ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Pratt & Whitney Rocketdyne, Inc.	)	ASBCA No. 58307
	)	
Under Contract No. NAS8-01140 *et al.*	)	

APPEARANCE FOR THE APPELLANT: Terry L. Albertson, Esq.
Crowell & Moring LLP
Washington DC

APPEARANCES FOR THE GOVERNMENT: E. Michael Chiaparas, Esq.
DCMA Chief Trial Attorney
Charles W. Goeke, Esq.
Senior Trial Attorney
Defense Contract Management Agency
Philadelphia, PA

OPINION BY ADMINISTRATIVE JUDGE SCOTT
ON APPELLANT'S MOTION TO DISMISS WITHOUT PREJUDICE UNDER BOARD RULE 30 OR TO SUSPEND PROCEEDINGS

This dispute principally involves the allowability of indirect environmental remediation costs. Pratt & Whitney Rocketdyne, Inc. (PWR) timely appealed under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109, from the final decision of the Defense Contract Management Agency's (DCMA's) divisional administrative contracting officer (DACO), which determined that 2005 discontinued operations costs, in the amount of $11,474,252, were unallowable. The final decision asserted a government claim for repayment but was modified to withdraw that demand when it was determined that the government had not paid PWR the disputed costs. Subsequent to its appeal, appellant filed a request for equitable adjustment (REA), apparently in the amount of about $40 million, with a National Aeronautics and Space Administration (NASA) procurement CO (PCO). To allow for the ultimate resolution of matters together at the agencies or Board, appellant moves to dismiss the instant appeal without prejudice pursuant to Board Rule 30 or, in the alternative, for a one-year suspension of proceedings. The government opposes the motion. For the reasons stated below, we deny the motion to dismiss but suspend the appeal proceedings until 1 November 2013.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION[1]

SSME Contract and Novation Agreement

Effective 1 January 2002 the George C. Marshall Space Flight Center, NASA, entered into the captioned Contract No. NAS8-01140 with The Boeing Company, Rocketdyne Propulsion and Power, known as the Space Shuttle Main Engine (SSME) contract (R4, tab 1; mot. at 3; gov't resp. at 1). The contract value was about $1 billion (app. reply at 2 n.1).

United Technologies Corporation (UTC) purchased Rocketdyne from The Boeing Company in August 2005 and made Rocketdyne part of the UTC Pratt & Whitney line of business, creating PWR, a wholly-owned subsidiary of UTC. The Boeing Company, PWR and the government executed a novation agreement, effective 2 August 2005, whereby the government recognized PWR as the successor party to Rocketdyne's government contracts listed in the agreement. (Gov't resp., ex. G-1 at first page; mot. at 1) The novation agreement provided:

> (7) [The Boeing Company] and [PWR] agree that the Government is not obligated to pay or reimburse either of them for, or otherwise give effect to, any costs, taxes, or other expenses, or any related increases, directly or indirectly arising out of or resulting from the transfer or this Agreement, other than those that the Government in the absence of this transfer or Agreement would have been obligated to pay or reimburse under the terms of the contracts.

(Gov't resp., ex. G-1 at second page)

Discontinued Operations Costs

According to appellant, since UTC's purchase of Rocketdyne, UTC has allocated to PWR certain discontinued operations costs of UTC's former Chemical Systems Division (CSD) business unit. CSD's principal location had been in San Jose, California. For many years it had developed and produced space propulsion products there, primarily for the government. After a decline in business and an explosion at the site in 2003, UTC and the government agreed that the CSD facility should be closed. Before and since the

---

[1] The government contends that the "basic facts are undisputed" (gov't resp. at 1). Due to the limited record currently before us, for purposes of deciding appellant's motion, when we do not have a document on point, we accept the facts recited by the parties in their motion papers.

closing, California State environmental authorities have directed UTC to remove from the site potentially hazardous substances used during the decades of site operation. Appellant asserts that, pursuant to a 1997 advance agreement, the government had agreed that 80 percent of remediation costs at the CSD site would be allowable and CSD had agreed that it would not seek recovery of the remaining 20 percent. (Mot. at 1-2)

Appellant states that:

> The costs of complying with the California environmental requirements have been substantial and are continuing. Since the closure of the CSD facility, the costs have been charged in accordance with UTC's disclosed and established practices as "discontinued operations" costs. Under those practices, a portion of discontinued operations costs, including the CSD costs, have been allocated to PWR since its acquisition by UTC. There was initially disagreement between UTC and the Government about how the CSD discontinued operations costs should be allocated and about whether they were allowable. Those disagreements were resolved and the costs are currently being charged on new contracts awarded to PWR since the acquisition.

(Mot. at 2; *see also* app. reply at 3)

Contract Modification and CSD Cost Re-Opener Provision

According to appellant, negotiated SSME contract Modification No. 097, signed in July 2007, added new work in the amount of about $1.4 billion. Appellant states that it had sought a new contract for the additional work, due to the significant increase in value and scope, but NASA had preferred to amend the existing contract for administrative reasons. Appellant contends that a new contract would not have been subject to the novation agreement's prohibition against the government's paying increased costs resulting from the UTC acquisition. As it developed, PWR proposed costs for the modification that included CSD discontinued operations costs. At the time, those costs were not included in approved forward pricing rates because allocability and allowability issues on PWR contracts had not been resolved. NASA declined to include the costs in the modification's price. The parties eventually agreed to include in the modification a "re-opener" clause, said in the DACO's final decision to have been effective as of 1 April 2006. (R4, tabs 2, 6 at 2; mot. at 3-4; app. reply at 2 n.1) The clause provides:

H.23 [CSD] COST RE-OPENER

The parties recognize that the Forward Pricing Rate Agreement (FPRA) dated April 5, 2007 does not include cost associated with the shutdown of the [CSD]. Further, the negotiated contract value does not include such costs. Should these costs be deemed allowable and allocable, the parties agree to negotiate an equitable adjustment to the contract when an FPRA has been approved that includes the discontinued operations costs. The negotiation of this item shall be excluded from any limitations in the "Contract Changes" clause of this contract and the number of labor hours shall remain as originally negotiated.

(Gov't resp., ex. G-2)

DACO's Decisions

On 8 June 2012 DACO Safwat K. El Masry of DCMA issued a final decision and demand for payment to PWR under the SSME contract and all other affected contracts. The SSME contract is the one mainly affected by the decision. The decision related to what the DACO described as unallowable legacy CSD costs claimed by PWR in its calendar year (CY) 2005 home office overhead cost proposal. The DACO determined that $10,092,330 in CSD discontinued operations costs subject to the 2 August 2005 novation agreement, the majority of which were environmental costs, and $1,381,922 in CSD discontinued operations costs allocated to contracts that were not subject to the agreement, were not allowable, for various reasons. He concluded that the re-opener clause did not apply by its terms, because no determination of allowability and allocability had been made, and that the clause did not apply to fiscal year (FY) 2005 overhead costs in any event.[2] The DACO declared that PWR had been overpaid pursuant to interim billing rates and was indebted to the government in the amount of $11,474,252. (R4, tab 6) PWR asserted, and DCAA verified, that PWR had not been paid the $11,474,252 amount demanded in the DACO's final decision and, by letter to PWR dated 31 August 2012, the DACO rescinded only the portion of his final decision that had demanded repayment (R4, tab 7). PWR timely appealed to the Board on 5 September 2012.

Appellant contends that the DACO issued his final decision not because the parties were failing to progress in their routine negotiation of FY 2005 indirect costs, but due to DCMA's CDA statute of limitation concerns about advancing the government's

[2] The DACO's initial decision refers both to CY 2005 and FY 2005 costs; his modified decision refers to CY 2005 costs; and appellant refers to FY 2005 costs.

disallowance contentions. Appellant adds that the decision and appeal also had the effect of calling to its attention the need to resolve the re-opener issue. (Mot. at 6)

Subsequent Proceedings

On 27 November 2012, pursuant to the re-opener provision added to the contract in July 2007, appellant submitted its REA to NASA's PCO under the SSME contract. Appellant contends that the total price adjustment due under the SSME contract is over $40 million. It asserts that, if the matter has not been resolved by July 2013, it will submit a CDA claim by then to avoid any statute of limitations issues of its own. (Mot. at 4; app. reply at 3 n.2, at 4)

On 30 November 2012 the Board received appellant's motion to dismiss its appeal without prejudice pursuant to Board Rule 30 or, in the alternative, to stay proceedings, preferably for one year. Briefing was complete on 22 January 2013.

DISCUSSION

Board Rule 30 provides:

> The Board may suspend the proceedings by agreement of counsel for settlement discussions, or for good cause shown. In certain cases, appeals docketed before the Board are required to be placed in a suspense status and the Board is unable to proceed with disposition thereof for reasons not within the control of the Board. Where the suspension has continued, or may continue, for an inordinate length of time, the Board may, in its discretion, dismiss such appeals from its docket without prejudice to their restoration when the cause of suspension has been removed. Unless either party or the Board acts within three years to reinstate any appeal dismissed without prejudice, the dismissal shall be deemed to be with prejudice.

As is apparent from the face of the Rule, a Rule 30 dismissal without prejudice or suspension of proceedings is discretionary with the Board. *Texas Engineering Solutions*, ASBCA No. 53669 *et al.*, 04-1 BCA ¶ 32,550; *see also Readiness Management Support, L.C.*, ASBCA No. 55880, 07-2 BCA ¶ 33,719.

Although the DACO's final decision raises several issues, appellant identifies three of particular significance to it. One is whether the terms of the novation agreement, which it describes as prohibiting the recovery on novated contracts of "increased costs"

that result from the novation, limit the allowability of its CSD costs (mot. at 2). Appellant contends that Rocketdyne was receiving an allocation of discontinued operations costs from Boeing prior to the sale to UTC and, because the UTC cost allocation received by PWR does not exceed the Boeing allocation, there are no "increased costs" to disallow (*id.*). Secondly, the parties disagree about the scope of the 1997 advance agreement and the meaning of its term "remediation cost" (mot. at 3). Appellant states that "[n]either of those issues alone would require dismissal of the appeal" (*id.*). The third major issue, upon which appellant largely bases its dismissal motion, concerns its potential entitlement to substantial sums under the re-opener clause.

Appellant further contends in its motion that, because its REA involves over $40 million, it is likely that the PCO will seek an audit, which will require time. Additionally, the parties' disagreement about the meaning of the 1997 advance agreement will potentially affect SSME contract re-opener issues. Appellant urges that a Rule 30 dismissal will promote judicial economy by allowing the parties to attempt to settle their issues, or at least by giving appellant time to bring its potential claim under the re-opener clause before the Board for consideration with the government's cost contentions. In the latter event, the Board would have jurisdiction to assess both the DACO's cost disallowances and whatever decision the PCO might issue on appellant's related cost claim. In the alternative, appellant suggests a one-year suspension of proceedings.

The government opposes appellant's motion and contends that the appeal presents a threshold issue of interpretation of the novation agreement that must be resolved before it can consider appellant's REA. The government states that an adjustment of over $40 million would require an extensive audit and negotiations before an agreement could be reached. It asserts that entering into this process without first resolving the question of the novation agreement's prohibition against increased costs would waste the parties' time and resources, noting, in particular, that the re-opener clause pertains only to allowable costs.

Appellant replies that the meaning and import of the re-opener provision will be key to resolving the parties' dispute and that the authority to decide the clause's meaning allegedly rests with the NASA CO responsible for the SSME contract, not with DCMA's DACO. It asserts that all relevant issues need to be resolved in the same proceeding, with all relevant parties. Appellant now states that resolution of its REA should not be time-consuming because the re-opener language issues are narrow and there is no dispute about the amount of the CSD costs, which have been the subject of considerable scrutiny and DCAA audit (reply at 5 n.4). Appellant expects a denial or deemed denial of its anticipated CDA claim sometime in the fall of 2013.

Upon review of the circumstances as presented to us at this early stage of the appeal, the Board concludes that dismissal is not appropriate. Rule 30's factors

warranting dismissal are not present. However, appellant has shown good cause for a reasonable suspension in the interests of judicial economy and potentially to foster settlement. The government's CSD cost disallowance and appellant's REA concerning CSD costs are closely connected. It makes best sense to resolve the issues together. If the parties do not settle, and appellant's REA and claim are denied, appellant expects that its likely appeal will occur in the fall and that it will be consolidated with the current appeal.

Accordingly, proceedings in this appeal are suspended until 1 November 2013. This does not preclude appellant from moving in the interim, if it has filed its contemplated second appeal, for consolidation of that appeal with the instant appeal. By 1 November 2013, or upon resolution of their disputes, if earlier, the parties are to submit a joint written status report to the Board.

DECISION

Appellant's motion for a dismissal of its appeal without prejudice pursuant to Board Rule 30 is denied. Appellant's alternative motion for a suspension of proceedings is granted to the extent stated.

Dated: 4 March 2013

CHERYL L. SCOTT
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

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. 58307, Appeal of Pratt & Whitney Rocketdyne, Inc., rendered in conformance with the Board's Charter.

Dated:

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