ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -	)	
	)	
Doubleshot, Inc.	)	ASBCA No. 61691
	)	
Under Contract No. N6835-06-C-0416 *et al.*	)	

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OPINION BY ADMINISTRATIVE JUDGE O'CONNELL

This appeal involves a government claim for the return of an alleged overpayment of $804,979. Appellant, Doubleshot, Inc. (Doubleshot) has moved for summary judgment, contending that the claim is barred by the statute of limitations. We deny the motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

This appeal arises out of four contracts administered by the Defense Contract Management Agency (DCMA):

Naval Air Warfare Center Contract No. N68335-06-C-0416 (the "416" contract) dated September 14, 2006 (R4, tab 1);

U.S. Army Tank-automotive and Armaments Command (TACOM) Contract No. W56HZV-07-C-0295 (295) dated March 22, 2007 (R4, tab 2);

Office of Naval Research Contract No. N00014-07-C-0386 (386) dated June 13, 2007 (R4, tab 5); and

Office of Naval Research Contract No. N00014-08-C-0497 (497) dated September 11, 2008 (R4, tab 11).

All of the contracts were at least in part cost-plus-fixed-fee, meaning that they listed an amount for estimated costs plus a fixed fee, and incorporated by reference Federal Acquisition Regulation (FAR) clause 52.216-7, ALLOWABLE COST AND PAYMENT (DEC 2002) (R4, tab 1 at 3, 18; tab 2 at 6, 16; tab 5 at 3, 7, 12; tab 11 at 3, 8, 13).

FAR 52.216-7 contains a number of provisions that establish a process for contractor billings based on interim rates with the subsequent establishment of final rates:

> (a) Invoicing.
>
> (1) The Government will make payments to the Contractor when requested as work progresses, but (except for small business concerns) not more often than once every 2 weeks. . . .
>
> . . . .
>
> (d) Final indirect cost rates.
>
> (1) Final annual indirect cost rates and the appropriate bases shall be established in accordance with subpart 42.7 of the Federal Acquisition Regulation (FAR) . . .
>
> (2)(i) The Contractor shall submit an adequate final indirect cost rate proposal to the Contracting Officer . . . and auditor within the 6–month period following the expiration of each of its fiscal years.
>
> . . . .
>
> (e) Billing rates. Until final annual indirect cost rates are established for any period, the Government shall reimburse the Contractor at billing rates established by the Contracting Officer . . . subject to adjustment when the final rates are established.
>
> . . . .
>
> (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.

The contracts also contained FAR 52.215-2, AUDIT AND RECORDS - NEGOTIATION (JUN 1999), or alternate III of this clause (R4, tab 1 at 18, tab 2 at 16, tab 5 at 11, tab 11 at 12). This clause provides:

> (b) Examination of costs. If this is a cost-reimbursement . . . contract . . . the Contractor shall maintain and the Contracting Officer, or an authorized representative of the Contracting Officer, shall have the right to examine and audit all records and other evidence sufficient to reflect properly all costs claimed to have been incurred or anticipated to be incurred directly or indirectly in performance of this contract.

This dispute concerns Doubleshot fiscal years (FY) 2009 and 2010, which ended on February 28 of each of those years (R4, tab 28 at 25, tab 29 at 31, tab 35 at 2). Thus, under FAR 52.216-7(d)(2)(i), Doubleshot's final incurred cost proposals were due by August 28, 2009 and 2010, respectively.

The contracting officer granted Doubleshot two extensions to submit the incurred cost proposals, the latter of which was in April 2011. While the date of the final deadline is not clear, the contracting officer stated in a May 29, 2012, email to Doubleshot that they were past due. (App. mot., ex. 6)

On April 29, 2011, the Defense Contract Audit Agency (DCAA) issued a "Flash Report on Accounting System Deficiencies Identified" based on a January 28, 2010 site visit at Doubleshot's office (app. mot., ex. 1 at 4). The report identified what can only be characterized as major problems with Doubleshot's recordkeeping, which it does not dispute (app. reply at 2). Among other things, DCAA observed that Doubleshot did not maintain a general ledger and that its "accounting system is non-existent" (app. mot., ex. 1 at 4).

The DCMA contracting officer wrote to a Naval Air Warfare Center contracting officer several times in July 2011 seeking to return the funds remaining on Contract No. N68335-06-C-0416. Among other things, he stated:

> DCAA has concluded they will not be approving any interim voucher submitted for these funds as Doubleshot does not have an approved accounting systems [sic], they are to-date unable to complete and submit a certified cost claim for any year, and there is a genuine question as to whether they will ever be able to submit a sufficient certified cost claim.

(App. mot., ex. 3 at 1)

By letter dated December 28, 2011, the DCMA contracting officer provided Doubleshot a copy of the DCAA flash report, and stated:

> [Y]our government cost accounting system is disapproved. Doubleshot's accounting system is not currently adequate for determining costs applicable to its contracts, and the system is not suitable for award of government cost-type contracts.

(R4, tab 25 at 1)

On May 29, 2012, the contracting officer issued unilateral modifications deobligating the remaining funds on the 416 and the 295 contracts (R4, tab 27; app. mot., ex. 7). The modification for the 295 contract stated: "[t]he contractor's accounting system has been disapproved, and there is no expectation the contractor will submit final incurred cost proposals for any of the years in which performance occurred" (R4, tab 27 at 2).

On that same date, the contracting officer wrote by email directing Doubleshot to submit its incurred cost proposals immediately. He further stated that his next step would be:

> [A]n evaluation of what the "worst-case scenario" will be for the costs incurred on Doubleshot contracts. Once that opinion is developed I will settle the contracts without an audit and require Doubleshot settle up to the price I have set. Doubleshot's recourse at that point will be utilization of the disputes process. In many cases, unilateral settlement of R&D type contracts has resulted in a 20% decrement across the board.

(App. mot., ex. 6 at 1) Despite this email, the contracting officer did not at that time follow through on his threat to unilaterally set rates based on a worst-case scenario.

While the record is silent as to what happened over the next 15 months, it appears Doubleshot worked to meet its contractual commitments. On August 29, 2013, Doubleshot submitted final incurred cost proposals* that DCAA deemed adequate for audit the following day. (Gov't opp'n, ex. G-1, decl. of Sheila Powell-Faulkner at 1; R4, tabs 28-29)

DCAA thereafter began an audit. According to undisputed testimony by DCAA auditor Wendy M. Tanaka, Doubleshot provided DCAA general ledgers for FY 2009 and 2010 for the first time on December 29, 2015 (gov't opp'n, ex. G-2, decl. of Wendy M. Tanaka ¶ 15).

On June 12, 2017, DCAA issued an audit report questioning various direct and indirect costs (R4, tab 30).

The contracting officer then used the audit report to issue her final decision on June 8, 2018. She concluded that Doubleshot had been overpaid direct and indirect costs on contract Nos. 416, 386, and 497, and had been underpaid on No. 295. She concluded that Doubleshot owed the government a net of $804,979. (R4, tab 35 at 5; gov't opp'n, ex. G-1, decl. of Powell-Faulkner at 2)

None of the invoices or vouchers for FY 2009 and 2010 are in the record. In their briefs, neither party goes through the discrete costs questioned by DCAA or the contracting officer and ties those costs to documents in the record that demonstrate the date on which the government knew, or should have known, that this cost was not supported.

Doubleshot filed a timely appeal on July 12, 2018.

DECISION

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). "[A]ll evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable factual inferences should be drawn in favor of the nonmoving party." *Dairyland Power Co-op. v. United States*, 16 F.3d 1197, 1202 (Fed. Cir. 1994) (citing *Anderson*, 477 U.S. at 255).

The statute of limitations is an affirmative defense for which the moving party bears the burden of proof. *Sikorsky Aircraft Corp. v. United States*, 773 F.3d 1315,

*Doubleshot submitted minor revisions to the proposals on September 25, 2013 (gov't opp'n, ex. G-1, decl. of Sheila Powell-Faulkner at 1; R4, tabs 28-29).

1320–22 (Fed. Cir. 2014); *Shell Oil Co. v. United States*, 751 F.3d 1282, 1297 (Fed. Cir. 2014). Pursuant to the Contract Disputes Act (CDA), "[e]ach claim by a contractor against the Federal Government relating to a contract and each claim by the Federal Government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim." 41 U.S.C. § 7103(a)(4)(A). The FAR provides that "[a]ccrual 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." FAR 33.201.

The question for the pending motion is whether the government's claim accrued within six years of the June 8, 2018, final decision, or June 8, 2012. The Federal Circuit has held (in the context of a contractor claim) that a cause of action "accrues 'when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action.'" *FloorPro, Inc. v. United States*, 680 F.3d 1377, 1381 (Fed. Cir. 2012) (quoting *Goodrich v. United States*, 434 F.3d 1329, 1333 (Fed. Cir. 2006)). "The issue of 'whether the pertinent events have occurred is determined under an objective standard; a plaintiff does not have to possess actual knowledge of all the relevant facts in order for the cause of action to accrue.'" *Id.* (quoting *Fallini v. United States*, 56 F.3d 1378, 1380 (Fed. Cir. 1995)).

Flexibly priced contracts such as those at issue have required a fact specific inquiry to determine when the government claim accrued. *DRS Global Enterprise Solutions, Inc.*, ASBCA No. 61368, 18-1 BCA ¶ 37,131 at 180,697. In some appeals, we have held that the claim accrued on the submission of an invoice or voucher that contained enough information to put the government on notice that the contactor sought an improper payment. *URS Federal Services, Inc.*, ASBCA No. 61227, 19-1 BCA ¶ 37,431 at 181,926; *Sparton DeLeon Springs*, LLC, ASBCA No. 60416, 17-1 BCA ¶ 36,601 at 178,311. We have also held that a claim did not accrue until the contractor submitted its final incurred cost proposal. *Technology Systems, Inc.*, ASBCA No. 59577, 17-1 BCA ¶ 36,631 at 178,389. And we have held that the statute may not begin to run upon submission of the incurred cost proposal if it fails to contain sufficiently detailed information to put the government on notice of the improper costs. *Alion Science and Technology Corp.*, ASBCA No. 58992, 15-1 BCA ¶ 36,168 at 176,490. The focus of our inquiry has been on whether the government had sufficient information to know of the claim; the statute is not suspended while the government performs an audit or if it fails to appreciate the significance of information it has received. *Raytheon Missile Systems*, ASBCA No. 58011, 13 BCA ¶ 35,241 at 173,018.

In its motion, Doubleshot attempts to turn what could be considered an embarrassment – a non-existent accounting system – to its benefit. Basically, it

contends that what DCAA saw at its January 28, 2010, site visit was so bad that the statue began to run on that day (app. mot. at 6). Its briefs raise at least one additional date beyond the statutory period – May 29, 2012. On that date the contracting officer deobligated funds from two of the four contracts and stated that he would proceed without an audit and unilaterally settle the contracts, and that this commonly resulted in a 20% decrement.

We are mindful that we must view the evidence in the light most favorable to the government and must draw all reasonable inferences in its favor. The undisputed evidence shows that on or before May 29, 2012, the government was aware of the inadequacy of appellant's accounting system, but it also shows that Doubleshot was eventually able to produce the ICPs and a general ledger. There is nothing in the record that identifies specific costs that the contracting officer knew, or should have known, had been overpaid as of that date.

While we recognize that the contracting officer raised the possibility of a 20% decrement outside the statutory period, there is no reason to believe that such a decrement would have been much more than a guess in May 2012. The Federal Circuit has held that a party can wait until it knew or should have known enough to formulate a sum certain before submitting its claim. *Kellogg Brown & Root Servs., Inc. v. Murphy*, 823 F.3d 622, 627 (Fed. Cir. 2016).

As described above, the contract required Doubleshot (1) to submit ICPs; and (2) to maintain and make available for audit records "sufficient to reflect properly all costs claimed to have been incurred." The former did not happen until 2013, and the latter arguably did not occur until Doubleshot produced its general ledger in 2015. Thus, all of the events necessary to fix Doubleshot's liability did not happen until after June 8, 2012. *FloorPro*, 680 F.3d at 1381. Doubleshot cannot fail to comply with its contractual duties, while at the same time contending that the statute is running on the government's claim.

The Board holds that the government's claim is not time barred.

CONCLUSION

Doubleshot's motion for summary judgment is denied.

Dated: July 22, 2020

MICHAEL N. O'CONNELL
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

OWEN C. WILSON
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. 61691, Appeal of Doubleshot, Inc., rendered in conformance with the Board's Charter.

Dated: July 23, 2020

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals