ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeal of -- | ) | |
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| Sparton DeLeon Springs, LLC | ) | ASBCA No. 60416 |
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| Under Contract Nos. N00164-01-D-0027 | ) | |
| N00167-04-D-0024 | ) | |

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OPINION BY ADMINISTRATIVE JUDGE MCILMAIL
ON APPELLANT'S MOTION FOR JUDGMENT ON THE PLEADINGS, AND
ALTERNATIVELY FOR SUMMARY JUDGMENT

Appellant, Sparton DeLeon Springs, LLC (Sparton), timely appeals from a 26 October 2015 contracting officer's final decision demanding the reimbursement of an alleged overpayment of certain direct costs. Appellant requests judgment on the pleadings, or summary judgment that the government's claim is time-barred. The appeal is governed by the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

The following is not in dispute. In 2001, Sparton's predecessor, Sparton Electronics Florida, Inc. (SEFI), and the government entered into Contract No. N00164-01-D-0027 (Contract 27) for research and development related to sonobuoys (answer at 2, ¶ 4). By 2005, the government had issued Delivery Orders 4, 8, 14, 15, and 16 to Contract 27 (*id.* at 2-3, ¶¶ 5-9). In 2004, SEFI and the government entered into Contract No. N00167-04-D-0024 (Contract 24) for engineering and technical services related to repair and maintenance of submarine acoustics (*id.* at 3 ¶ 10). By 2006, the government had issued Delivery Orders 2 and 3 to Contract 24 (*id.* at 4, ¶¶ 11-12).

Contract 27 incorporated by reference Federal Acquisition Regulation (FAR) clause 52.216-7, ALLOWABLE COST AND PAYMENT (MAR 2000); Contract 24 incorporated by reference

the December 2002 version of the same clause (answer at 4, ¶ 13). Both versions provide the following:

> (g) Audit. At any time or times before final payment, the Contracting Officer may have the Contractor's invoices or vouchers and statements of cost audited. Any payment may be—
>
> (1) Reduced by amounts found by the Contracting Officer not to constitute allowable costs; or
>
> (2) Adjusted for prior overpayments or underpayments.

By 10 January 2007, the government had paid interim vouchers that SEFI had submitted that included breakdowns of certain intra-company "Jackson Engineering Support Costs" (Jackson costs) that SEFI allegedly incurred at its Jackson, Michigan plant, and that are the subject of this appeal (gov't resp. at 4, ¶ 1, at 6, ¶ 6, at 8, ¶¶ 12-13). On 5 March 2007, Sparton submitted to the government its final indirect cost rate proposal for its fiscal year 2006 (FY 06); on 29 January 2008, Sparton submitted its final indirect cost rate proposal for its fiscal year 2007 (FY 07) (*id.* at 8-9, ¶ 14). Both proposals included a "Schedule I," which the government also calls a "Cumulative Allowable Cost Worksheet—('CACWS')" (*id.* at 9, ¶ 15, at 11, ¶ 20, at 14-15, ¶ 27). In neither proposal (more specifically, in neither Schedule I) did Sparton include the Jackson costs (*id.* at 9, ¶ 15).

During subsequent Defense Contract Audit Agency (DCAA) audits of the indirect cost rate proposals, Sparton submitted revisions of those proposals (gov't resp. at 10, ¶ 17). Sparton submitted the revision of the FY 06 proposal on 25 August 2011, and the revision of the FY 07 proposal on 30 July 2013 (answer at 4-5, ¶¶ 14-15). The revised proposals did not include the Jackson costs (gov't resp. at 10, ¶ 17). In September 2013, DCAA issued audit reports on those indirect cost rate proposals, noting that the proposals did not include the Jackson costs (answer at 5-6, ¶¶ 16-17).

The parties eventually executed final indirect cost rate agreements for FY 06 and FY 07, and Sparton provided updated Schedule I forms reflecting the agreed-upon rates (gov't resp. at 10-11, ¶¶ 19-20). On 2 April 2014, Sparton provided an updated Schedule I for FY 06; on 23 May 2014, it provided an updated Schedule I for FY 07 (answer at 6, ¶ 19; gov't resp. at 15, ¶ 30). The updated Schedule I forms did not include the Jackson costs (*see* gov't resp. at 11, ¶¶ 20-21).

On 12 August 2014, the contracting officer requested that Sparton submit final vouchers and supporting documentation for Delivery Orders 2 and 3 to contract 24, and 4, 8, 14, 15, and 16 to contract 27 (answer at 6-7, ¶ 20; gov't resp. at 15, ¶ 31).[1] Sparton

[1] In its complaint, the government alleges that the contracting officer requested the final vouchers on 12 August 2016 (compl. at 5, ¶ 20). Sparton answered that the request

responded by submitting the final vouchers, and "other documents" (answer at 6-7, ¶ 20), on a date not identified by either party. The final vouchers included the previously invoiced and paid Jackson costs (*see* gov't resp. at 12, ¶ 22; answer at 7, ¶ 21).

On 26 October 2015, the contracting officer issued a final decision demanding that Sparton repay $577,415.36, and stating:

> On August 26, 2014, after agreeing on final indirect rate costs, I requested final vouchers and supporting documentation, including the required Cumulative Allowable Cost Worksheet.
>
> *After reviewing the final voucher submission, I noticed certain costs that were not included in SEFI's Incurred Cost proposals for CFY 2006 or CFY 2007.* These additional costs were supposedly payments made to your former Jackson, Michigan facility that closed in 2006. I contacted your company for information that would establish that these additional costs are allowable. To date, despite repeated requests, your company has not provided information that establishes these additional costs were actually incurred or paid by SEFI. You have provided only a spreadsheet showing that the Government paid SEFI. *There is no proof whatever that SEFI was billed for work, or more importantly, that SEFI paid these costs in connection with any Government contract.* [Emphasis added]

(Gov't resp. at 13-14, ¶ 25 (citing R4, tab 36 at 954))[2] Sparton timely appealed on 14 January 2016, and the government filed a complaint alleging that Sparton had been overpaid because the Jackson costs "were insufficiently supported" (compl. at 6, ¶ 22; gov't resp. at 14, ¶ 26).

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was made on 12 August 2014 (answer at 7, ¶ 20). In its response to the motion for summary judgment, the government states that the request was made on 12 April 2014 (gov't resp. at 24); later in the same document, it states that the request was made on 12 August 2014 (gov't resp. at 15, ¶ 31), consistent with Sparton's answer to the complaint (answer at 6-7, ¶ 20).

[2] In its Statement of Undisputed Material Facts, Sparton states that the contracting officer issued the final decision "[m]ore than a year later," without providing the date of issuance or any reference from which the year of issuance may be deduced (app. mot. 8, ¶ 25). However, in support of that assertion, Sparton cites page 954 of tab 36 of the Rule 4 file; that page bears the date 26 October 2015. The government does not dispute the assertion, which we take as agreement that on 26 October 2015, the contracting officer issued the final decision claiming the overpayment.

## DECISION ON THE MOTION FOR SUMMARY JUDGMENT

Summary judgment shall be granted if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Great America Construction Co.*, ASBCA Nos. 60437, 60501, 16-1 BCA ¶ 36,460 at 177,677. Under the CDA, the government must bring a contract claim against a contractor within six years after the accrual of the claim. *See* 41 U.S.C. § 7103(a)(4)(A). A claim accrues on "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." FAR 33.201. A movant has the burden to prove that a claim is time-barred. *Supreme Foodservice GmbH*, ASBCA No. 57884 *et al.*, 16-1 BCA ¶ 36,426 at 177,582.

There is no dispute that the contracting officer claimed the $577,415.36 overpayment on 26 October 2015; consequently, to be timely, that claim must not have accrued earlier than 26 October 2009. The government contends that it was not put on notice of its overpayment claim until Sparton submitted its final vouchers in response to the contracting officer's 2014 request, because although the final vouchers included the already-paid Jackson costs, those costs were not included in the updated Schedule I forms of Sparton's revised final indirect rate cost proposals (*see* gov't resp. at 23-24). But there is no genuine dispute that the government knew or should have known of that discrepancy no later than 29 January 2008.

First, there is no genuine dispute that the government knew or should have known of the Jackson costs as early as 10 January 2007, by when it paid those costs pursuant to the interim vouchers that, even according to the government's brief, included information related to the Jackson costs (gov't resp. at 24). Second, there is no genuine dispute that the government knew or should have known by 29 January 2008 that Sparton had not included the Jackson costs in its indirect cost rate proposals, because that is the date by when Sparton first submitted the indirect cost rate proposals, each of which included a Schedule I that did not include the Jackson costs. There is no assertion that the revisions to the indirect cost rate proposals, the updates to the Schedule I forms, or the submission of the final vouchers change that basic picture. Consequently, there is no genuine dispute that the government's claim accrued no later than 29 January 2008, when all events that fix the alleged liability of Sparton in this case, and permit assertion of the government's overpayment claim, were known or should have been known by the government. Because the overpayment claim accrued before 26 October 2009, it is untimely, and barred.

Looked at another way, the government's overpayment claim is based upon the contention that Jackson costs were "insufficiently supported" (*see* compl. at 6, ¶ 22), and that, according to the contracting officer, there is no proof that Sparton's predecessor paid those costs in connection with any government contract. However, if that is true, it was no less so on 10 January 2007, by when the government paid those costs pursuant to the interim vouchers. Again, there is no dispute that the interim vouchers included information related to the Jackson costs (gov't resp. at 24); as Sparton contends (app. mot. at 15; gov't reply at 3,

8), any insufficiency of support for those costs would have been as evident from the interim vouchers as from the final vouchers provided in response to the contracting officer's 2014 request. In other words, if (as the contracting officer found) there was "no proof whatever" for the costs in 2014 and 2015, there cannot have been any less support for the same costs in 2007. At least, the government provides no indication otherwise. Indeed, the government says that the interim vouchers "included accounting information related to the cost of labor provided by its Jackson, Michigan facility," but that "[t]his information did not contain the basis for the reported labor costs reflected in Sparton's accounting system, such as certified time cards" (gov't resp. at 24). If it is the case that the interim vouchers lacked support such as certified time cards, the government knew or should have known that no later than 10 January 2007, by when it paid those interim vouchers. Consequently, even from the perspective of whether the Jackson costs are "insufficiently supported," there is no genuine issue that the government knew or should have known of its overpayment claim by 10 January 2007, again, more than six years before the 2015 assertion of the claim. For all these reasons, Sparton is entitled to judgment as a matter of law.

Without expressly arguing that FAR clause 52.216-7(g) trumps the CDA's six-year statute of limitations, the government invokes that clause,[3] contending that it "allows the contracting officer to adjust any prior overpayments" (gov't opp. at 24-25). The government continues that when the government paid Sparton's interim vouchers, it had not yet audited Sparton's costs, and that:

> Clearly the Government did not know, nor should it have known, of its claim for the lack of supporting documentation for these costs at the time Sparton first submitted these vouchers. If that were the case, the allowable cost and payment clause giving the Government the right to audit a contractor's costs prior to final payment would be superfluous.

(*id.* at 25)

If the government means that FAR clause 52.216-7(g) provides more than six years after accrual to assert an overpayment claim as long as final payment has not been made, we are not persuaded. Of course, the CDA's six-year statute of limitations is no longer jurisdictional. *See Combat Support Associates*, ASBCA No. 58945, 15-1 BCA ¶ 35,923 at 175,590. Because a party may waive an affirmative defense, 5 C. Wright & A. Miller, Federal Practice and Procedure § 1278 at 644-45 (3d ed. 2004), the six-year statute of limitations does not bar us from entertaining a claim that is asserted after the expiration of the limitations period where a non-claimant does not raise the statute of limitations as an affirmative defense. In addition, parties to a government contract may voluntarily waive certain rights, even certain statutory rights. *See Minesen Co. v. McHugh*, 671 F.3d 1332, 1339-40 (Fed. Cir. 2012) (citing *Burnside-Ott Aviation Training Center v. Dalton*, 107 F.3d

[3] The government miscites the clause as FAR 31.216-7(g) (gov't opp. at 24).

854 (Fed. Cir. 1997)). However, we are not persuaded that FAR clause 52.216-7(g) limits the applicability or availability of the CDA's six-year statute of limitations in appeals from government overpayment claims; that clause does not even address the statute of limitations. *Cf. Minesen*, 671 F.3d at 1343 (where contract provided that "[d]ecisions of the Armed Services Board of Contract Appeals are final and not subject to further appeal," government contractor waived CDA right to court of appeals reviews). And although the government says that when it paid the interim vouchers it had not yet audited them (gov't resp. at 25), delay by a contracting party assessing the information available to it does not suspend the accrual of its claim. *Raytheon Missile Systems*, ASBCA No. 58011, 13 BCA ¶ 35,241 at 173,018. Once a party is on notice that it has a potential claim, the statute of limitations starts to run. *See Kellogg Brown & Root Services, Inc.*, ASBCA No. 58175, 15-1 BCA ¶ 35,988 at 175,824.

The government also says that *Public Warehousing Company, K.S.C.*, ASBCA No. 59020, 16-1 BCA ¶ 36,366, precludes summary judgment (gov't resp. at 26-27). We disagree. There, we denied summary judgment on the government's affirmative defense that the CDA's six-year statute of limitations barred an appellant's claim for interest penalties pursuant to the Prompt Payment Act, 31 U.S.C. §§ 3901-3907, because the government had not introduced "invoice-specific facts"; that is, the government had "fail[ed] to establish the facts regarding the date of the specific invoices for which it seeks summary judgment, the amount of such invoices, or the date such invoices were paid, precluding an assessment of when the government's alleged liability with regard to any particular invoice was fixed." 16-1 BCA ¶ 36,366 at 177,263, 177,271. Here, however, it is undisputed that: (1) Sparton submitted vouchers for costs that allegedly lacked support for those costs; (2) the government paid those costs no later than 10 January 2007; (3) by 29 January 2008, Sparton submitted Schedule I forms that do not include those costs; and (4) the government asserted its overpayment claim for the reimbursement of those costs on 26 October 2015. That demonstrates that there is no genuine issue that the government knew or should have known of its overpayment claim no later than 29 January 2008, which is more than seven years prior to the assertion of that claim on 26 October 2015. Summary judgment, therefore, is not precluded.

The government also contends that summary judgment is inappropriate because there has been no discovery in this appeal, and so "the Government has not had an opportunity to determine whether [the] interim vouchers contained the necessary supporting documentation" (gov't resp. at 26). We disagree that summary judgment is inappropriate here. Whether the interim vouchers contained the necessary supporting documentation is something that the government should be able to substantiate on its own, without having to conduct discovery; at least, the government provides no indication why that is not the case.[4] *Cf. Avant Assessment,*

[4] In any event, if the interim vouchers did not contain the necessary supporting documentation to support the payment of the Jackson costs, that would presumably only confirm that the overpayment claim accrued no later than the payment of those

*LLC*, ASBCA No. 58866, 16-1 BCA ¶ 36,511 (government should have been able to substantiate, without discovery, claim that contractor failed to meet delivery schedule).

## CONCLUSION

The motion for summary judgment is granted. Accordingly, the motion for judgment on the pleadings is denied as moot, and the appeal is sustained.

Dated: 28 December 2016

TIMOTHY P. MCILMAIL
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

RICHARD SHACKLEFORD
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. 60416, Appeal of Sparton DeLeon Springs, LLC, rendered in conformance with the Board's Charter.

Dated:

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

costs; if they did contain the necessary supporting documentation, presumably that would be fatal to the overpayment claim on its merits.