheon gave it all of the information necessary to know of that claim in 1999.

The government maintains its claim did not accrue in 1999. It says that nothing in the price analyst's 26 July 1999 report shows that, at that time, he recognized the Lockheed Martin subcontract was receiving full burden when it should not have. Even if that is true, it does not demonstrate that the analyst failed to appreciate that fact. Moreover, claim accrual does not turn upon what a party subjectively understood; it objectively turns upon what facts are reasonably knowable. See *United States v. Commodities Export Co.*, 972 F.2d 1266, 1272 (Fed. Cir. 1992) (under 28 U.S.C. § 2416, once the facts making up the essence of the cause of action are reasonably knowable, the statute of limitations is running); *Gray Personnel*, 06-2 BCA ¶ 33,378 at 165,476 (failure to recognize the causes of increased costs did not suspend claim accrual). The price analyst's own 26 August 2005 reconsideration of Raytheon's 1999 price proposal concedes that the proposal disclosed that the Lockheed Martin subcontract was receiving full burden (SOF ¶ 3). As noted, the test for finding that events fixing liability should not have been known turns on whether they were concealed or "inherently unknowable." Here, Raytheon's alleged CAS noncompliance was perfectly knowable in 1999 because Raytheon disclosed the underlying facts about its subcontract burdens to the government at that time. At the latest, it was known by 26 August 2005, when the price analyst acknowledged those facts.

The government also contends that, even assuming the price analyst was on notice of the subcontract burdens in 1999, only the DACO's personal knowledge is relevant to determining when a claim has accrued given that only the DACO may issue a final decision asserting a government claim. Because only the price analyst, and not the DACO, knew in 1999 how Raytheon had burdened the Lockheed Martin subcontract, the government maintains the claim did not accrue then. The government fails to cite any authority supporting the proposition that claim accrual is based only upon the knowledge of the individual clothed by a contracting party with authority to assert the claim. If that were the case, then both contractors and the government could suspend accrual by internally compartmentalizing relevant information and insulating senior decision makers from it for as long as they choose. Nothing in FAR 33.201, which commences accrual of a claim when the events fixing alleged liability "were known or should have been known" by a party, contemplates permitting such gamesmanship. Claim accrual is not suspended simply because the government may have been delayed appreciating the implications of what Raytheon had disclosed, or in funneling to the individual authorized to act upon the claim all of the information relevant to it. See *Gray Personnel*, 06-2 BCA ¶ 33,378 at 165,476; *Raytheon Co. v. United States*, 104 Fed. Cl. 327, 330-33, *recon. denied*, 105 Fed. Cl. 351 (2012).

Similarly, the government relies upon the component of FAR 33.201 conditioning the accrual of a claim upon the occurrence of some injury to suggest that, as late as the price analyst's 26 August 2005 report confirming the Lockheed Martin contract was receiving full burden, it should not have known that Raytheon's alleged CAS

noncompliance had caused it injury. The government contends its claim only accrued when DCAA's 22 September 2006 audit report calculated that Raytheon's alleged CAS noncompliance had a \$9.2 million price impact upon the ReMan 1 contract. It also suggests that subsequent discussions by the parties about the claim's merit and its degree of financial impact may have also suspended its accrual.

Accrual of a contracting party's claim is not suspended until it performs an audit or other financial analysis to determine the amount of its damages. "[A] single party [cannot] postpone unilaterally and indefinitely the running of the statute of limitations." *United States v. Commodities Export Co.*, 972 F.2d at 1271; *Raytheon*, 104 Fed. Cl. at 330-33. Damages need not have actually been calculated for a claim to accrue. See *CACI Int'l, Inc.*, ASBCA No. 57559, 12-1 BCA ¶ 35,027 at 172,138-39. The fact of an injury must simply be knowable.

Here, the government's own admissions demonstrate that it was on notice of injury at least as early as 26 August 2005. DCAA's 2006 draft condition statement asserting Raytheon's alleged CAS noncompliance, along with its subsequent audit report, relied upon Raytheon's 20 July 1999 price proposal, the price analyst's 26 August 2005 report, and other materials generated in 1999, to conclude that the government had been financially damaged by Raytheon's alleged noncompliance (SOF ¶ 4). The fact the government waited until 2006 to declare in an audit report that these earlier materials provided that notice is irrelevant. Delay by a contracting party assessing the information available to it does not suspend the accrual of its claim. *Raytheon*, 104 Fed. Cl. at 330-33. These facts distinguish this appeal from *Lockheed Martin Corp.*, where we held the government was not notified of overbillings until a DCAA draft audit discovered them. 12-1 BCA ¶ 35,017 at 172,065-66. Additionally, in the absence of misconduct by Raytheon rising to the level of trickery, once the claim accrued and the limitations period began to run, subsequent communications between Raytheon and the government about the claim's merits and magnitude did nothing to toll it. *Boeing*, 12-1 BCA ¶ 34,916 at 171,673-74. There is no evidence of trickery here.

CONCLUSION

The events fixing any liability here occurred in 1999, and Raytheon placed the government on notice of them at that time. At the latest, the government had access to all of the information to know about its claim by 26 August 2005. Accordingly, its 29 November 2011 claim was untimely and is therefore invalid. The appeal is dismissed for lack of jurisdiction.

Dated: 28 January 2013



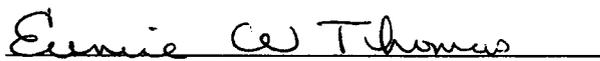
MARK A. MELNICK
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



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

I concur



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. 58011, Appeal of Raytheon Missile Systems, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals