ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
CiyaSoft Corporation	)	ASBCA Nos. 59519, 59913
	)	
Under Contract No. W91B4L-10-P-1475	)	

APPEARANCE FOR THE APPELLANT: Mr. Hamid Daroui
Corporation Officer

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
CPT William T. Wicks, JA
Evan C. Williams, Esq.
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE WILSON
ON THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

The government moved for summary judgment contending that CiyaSoft Corporation (CiyaSoft or appellant) cannot satisfy the elements required to establish that the Army breached the above-captioned contract. Appellant counters that there are genuine issues of material fact in dispute that preclude summary judgment.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 19 August 2010, the Army entered into a contract with CiyaSoft for the purchase of 20 "Single User Bi-Directional English/Dari Software Licenses" with a one-year period of support and maintenance. This software was to be delivered to Kandahar Airfield, Afghanistan. The contract included FAR 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (JUN 2010); and DFARS 252.212-7001, CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS APPLICABLE TO DEFENSE ACQUISITIONS OF COMMERCIAL ITEMS (JUN 2010) clauses. (R4, tab 1)

2. On 10 September 2010, appellant shipped to the contracting officer (CO), *inter alia*, 20 compact disc (CD) cases, 20 keyboard labels, help guides, license agreements, and 20 unique product identifications (IDs). The accompanying letter read as follows:

> The last four character[s] of each product ID, which is unique, is provided separately along with license agreement inside each CD case and may be used instead of the full

> product ID when updating us with the names or initials of those activations that did not go through registration after installation. CD/product ID assignment information should be mailed or emailed to CiyaSoft MT technical support (See the license agreement for more details.)

(App. supp. R4[1], tab 2)

3. On 9 October 2010, appellant submitted an invoice to the CO for payment (R4, tab 6). By letter dated 14 October 2010, the invoice was certified for payment, indicating that the goods for which payment was to be made were received and accepted by the government (R4, tab 7).

4. The record shows that as early as December of 2010, appellant began noticing some duplicate registrations and requested that the government provide a list of names or initials of those users using the software (app. supp. R4, tab 9). The parties exchanged correspondence on this subject throughout the next two years and on 19 November 2013, appellant sent a letter to the government advising that there may have been violations of the software licenses delivered under the contract. Appellant stated:

> The license clearly specifies the limits of the license which was a condition of the sale of the product to the Army. While our Company changed the software as an accommodation to the Army and to comply with contract requirements so that registration was not a requirement for activation, we did not waive the license requirement of single use[.]

(R4, tab 9)

5. The government replied, by email dated 17 December 2013, informing appellant that it examined its systems and could not identify any systems using the software and considered the matter closed (R4, tab 11 at 2). There were several other exchanges between the parties (R4, tabs 12-14), culminating on 15 April 2014 with appellant filing a certified claim[2] with the CO (R4, tab 15).

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[1] The Board designates appellant's submittal of documents with its complaint dated 24 October 2014 and 17 March 2017 supplement collectively as appellant's Rule 4 supplement.

[2] The 15 April 2014 claim certification contained in the Rule 4 file was not signed by appellant. However, in its notice of appeal, appellant provided a signed certification on 26 August 2014. The CO issued a final decision on the properly certified claim on 30 March 2015. Appellant filed a timely protective appeal, by letter dated 6 April 2015, which was docketed as ASBCA No. 59913. (Bd. corr. file)

6. By decision dated 2 June 2014, the CO denied the claim (R4, tab 16). On 26 August 2014, appellant filed an appeal with the Board, which was docketed as ASBCA No. 59519.

DECISION

The government contends that appellant cannot satisfy the elements required to establish that the Army breached the contract by causing unauthorized copies of its software to be made or the alleged failure to secure and protect appellant's software that was delivered under the contract. Specifically, the end user license agreements (EULAs) were not incorporated into the contract (explicitly, implicitly, or by installation by the end users). Further, any military or contractor personnel who willfully reproduced the software for their own profit may be potentially individually directly liable; but not the government. (Gov't mot. at 10-17) Finally, the government argues that the general reference to 20 software licenses (as well as Army regulations) did not create a duty of care, or a fiduciary duty, on behalf of the Army to safeguard appellant's software (gov't mot. at 20-25). Appellant counters, *inter alia*, that there is a factual dispute regarding whether the EULA was part of the contract (app. reply at 4-15).

Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Proveris Scientific Corp. v. Innovasystems, Inc.*, 739 F.3d 1367, 1371 (Fed. Cir. 2014); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). A material fact is one that may affect the outcome of the decision. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). The moving party bears the burden of establishing the absence of any genuine issue of material fact, and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). We draw all justifiable inferences in favor of the nonmoving party. *CI², Inc.*, ASBCA Nos. 56257, 56337, 11-2 BCA ¶ 34,823 at 171,353.

We have carefully considered the Army's allegations and the underlying contract in question but conclude that there are genuine issues of material fact that preclude summary judgment. Specifically, there is a genuine issue as to circumstances surrounding the existence of and details regarding use of the alleged software licenses/EULAs that were contracted for and delivered to the Army and discussed by the parties for two years (SOF ¶ 4). These issues are fact intensive and, based on the current record, are not ripe to be resolved by summary judgment. *Cooley Constructors, Inc.*, ASBCA No. 57404, 11-2 BCA ¶ 34,855 at 171,457.

CONCLUSION

The motion is denied.

Dated: 6 April 2017

OWEN C. WILSON
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 Nos. 59519, 59913, Appeals of CiyaSoft Corporation, rendered in conformance with the Board's Charter.

Dated:

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