ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Triple Canopy, Inc.	)	ASBCA Nos. 61415, 61416, 61417
	)	61418, 61419, 61420
	)	
Under Contract Nos. H92237-10-0593 *et al.*	)	

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OPINION BY ADMINISTRATIVE JUDGE WOODROW

This case concerns the application of Federal Acquisition Regulation (FAR), 52.229-6, TAXES-FOREIGN FIXED-PRICE CONTRACTS (June 2003), to a series of contracts to provide private security services to military bases in Afghanistan. Triple Canopy, Inc. (Triple Canopy) appeals the contracting officer's (CO) deemed denial of six certified claims, totaling $382,843.24, each derived by fees imposed by the Government of the Islamic Republic of Afghanistan (GIRA) on private security companies (PSC) operating in Afghanistan with more than 500 employees.

The parties elected to proceed without an evidentiary hearing, via Board Rule 11, with each side relying upon the Rule 4 file and its supplements and submitting opening and reply briefs in accordance with an agreed-upon schedule. For the reasons set forth below, we conclude that Triple Canopy's claims are time-barred. We deny the appeals.

FINDINGS OF FACT

I. Afghan Government Regulation of Private Security Contractors

1. In February 2008, GIRA issued a directive entitled "Procedure for Regulating Activities of Private Security Companies in Afghanistan" (PSC Regulation) (R4, tab 33 at 17).

2. Article 7 of the PSC Regulation required all PSCs to observe Afghanistan law, including the PSC Regulation: "A Security Company is obliged to observe the provisions of the valid laws of the country and this procedure." (R4, tab 33 at 22)

3. Article 10 provided: "The number of staff of each Security Company shall not be more the [sic] 500 people, unless the Council of Ministers agrees an increased number of staff" (R4, tab 33 at 23).

4. Although the PSC Regulation limited the number of PSC personnel at 500, the regulation did not provide for imposing fees on PSCs operating in Afghanistan that exceeded the 500 person limit (*see generally* R4, tab 33).

II. The Private Security Contracts

5. On March 15, 2009, the Department of Defense, through the Combined Joint Special Operations Task Force-Afghanistan (CJSOTF-A) Contracting Office (government), awarded to Commercial Security Guard Service (CSGS) Contract No. W91B4M-09-P-0297 for the provision of security services for the Canadian Forward Operating Base, Kabul Military Training Center (the KMTC Contract) (R4, tab 1).

6. In February 2010, Triple Canopy acquired CSGS and the KMTC Contract transferred to Triple Canopy by operation of law (*see* R4, tab 6) (noting "Triple Canopy Limited" as new contractor).

7. The KMTC Contract was for a base period of six months with two additional six month option periods (R4, tab 1 at 28 § 1.2.). The government extended the period of performance for the KMTC Contract through April 30, 2013 (R4, tab 22 at 1).

8. The KMTC Contract provided for Triple Canopy to provide 124 personnel at the time relevant to this appeal (R4, tab 50 at 427).

9. On July 19, 2010, the government awarded to Triple Canopy Contract No. H92237-10-C-0552 for the provision of security services at Forward Operating Base Tinsley (Tinsley Contract) (R4, tab 27 at 1).

10. The Tinsley Contract was for a base period of six months (R4, tab 27 at 3-5). The government extended Triple Canopy's performance of the Tinsley Contract through July 31, 2011 (R4, tab 28 at 1).

11. The Tinsley Contract required Triple Canopy to provide a total of 237 personnel (R4, tab 27 at 3-5).

12. On July 19, 2010, the government awarded to Triple Canopy Contract

No. H92237-10-C-0555 for the provision of security services at Firebase Tycz (Tycz Contract) (R4, tab 34 at 1).

13. The Tycz Contract was for a base period of six months (R4, tab 34 at 3-5). The government extended performance of the Tycz Contract through July 31, 2011 (R4, tab 35 at 1).

14. The Tycz Contract required Triple Canopy to provide a total of 287 personnel (R4, tab 34 at 3-5).

15. On September 17, 2010, the government awarded to Triple Canopy Contract No. H92237-10-C-0593 for the provision of security services for Parmakan Village Stability Operations (Parmakan Contract) (R4, tab 45 at 1).

16. The Parmakan Contract was for a base period of three months (R4, tab 45 at 3-4). The government extended performance of the Parmakan Contract through June 26, 2011 (R4, tab 46 at 1).

17. The Parmakan Contract initially required Triple Canopy to provide a total of 33 personnel (R4, tab 45 at 3).

18. On July 25, 2010, the government awarded to Triple Canopy Contract No. H92237-10-C-0572 for the provision of security services for Maiwand Village Stability Operations (Maiwand Contract) (R4, tab 39 at 1).

19. The Maiwand Contract was for a base period of 6 months (R4, tab 39 at 3-4). The government extended performance of the Maiwand Contract through August 15, 2011 (R4, tab 41 at 1).

20. The Maiwand Contract required Triple Canopy to provide a total of 24 personnel (R4, tab 39 at 3-4).

21. On September 17, 2010, the government awarded to Triple Canopy Contract No. H92237-10-C-0594 for the provision of security services for Sanowghan Village Stability Operations (Sanowghan Contract) (R4, tab 51 at 1).

22. The Sanowghan Contract was for a base period of three months (*see* R4, tab 51 at 3-4). The government extended performance of the contract through June 26, 2011 (*see* R4, tab 52 at 1).

23. The contract initially required Triple Canopy to provide a total of 33 personnel (R4, tab 51 at 3).

24. Each contract incorporated by reference FAR 52.229-6, TAXES-FOREIGN FIXED-PRICE CONTRACTS (June 2003). The clause provides, in relevant part: "The contract price shall be increased by the amount of any after-imposed tax . . . that the Contractor is required to pay or bear." (R4, tab l at 7, tab 27 at 9, tab 34 at 9, tab 39 at 8, tab 45 at 7, tab 51 at 7).

25. Each contract required Triple Canopy to comply with local law (R4, tabs 1, 27, 34, 39, 45, 51).

III. *The Government Requested that Triple Canopy be Exempt from the GIRA's Regulations Limiting PSCs to 500 Personnel*

26. On August 13, 2010, the CO, Captain Brussell C. Bungay, sent a letter to the Afghanistan Ministry of Interior (MOI). In the letter, the CO informed the MOI that "Triple Canopy's manning requirement in support of US Military contracts will exceed 500 personnel." (R4, tabs 33, 38, 44, 50, 54 at 258-59) In the August 13, 2010 letter, the CO stated:

> In order to ensure there is no disruption to Afghanistan's reconstruction process, the CJSOTF-A [] respectfully requests an exemption excepting from the 500 allowable security staff, for the above referenced contracts. It is understood and expected that Triple Canopy will still be required to abide by all other relevant laws and regulations as a licensed Private Security Company.

(Id.)

27. The CO further stated that: "This exemption shall be considered immediately valid by both [] CJSOTF-A and Triple Canopy." (*Id.*)

28. On August 16, 2010, Triple Canopy submitted the letter to the MOI to support Triple Canopy's request that MOI issue a formal exemption in accordance with the government's position (R4, tabs 33, 38, 44, 50, 54 at 264-269).

IV. *Afghanistan* Government Issues Presidential Directive Enforcing PSC Regulation

29. On March 15, 2011, the GIRA issued Presidential Directive No. 7339 (PD7339) (R4, tabs 33, 38, 44, 50, 54 at 396-98).

30. PD7339 required that all PSCs operating in Afghanistan pay a fee of 100,000 AFN ($2,323.42)[*] for each person over the 500 employee cap and 250,000 AFN ($5,808.56) for each foreign national working without an Afghan visa (*id.*).

31. On March 24, 2011, the GIRA implemented PD7339 by assessing fees for each individual Triple Canopy employed over the 500 person limit. Specifically, GIRA assessed a fee for 174 unregistered Afghan citizens and 30 unregistered foreign citizens. The penalty was assessed against Triple Canopy's total number of personnel across all of its contracts. GIRA's fine totaled 37,860,000 AFN ($879,647.95) (R4, tab 33 at 400).

32. The GIRA directed Triple Canopy to pay this assessment within 15 days of the notification (R4, tab 33 at 400).

33. In a March 27, 2011 memorandum to the GIRA, Captain Jeffrey D. Gillespie stated:

> Triple Canopy's manning requirement in support of US Military contracts will exceed 500 personnel. In order to ensure there is no disruption to Afghanistan's reconstruction process, the US Department of Defense respectfully requests an exemption excepting from the 500 allowable security staff, for the above referenced contracts. It is understood and expected that Triple Canopy will still be required to abide by all other relevant laws and regulations as a licensed Private Security Company.

(R4 tabs 33, 38, 44, 50, 54 at 403)

34. The March 27, 2011 memorandum further stated: "This exemption shall be considered immediately valid by both the United States Department of Defense Regional Contracting Centers and Triple Canopy." (*Id.)*

35. On March 28, 2011, Captain David W. Knox of the U.S. Air Force drafted a memorandum to the GIRA with the subject "Triple Canopy." The memorandum stated:

> Triple Canopy's manning requirement in support of US Military contracts will exceed 500 personnel. In order to ensure there is no disruption to Afghanistan's reconstruction process, the US Department of Defense respectfully requests an exemption excepting from the 500 allowable security staff, for the above referenced contracts. It is understood and

[*] Conversion to U.S. currency as of July 2011.

> expected that Triple Canopy will still be required to abide by all other relevant laws and regulations as a licensed Private Security Company.

(R4 tabs 33, 38, 44, 50, 54 at 405-07)

36. The memorandum further stated: "This exemption shall be considered immediately valid by both the United States Department of Defense Regional Contracting Centers and Triple Canopy." (*Id.)*

37. On April 8, 2011, Triple Canopy appealed the assessment to the GIRA (R4, tabs 33, 38, 44, 50, 54 at 409-19).

38. On April 21, 2011, Triple Canopy told the CO that it would submit a request for equitable adjustment (REA) if its appeal was denied (R4, tab 38 at 12).

39. On July 6, 2011, the GIRA sent a revised letter to Triple Canopy reducing the original fees assessed in the GIRA's March 24, 2011 letter (R4, tabs 33, 38, 44, 50, 54 at 421-22).

40. The revised letter restructured the GIRA's March 24, 2011 assessment by applying a fee of 100,000 AFN ($2,323.42) per individual for 174 Afghan nationals and four foreign nationals, and 250,000 AFN ($5,808.56) per individual for three additional foreign nationals. (*Id.*) The total fee assessed against Triple Canopy was 18,550,000 AFN ($430,994.97). (R4, tabs 33, 38, 44, 50, 54 at 427)

41. On July 18 and 20, 2011, Triple Canopy paid the GIRA a total of 18,550,000 AFN ($430,994.96) in satisfaction of the assessed fees (R4, tab 54 at 424-25).

V. Procedural History

42. On June 6, 2017, Triple Canopy submitted its claims under each contract to the CO seeking reimbursement for the amounts allocable to each contract (R4, tabs 26, 33, 38, 44, 50, 54).

43. To date, the government has not issued any contracting officer final decisions (COFDs).

44. Triple Canopy appealed to the Board on November 20, 2017, on the basis of deemed denials.

DECISION

I. Standard of Review

Board Rule 11 permits parties "to waive a hearing and to submit [their] case upon the record." The standards of review and burdens of proof of a motion for summary judgment and a decision on the merits under Board Rule 11 vary substantially. *DG21, LLC,* ASBCA No. 57980, 15 BCA ¶ 36,016 at 175,909 n.1. Unlike a motion for summary judgment, which must be adjudicated on the basis of a set of undisputed facts, pursuant to Board Rule 11, the Board "may make findings of fact on disputed facts." *Grumman Aerospace Corp.,* ASBCA No. 35185, 92-3 BCA ¶ 25,059 at 124,886 n.13.

II. Whether Triple Canopy Presented its Claim Outside of the Six-Year Presentment Period

A contractor must submit its claim to the CO within six years after accrual of that claim. 41 U.S.C. § 7103(a)(4)(A); *Sikorsky Aircraft Corp. v. United States,* 773 F.3d 1315, 1320 (Fed. Cir. 2014). The failure of a party to submit a contract claim within the six-year limitations period is an affirmative defense to that claim. *Alion Science & Tech. Corp.,* ASBCA No. 58992, 15 BCA ¶ 36,168 at 176,488-89.

In this appeal, the government bears the burden of demonstrating that Triple Canopy's claim accrued on or before June 6, 2011, six years prior to the date on which Triple Canopy submitted its claims to the CO. The government contends that Triple Canopy's liability affixed on March 24, 2011, the date on which GIRA assessed its fines. Triple Canopy, in contrast, contends that its claim did not accrue until July 18, 2011, the date on which it paid the assessment.

A. The Legal Basis for Triple Canopy's Claim

The question of "whether and when a CDA claim accrued is determined in accordance with the FAR, the conditions of the contract, and the facts of the particular case." *Kellogg Brown & Root Servs., Inc. v. Murphy,* 823 F.3d 622, 626 (Fed. Cir. 2016). Although the CDA does not define the term "accrual," the FAR defines "accrual of a claim" as "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. To determine when a claim accrued, and the events that fix the alleged liability, we start by examining the legal basis for the particular claim. *Environmental Safety Consultants, Inc.*, ASBCA No. 54615, 07-1 BCA ¶ 33,483 at 165,984; *Gray Personnel, Inc.,* ASBCA No. 54652, 06-02 BCA ¶ 33,378 at 165,475-76; *Raytheon Co., Space & Airborne Systems,* ASBCA No. 57801 *et al.*, 13 BCA ¶ 35,319 at 173,376 ("To evaluate when the claimed liability was fixed, we look to the legal basis of the claim").

Our analysis of the legal basis for Triple Canopy's claim begins with FAR 52.229-6, which is incorporated into each of Triple Canopy's contracts with the government (finding 24). FAR 52.229-6 provides:

> (d) The contract price shall be increased by the amount of any after-imposed tax or of any tax or duty specifically excluded from the contract price by a provision of this contract that the Contractor is required to pay or bear, including any interest or penalty, if the Contractor states in writing that the contract price does not include any contingency for such tax and if liability for such tax, interest, or penalty was not incurred through the Contractor's fault, negligence, or failure to follow instructions of the Contracting Officer or to comply with the provisions of paragraph (i) below.

If we accept Triple Canopy's contention that the GIRA assessment is an "after-imposed tax," then Triple Canopy's legal obligation to pay the assessment arises when Triple Canopy is "required to pay or bear" the assessment. Here, there is no dispute that GIRA demanded payment of the assessment on March 24, 2011. (Finding 31)

To counter this conclusion, Triple Canopy makes two arguments regarding its legal obligation to pay the GIRA assessment. First, Triple Canopy contends that its claim did not accrue until it actually paid the assessment (app. reply br. at 3-4). According to Triple Canopy, the legal basis for its claims is the obligation to *reimburse* it for "after-imposed" taxes. Specifically, Triple Canopy contends that the government's contractual obligation to reimburse Triple Canopy only arises after Triple Canopy paid the assessments – on July 18 and July 20, 2011. (App. reply br. at 3)

In contrast, the government contends that Triple Canopy's legal obligation to pay the penalty was set on March 24, 2011, when GIRA assessed the penalty. According to the government, incurred costs are costs for which a party has some sort of legal liability to make payment. Here, the government asserts that the government's liability would attach when "the contractor is required to pay or bear" such a tax. (Gov't reply br. at 12-13)

Triple Canopy relies on *Raytheon Co.*, ASBCA No. 57576, 57679, 13 BCA ¶ 35,209 for the proposition that a claim does not accrue until an actual payment is made (app. reply br. at 4). Triple Canopy stretches the holding in *Raytheon* too far.

In *Raytheon*, the government, as claimant, sought to recover costs it had already paid to Raytheon. The issue in *Raytheon* was when the government knew, or should have known, that it had overpaid. 13 BCA ¶ 35,209 at 172,751. In *Raytheon*, we held that the government's claims to recover costs in fiscal years in which it had already made

overpayments accrued when it audited those costs and determined that they were unallowable. (*Id.*) However, with respect to subsequent fiscal years, we held that the government's claims were timely, because the government could not have known of any overpayments in these years "until the advent of these years and until payments were made under government contracts in those years." (*Id.* at 172,752) It is logical that a claim to recover an overpayment cannot accrue until the overpayment has occurred, because the claimant cannot know it has overpaid until it has made a payment.

Here, in contrast, the issue is when Triple Canopy knew, or should have known, that it had an obligation to pay the GIRA assessment. Triple Canopy knew it was obligated to pay the GIRA assessment when it received GIRA's demand letter on March 24, 2011.

Once Triple Canopy became legally obligated to pay the assessment, the costs were incurred. The fact that the final amount could change does not matter, nor does the fact that actual payment had not yet occurred. *Gray Personnel, Inc.*, 06-02 BCA ¶ 33,378 at 165,476; *see also McDonnell Douglas Services, Inc.*, ASBCA No. 56568, 10-1 BCA ¶ 34,325 at 169,528. Indeed, the CDA permits contractors to submit claims before they have incurred the total costs relating to the claim. *Gray Personnel, Inc.*, 06-02 BCA ¶ 33,378 at 165,476. This is because the incurrence of costs – and the tolling of the statute of limitations – occurs when the claimant is legally obligated to pay. The legal obligation to pay arises when a fee is assessed or a fine is levied, not when the claimant decides to actually pay the assessment or fine. *Id.* (holding that once a party is on notice that it has a potential claim, the statute of limitations can start to run).

Alternatively, Triple Canopy contends that the relevant legal obligation is the *government's* contractual obligation to reimburse Triple Canopy, and that obligation arises only after the date Triple Canopy paid its fine (July 18 or July 20, 2011) (app. reply br. at 3). This argument misses the mark. The relevant point in time is when Triple Canopy became aware that it was obligated to pay, not when the government might conceivably be required to reimburse Triple Canopy for its payment. The statute of limitations applies to the *claimant* (here, Triple Canopy), and is necessarily viewed from the perspective of when the claimant knew, or should have known, of its obligation to pay the fee. *KBR v. Murphy*, 823 F.3d at 628 (holding that accrual is based on when the claimant could have requested a sum certain from the government); *see also Raytheon Co., Space & Airborne Systems*, ASBCA No. 57801, *et al.*, 13 BCA ¶ 35,319 at 173,376 (holding that a claim accrues when the claimant knew, or should have known, that some costs have been incurred, even if the amount is not finalized).

On March 24, 2011, GIRA assessed a penalty on Triple Canopy in the amount of 37,860,000 AFN ($879,647.95) (finding 31). Therefore, we conclude that the legal obligation to pay the fine – the final amount of which was yet to be determined – arose when GIRA assessed the fine on March 24, 2011.

III. Whether Triple Canopy's Appeal of the GIRA Assessment Tolls the Statute of Limitations

We next examine whether Triple Canopy's appeal of the GIRA assessment tolls the limitations period. Triple Canopy contends that, even if it was "required to pay or bear" the taxes before payment, its claims did not accrue until after Triple Canopy exhausted its appeal rights. (App. reply br. at 6-8) In particular, Triple Canopy contends that, by announcing to the government that it was "appealing the entire imposed [GIRA] fee," Triple Canopy had not yet incurred any costs (app. reply br. at 7).

We disagree, and hold that appealing the GIRA fine did not toll the limitations period.

The Federal Circuit recently held that "the limitations period does not begin to run if a claim cannot be filed because mandatory pre-claim procedures have not been completed." *Kellogg Brown & Root Services, Inc. v. Murphy*, 823 F.3d 622, 628 (Fed. Cir. 2016); *see also Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California, Inc.*, 522 U.S. 192, 200-01 (1997) (holding under "basic limitations principles" that the statute of limitations cannot begin until such time as the claimant is legally eligible to bring the claim).

In *KBR v. Murphy*, the Army required KBR to first resolve disputed costs with its subcontractor before KBR could present a claim for reimbursement of those costs. The Federal Circuit held that KBR's claim accrued only after KBR had resolved the disputed costs with its subcontractor and the contractor had received a claim from its subcontractor. *KBR v. Murphy*, 823 F.3d at 628.

This appeal is distinct from *KBR v. Murphy*, in three key ways. First, Triple Canopy seeks reimbursement from fees imposed on it, not those of a subcontractor. Second, although the government stated that it would seek an exemption on Triple Canopy's behalf, there is no evidence that the government ever told Triple Canopy to defer submitting its claim until after Triple Canopy had resolved its appeal with the GIRA (findings 26 - 28). *KBR v. Murphy*, 823 F.3d at 626-27. Third, Triple Canopy possessed the information necessary to present a claim for a sum certain on March 24, 2011, when Triple Canopy received GIRA's demand letter. In contrast, as the Federal Circuit points out, KBR did not possess the necessary information to present a claim for a sum certain until after the critical limitations date. (*Id.* at 627)

In this appeal, we conclude that the process of appealing the fine levied on Triple Canopy was not mandatory, but was rather an optional process Triple Canopy elected to undergo in order to potentially reduce the amount of the fine (finding 37). Therefore, the appeal process did not toll the statute of limitations.

B. Whether Triple Canopy Could File a Claim While Simultaneously Appealing the Fine

In an alternative argument, Triple Canopy contends, without support, that it could not file a claim while simultaneously appealing the fine, arguing that to do so would have "potentially subjected Triple Canopy to liability under the False Claims Act, 31 U.S.C. § 3729 *et seq.*" Triple Canopy warns that it "would have been seeking to recover amounts from the US government while at the same time arguing to the GIRA that those amounts were not due and owing." (App. reply br. at 7-8) We disagree.

FAR 52.229-6(i) expressly requires the contractor to take all reasonable action to obtain exemption from or refund of any taxes or duties:

> (i) The Contractor shall take all reasonable action to obtain exemption from or refund of any taxes or duties, including interest or penalty, from which the United States Government, the Contractor, any subcontractor, or the transactions or property covered by this contract are exempt under the laws of the country concerned or its political subdivisions or which the governments of the United States and of the country concerned have agreed shall not be applicable to expenditures in such country by or on behalf of the United States.

Pursuant to this provision, Triple Canopy had a duty to appeal the fine levied by GIRA, if it believed in good faith that it had a reasonable basis for challenging the amount of the assessment.

In addition, FAR 52.229-6(j) requires the contractor to "promptly notify the Contracting Officer of all matters relating to taxes or duties that reasonably may be expected to result in [] an increase . . . in the contract price . . . ." This prompt notice provision is prospective in nature, in that it requires notice of taxes or duties that "may be expected" to increase the contract price. Pursuant to this provision, therefore, Triple Canopy had a duty to promptly notify the government as soon as GIRA assessed the penalty on March 24, 2011. *See*, *e.g.*, *Gazpromneft–Aero Kyrgyzstan LLC v. United States*, 132 Fed. Cl. 202 (2017) (holding that contractor's failure to provide timely notice of after-imposed taxes barred it from seeking reimbursement).

Thus, pursuant to FAR 52.229-6, Triple Canopy had a duty both to notify the government of the potential fine and to challenge the amount of the fine. In light of the statutory duties, we cannot conclude that filing a claim, while simultaneously appealing

the assessment, would have subjected Triple Canopy to liability under the False Claims Act.

CONCLUSION

For these reasons, we conclude that Triple Canopy's claims under each of its contracts are time-barred. Accordingly, the appeals are denied.

Dated: May 7, 2020

KENNETH D. WOODROW
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 Nos. 61415, 61416, 61417, 61418, 61419, 61420, Appeals of Triple Canopy, Inc., rendered in conformance with the Board's Charter.

Dated: May 7, 2020

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