ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Corbett Technology Company, Inc.	)	ASBCA No. 49477
	)	
Under Contract No. DAAH01-87-D-0198	)	

APPEARANCE FOR THE APPELLANT: Kenneth A. Corbett
Vice President

APPEARANCES FOR THE GOVERNMENT: COL Nicholas P. Retson, JA
Chief Trial Attorney
CPT Thomas C. Modeszto, JA
CPT Melissa T. Miller, JA
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE TODD

This appeal involves claims of Government interference with appellant's subcontracting for delivery of a high speed fiber payout system. Appellant also claims delay resulting from the proposed debarment of a proposed subcontractor and breach of contract by the Government in selecting a contractor other than appellant for additional work and providing third party access to the high speed payout system. Mr. Corbett represented appellant *pro se*. Only entitlement is before us for decision.

FINDINGS OF FACT

1. On 15 May 1987, the United States Army Missile Command (MICOM), Redstone Arsenal, Alabama awarded Contract No. DAAH01-87-D-0198 to appellant Corbett Technology Company, Inc. The contract was a Time and Materials/Indefinite Quantity type contract for technical support for the demonstration and testing of the fiber optic guided missile weapon system. (R4, tab 1)

2. The contract included the following clause concerning orders:

> Upon award of this contract, the Government shall issue an initial bilateral work order requiring an estimated minimum of 786 manhours (composite) which represents the Government's minimum requirements under this contract. It is anticipated that the Government will require the issuance of additional orders under this contract, during the term of the

> contract. However, since the effort required hereunder is dependent upon ongoing research, it is impossible for the Government to give meaningful estimate of requirements hereunder. Therefore, *the Government shall be under no obligation to issue any subsequent order, and no liability to the contractor shall be incurred in the event no subsequent orders are issued.*

(R4, tab 1 at 10; emphasis added.)

3. The contract included standard provisions "SUBCONTRACTOR COST OR PRICING DATA (APR 1985)" (FAR 52.215-24),"INDEFINITE QUANTITY (APR 1984)" (FAR 52.216-22), "PAYMENTS UNDER TIME-AND-MATERIALS AND LABOR-HOUR CONTRACTS (APR 1984)" (FAR 52.232-7), "DISPUTES (APR 1984)" (FAR 52.233-1) and "SUBCONTRACTS (TIME-AND-MATERIALS AND LABOR-HOUR CONTRACTS) (APR 1985)" (FAR 52.244-3) (*id.* at 17-18). The referenced Subcontracts clause required the contractor to obtain the contracting officer's written consent before placing any subcontracts except for purchase of raw materials or commercial stock items.

4. By letter dated 21 July 1989, appellant submitted its proposal in response to the Scope of Work entitled "High Speed Fiber Payout System" which was to be issued as a delivery order under the contract. Appellant had its own design of a payout system, but decided to solicit proposals from several manufacturers. Appellant selected the proposal of SCI Technology, Inc. (SCI) for submission to the Government because it was technically acceptable and the lowest bidder. Mr. Corbett heard from Government representatives that they wanted to procure the SCI system, but the Government did not specify a particular subcontractor or proprietary product in the Scope of Work. (R4, tab 2; exs. A-24, -29; tr. 1/32, 2/71-72, 94, 98, 139-42)

5. On 29 September 1989 Delivery Order No. 0015 to the contract was awarded to appellant in an amount not to exceed $102,374.42 for development, fabrication and installation of a high speed fiber payout machine in a Government facility. The total estimated amounts were $6,661.44 for labor and $95,713.28 for material. The delivery order required that all work be completed no later than 30 April 1990. The contract provided for the contractor to determine what was necessary to prepare the MICOM fiber optic payout facility for installation of the equipment and to install the payout system. The Government was required to provide access to the facility and furnish an air system either in cylinder or compressor form as Government-furnished property (GFP) that was needed for demonstration and operation of the payout system. (R4, tab 3)

6. The Government did not approve appellant's request for consent to subcontract with SCI because the proposed subcontract did not contain a patent rights clause and SCI had not submitted a Certificate of Current Cost and Pricing Data. On 9 November 1989 Mr. Corbett requested assistance from the Government to obtain the required cost and pricing data from SCI. On 14 November 1989 Mr. Vance DeHaven, an SCI employee, met with representatives of the Government and arrived at a solution as to how the data could be submitted. SCI was having difficulties dealing with appellant. Appellant was not invited and did not attend the meeting. Appellant, SCI, and the Government later agreed that appellant should not have been left out of the meeting. Appellant's absence from this meeting did not cause it to suffer any harm. (AR4, tabs 10 through 12; ex. A-23; tr. 1/33-35, 2/54-56, 101-09, 145-48)

7. Appellant received Government concurrence to subcontract with SCI, but SCI chose not to accept the subcontract because it was unable to meet the delivery schedule (R4, tab 4; tr. 2/57, 59, 110-11, 149).

8. On 21 December 1989 appellant requested an extension of time under the contract (R4, tab 4; tr. 2/59). Appellant asked for assistance from the Government as to how to proceed and learned from the contracting officer that Hughes Aircraft Corporation (Hughes) had an excess system as a result of a new payout system they were building. The contracting officer told Mrs. Susan Corbett, appellant's president, that appellant ought to buy "a part number"[*] from Hughes (tr. 2/60, 112). In a conversation with Ms. Overstreet, a Government technical representative, Mr. Corbett found that she was "very forceful and demanding" that appellant obtain the payout system from Hughes, but he acknowledged that she did not "direct" him to buy it (tr. 2/150). The Government thus identified a source for appellant to furnish the payout system and suggested procurement from Hughes. The contracting officer denied appellant's request for an extension on 22 January 1990. The letter stated in pertinent part, "The contractor should put forth the appropriate management effort required to insure completion by 30 April 1990." (R4, tab 5; AR, tab 17; tr. 1/63-64, 187, 2/151) The Government asked the contractor to complete the work, but, having considered all the testimony, we find that it did not direct appellant to subcontract with Hughes or threaten appellant with default (tr. 1/44, 187, 2/79, 95, 112, 114).

9. Appellant requested and received a firm, fixed-price proposal from Hughes to deliver its used payout system directly to the Government. In its proposal Hughes

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[*] The terminology conveyed the possibility of obtaining the equipment by purchase order without any requirement for Government consent to subcontracting. Mrs. Corbett understood the term to refer usually to commercial products with published prices for all customers. The payout system did not have commercial application. (Tr. 2/61-62)

required that appellant and third parties execute a Proprietary Information Non-Disclosure Agreement prohibiting duplication of the equipment before being provided access to the high speed payout system. Hughes further required that the Government provide the facility ready by 6 April 1990. Appellant forwarded Hughes' proposal to the Government because it questioned Government concurrence to the terms and conditions Hughes required be included in the subcontract. (R4, tabs 6, 7; tr. 2/63-65, 116, 152) By letter dated 23 February 1990 the contracting officer stated partial Government agreement as follows:

> The Government hereby agrees to the fact that the equipment will not be duplicated for the use of the Government or others, and will be operated only by Government, Corbett Technology, or Hughes personnel. Third parties will not be allowed access to the payout system until Hughes' patent for the system is awarded.

(R4, tab 8) Mr. Corbett understood that only appellant would be legally allowed to provide support work (tr. 2/155-56). The Government took exceptions to some of Hughes' terms and conditions, but Hughes did not accept the Government's position. The contracting officer later agreed to a revised proposal from Hughes with no exceptions taken. (R4, tabs 8, 10, 11; AR, tab 19; tr. 2/62-67, 120, 152)

10. Appellant then had difficulty negotiating the subcontract with Hughes and by letter, dated 1 May 1990, requested assistance from the Government to modify certain clauses in the Federal Acquisition Regulation (FAR) that Hughes refused to agree to include in the subcontract. On 4 May 1990, appellant's consultant met with the contracting officer and other Government representatives and requested a delivery schedule extension that he anticipated would facilitate negotiations. As a result of the contracting officer's interceding on appellant's behalf, appellant reached verbal agreement with Hughes on 7 May 1990. (R4, tabs 12 through 15; AR, tab 22; tr. 2/67-71, 122-23, 152-53) Appellant's efforts in getting subcontractor participation for performance of the contract work were not excessive (tr. 1/86, 2/100, 121, 153-54).

11. Bilateral Modification No. 001501, dated 10 May 1990, extended the period of performance from 30 April 1990 to 30 September 1990 (R4, tab 16).

12. By letter dated 14 May 1990, Hughes advised appellant that it had received a "Notice of Proposed Debarment" from the United States Air Force on 10 May 1990. Hughes stated that it expected a favorable resolution "in the near future." (R4, tab 17) Appellant notified the contracting officer of the proposed debarment and requested a termination for convenience of Delivery Order No. 0015. The contracting officer wanted appellant to wait until the end of June to take any action with respect to Hughes because

he expected the proposed debarment issue would be settled by then. By letter dated 13 June 1990, the contracting officer advised appellant that Hughes' proposed debarment had been lifted, and that the Government did not intend to terminate the delivery order. (R4, tabs 18, 20; AR4, tabs 23, 25; tr. 1/81-82, 2/9-10, 72-73, 123-26)

13. On 2 August 1990 appellant requested a no-cost extension of time until 15 November 1990. Appellant's practice was to request no-cost extensions if no extra costs were going to be incurred. (R4, tab 21; tr. 1/83-84) On 29 August 1990 appellant executed its subcontract with Hughes (AR4, tab 30).

14. Bilateral Modification No. 001502, dated 28 August 1990, extended the period of performance from 30 September 1990 to 15 November 1990 at no cost. The modification provided in pertinent part:

> THE PARTIES HEREBY AGREE THAT THIS MODIFICATION CONSTITUTES FULL, COMPLETE AND FINAL SETTLEMENT FOR ANY AND ALL CLAIMS ARISING OUT OF THIS TRANSACTION.

(R4, tab 22; tr. 2/127)

15. On 24 September 1990 the Government entered into Contract No. DAAH01-90-D-0107, Delivery Order No. 0016, with System Dynamics International, Inc. (SDI) for analysis and evaluation of improved adhesives to be used as the binder for the fiber optic cable in the fiber optic guided missile system. The contractor was to make any modifications to the existing payout machine facility required for the adhesive testing. The Government agreed to make available to the contractor certain GFP that included "access to [the] pneumatic shoe payout facility." (R4, tab 22A at 9) Morgan Research Corporation (MRC) was a subcontractor to SDI (R4, tab 22A; tr. 2/164).

16. MRC performed services that included installation of an air tank, compressor, instrumentation, pipes and valves to provide an air supply to the facility so that the payout machine could be hooked up and operated. Hughes has not raised any concerns that the Government provided access to its proprietary design. We do not find that either SDI or MRC had access to it. (Tr. 2/164-66)

17. By letter dated 23 October 1990, appellant requested additional funding of $17,064 for a "new activity" to provide a compressed air system for operation of the high speed payout system that had not been made available as GFP (R4, tab 24 at 2). Mr. Corbett thought the Government needed support and did not know that other

arrangements had been made with SDI. The Government denied appellant's request. (R4, tabs 24, 25; tr. 1/77, 2/153-55)

18. Appellant expected that Hughes would deliver the equipment no later than 29 October 1990, but Hughes did not plan to deliver by that date because the facility was not ready for installation of the equipment. The Government orally advised appellant in October that it would default appellant if delivery was not made by 15 November 1990. Hughes requested modification of its subcontract to provide that delivery was contingent on the Government providing the fully equipped facility for complete delivery and acceptance of the equipment. Appellant forwarded Hughes' request to the Government. (AR4, tabs 28, 29, 31; tr. 1/49-50)

19. Bilateral Modification No. 001503, dated 21 November 1990, extended the period of performance from 15 November 1990 to 31 December 1990 at no cost. The modification included language making delivery contingent on the availability of the facility as requested and the release language in the prior modification. (R4, tab 26)

20. Hughes requested notice by 7 December 1990 that the facility was ready for receipt, installation and acceptance testing of the high speed payout equipment. Appellant forwarded Hughes' request to the Government. The Government was unable to confirm that the facility would be ready and recommended delivery of the payout machine on an "as-is" basis. Hughes delivered the equipment directly to the Government, and on 18 December 1990 the Government acknowledged delivery and acceptance of the fiber optic payout equipment. (R4, tab 27 at 7; AR4, tabs 34, 35; tr. 1/102-03, 211-12, 2/14-15) Appellant learned that delivery had been made from the invoice, dated 21 December 1990, that it received from Hughes. The total amount due Hughes was $91,881. (R4, tab 27 at 6; tr. 2/80, 155).

21. By letter dated 21 May 1991, appellant asserted that the Government had violated the contract by rejecting its request for additional funding and contracting with SDI for support work using the payout machine. The Government's response was that its contract with SDI included performing modifications to the payout machine facility required for adhesive testing, but did not involve operation of or access to the payout machine by SDI. (R4, tabs 28, 29; tr. 2/85, 156-57)

22. On 22 July 1991 appellant submitted a final voucher for five percent labor retention and material handling in the amount of $324.94 and a release. Appellant previously invoiced the Government for $9,734.49 in addition to the amount due Hughes. Mrs. Corbett rescinded her signature on the release prior to payment. There is no release subsequently executed in the record. Appellant did not submit any other final voucher. (R4, tab 27; AR4, tab 38; tr. 2/29-34, 86-87)

23. In July 1990 appellant purchased an adhesive pump for the Government under Delivery Order No. 0020, a delivery order under a different contract. The Government paid appellant for the pump and turned it over to SDI for adhesive system evaluation. On 1 August 1990 SDI returned the pump unused to Cole-Parmer Instrument Company (Cole-Parmer), the vendor which had sold the pump to appellant. Cole-Parmer refunded the purchase price of $931.36 to appellant. When Cole-Parmer requested return of the money on behalf of SDI, which was accountable for the pump, Mrs. Corbett contacted the Government. The Government directed appellant to refund the price to the United States Treasury, and appellant did that on 3 January 1991. When appellant repaid the funds, Mr. Corbett was allegedly unaware that the Government had contracted with SDI to have it use the equipment in the performance of its Delivery Order No. 0016. (R4, tabs 30 at 17-18, 32 at 15-16; AR, tab 36; tr. 2/83-85)

24. On 31 January 1994 appellant submitted a claim for $46,000 for the Government using it as a purchasing agent without compensation and interfering with its negotiations with subcontractors. In addition, appellant alleged that the Government breached its contract with appellant when the Government contracted with SDI and provided third party access to the facility which contained the high speed fiber payout system. The claim included an amount for material costs incurred under Delivery Order No. 0020 as further damages for breach of contract. The contracting officer issued a final decision denying the claim on 5 April 1994. Appellant filed a timely appeal that the Board docketed as ASBCA No. 47745. The appeal was dismissed without prejudice for lack of jurisdiction on 16 March 1995. 95-1 BCA ¶ 27,586. (R4, tabs 30, 31; tr. 1/169-70, 181-89, 207)

25. On 22 September 1995 appellant submitted a revised claim in the amount of $81,876.95 based on the actions and inactions of the Government that were the subject of its earlier claim. Appellant added an allegation that it was delayed in entering into its subcontract with Hughes because of the proposed debarment. Appellant calculated the principal amount of its revised claim as indirect labor cost of $78,119.26 that it would have earned but for the alleged interference with appellant's subcontractors, breach of contract by the Government in contracting with SDI and providing third party access to the high speed payout system, and other problems. (R4, tab 32; tr. 1/190-91)

26. The revised claim also included amounts for labor retention and material handling that were invoiced in the amount of $324.94 (finding 22, *supra*), and an additional amount of $151.00 for material handling. Appellant had not previously requested payment for this additional material handling (*id.*). Appellant had noticed that its material handling rate was audited at an actual rate of 8.74 percent, but had been billed at a rate of only 4 percent. Appellant also noticed that the amount of $151.00 remained in estimated material cost because the total amount had not been billed. Appellant claimed the amount of $931.36 for material costs incurred under Delivery Order No.

0020 that was listed as "[f]unds returned" (R4, tab 32 at 17). Appellant also claimed an amount of $2,350.39 for material handling as breach of contract damages. Appellant calculated this amount as material handling it would have earned if the Government had not breached its contract and it had performed the delivery order that was issued to SDI. (R4, tab 32; tr. 2/44-46)

27. The contracting officer did not receive supporting documentation for the costs claimed in appellant's revised claim, saw no basis for the claim, and did not issue a final decision (R4, tab 32; tr. 1/171-72, 190-92, 207-08). Appellant appealed on the basis of a deemed denial of its revised claim.

DECISION

In order to receive an equitable adjustment from the Government, a contractor has the burden of proving the fundamental facts of its affirmative claim by a preponderance of the evidence and must show liability, causation, and resultant injury. *Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994) (*en banc*); *Metric Constructors, Inc.*, ASBCA No. 48423, 96-2 BCA ¶ 28,459. Appellant has alleged that the Government improperly used appellant as its purchasing agent by designating subcontractors to deliver the payout system (app. br. at 31; app. reply br. at 2). We have found appellant proposed SCI and later Hughes to perform the contract work. The Government did not direct appellant to use a particular subcontractor or a design that was exclusive to a particular subcontractor or otherwise designate a source of supply. Appellant has not proved this portion of its claim.

Appellant has alleged that the Government interfered with appellant's negotiations with its subcontractors. The omitted invitation to a meeting between the Government and a representative of appellant's proposed subcontractor SCI that appellant did not attend involved the Government's effort to intercede on behalf of appellant to obtain agreement to the subcontract and did not cause appellant harm. The Government was within its contractual rights in denying appellant's request for an extension of time when SCI declined to execute the subcontract (finding 8) and in mentioning default when Hughes did not plan delivery before the facility was ready (finding 18). The contracting officer's letter, dated 22 January 1990, did not constitute an acceleration order, as appellant has alleged (finding 8). We have concluded that the Government's actions with reference to appellant's subcontractors, which did not cause appellant to expend excessive efforts, did not constitute compensable harm (finding 10).

Appellant has alleged that the Government has failed to compensate it for delay caused by the proposed debarment of Hughes (compl. at 5). Assuming arguendo, that such action is compensable, appellant has failed to explain why it should not be held to the parties' agreement in Modification No. 001502. Appellant's claim for delay due

to the proposed debarment existed before 28 August 1990, the effective date of the modification. By executing that modification the parties removed from consideration all prior causes of delay. *Hill Construction Corporation*, ASBCA No. 49820, 99-1 BCA ¶ 30,327.

Appellant has alleged that the Government's arbitrary selection of SDI to perform work needed for the installation of the payout system constituted a breach of appellant's contract. To recover for breach of contract, a party must allege and establish (1) a valid contract between the parties, (2) an obligation or duty arising out of the contract, (3) a breach of that duty, and (4) damages caused by the breach. *ANC Group,* ASBCA No. 47065, 94-3 BCA ¶ 27,086, *aff'd on reconsid.*, 95-1 BCA ¶ 27,293, *citing San Carlos Irr. and Drainage Dist. v. United States*, 877 F.2d 957 (Fed. Cir. 1989). The Government had an obligation to provide the air compressor system for the payout facility, and it was under no duty to order the system or the related installation service offered by appellant. Appellant was not the only party that could do the support work. SDI and its subcontractor MRC did not have access to the payout system in violation of any proprietary arrangements, but only provided the air source to the facility. We will not infer that SDI or MRC had access to the payout machine merely from the terms of the SDI contract which required installation of an air supply system in the facility. Appellant is not, therefore, entitled to the breach of contract damages it has claimed.

Appellant's claim includes items for labor retention and material handling ($324.94) and additional material handling ($151.00). The Government does not dispute appellant's right to the amount of $324.94 provided the required release is provided (Gov't br. at 74). There is no release in the record. Appellant has not provided a voucher for the amount claimed for additional material handling. Appellant has not complied with the contract terms and, accordingly, is not entitled to these items of its claim.

The claim for the $931.36 appellant refunded to the Government under Delivery Order No. 0020 is based on the alleged breach of contract by the Government in contracting with SDI and providing third party access to the high speed payout system. We have concluded that appellant is not entitled to the breach of contract damages it has claimed, and this item is also not recoverable.

We have considered appellant's other arguments that included Government breach of the duty of good faith and fair dealing, withholding evidence, incorrect claim of participation in a patent, and discrimination. We have found them without sufficient support in the evidence to warrant discussion.

For these reasons, the appeal is denied without prejudice to the recovery of labor retention and material handling and additional material handling, provided that appellant

fulfills the contract requirements and the total amount payable to appellant does not exceed the ceiling price of the delivery order.

Dated: 18 January 2000

LISA ANDERSON TODD
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
Acting 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. 49477, Appeal of Corbett Technology Company, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals