ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Godwin Equipment, Inc.	)	ASBCA No. 51939
	)	
Under Contract Nos. M67004-95-D-0011 M67004-95-D-0012	)	

APPEARANCE FOR THE APPELLANT: Peter E. Moye, Esq.
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APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
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Washington, DC

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

This appeal arises from alleged Government delays and interference in the performance of two contracts to inspect and repair military vehicles. The Government moves for summary judgment alleging *inter alia* that the types of damages sought are not recoverable as a matter of law. The Government also moves to dismiss portions of the appeal for lack of jurisdiction and mootness.

STATEMENT OF FACTS FOR THE PURPOSES OF THE MOTION

1. The Government awarded appellant two contracts to "inspect and repair only as necessary" (IROAN) military vehicles. Contract No. M67004-95-D-0011, which was awarded on 28 September 1995, involved the inspection and repair of 5-ton trucks (the five-ton contract). Contract No. M67004-95-D-0012 was awarded on 29 September 1995 and involved the inspection and repair of high mobility multi-purpose wheeled vehicles (the HMMWV contract). The contracts included a base year and one option year. (R4, tabs 1, 5)

2. The contracts included the following clauses which are relevant, in part, to this appeal:

FAR 52.212-15 GOVERNMENT DELAY OF WORK (APR 1984)

(a) If the performance of all or any part of the work . . . is delayed or interrupted . . . by a failure of the Contracting Officer to act within the time specified . . . or within a reasonable time if not specified, an adjustment (excluding profit) shall be made for any increase in the cost of performance . . . and the contract shall be modified in writing accordingly. Adjustment shall also be made in the delivery or performance dates and any other contractual term or condition affected by the delay or interruption. However, no adjustment shall be made . . . for any delay or interruption to the extent that performance would have been delayed or interrupted by any other cause, including the fault or negligence of the Contractor, or for which an adjustment is provided or excluded under any other term or condition of this contract.

(b) A claim under this clause shall not be allowed (1) for any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved, and (2) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of the delay or interruption, but not later than the day of final payment under the contract.

FAR 52.243-1 CHANGES--FIXED-PRICE (AUG 1987)

(a) The Contracting Officer may at any time, by written order . . . make changes within the general scope of this contract . . . .

(b) If any such change causes an increase or decrease in the cost of, or the time required for, performance . . ., the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.

(c) The Contractor must assert its right to an adjustment . . . within 30 days from the date of receipt of the written order. . .

FAR 52.216-22 INDEFINITE QUANTITY (APR 1984)

(a) This is an indefinite-quantity contract . . . . The quantities of . . . services specified . . . are estimates only and are not purchased by this contract.

(b) . . . The Contractor shall furnish . . . when and if ordered, the . . . services specified . . . up to and including the quantity designated . . . as the “maximum.” The Government shall order

> at least the quantity of supplies or services designated . . . as the "minimum."

(R4, tabs 1, 5)

3. Both contracts contained Clause H-12 CONTRACTOR ACCESS TO DEPARTMENT OF DEFENSE (DOD) SUPPLY SYSTEM which provides, in part, as follows:

> (a) [The] DoD supply system will be available to private firms. . . . Use of this system is not mandatory. . . . If the DoD supply system is to be utilized . . . MILSTRIP Requisitions . . . shall be submitted to the Marine Corps Logistics Base, Albany, GA. . . . Administrative Lead Time will be from one to two weeks to determine if the item is in stock. If assets are not available . . . the contractor will be notified in writing that the . . . Requisition is being cancelled [sic] and that he will be responsible for procuring [the] item from another source. . . .
>
> (b) . . . [D]eficiencies and delays of the DoD supply system will not absolve the contractor from meeting the required delivery schedule. . . .

(R4, tabs 1, 5)

4. The Government exercised both options and ordered the minimum quantities specified under both contracts. (R4, tabs 2, 3 at 55-59, 4 at 39-40, 6, 7 at 24-26, 10 at 78-79).

5. On 15 July 1998, appellant submitted a combined claim under both contracts for $2,839,181.74, alleging *inter alia* that the DoD Supply System failed to deliver approximately 41 percent of the parts ordered on a timely basis, delaying and interrupting performance. In addition, appellant alleges that the Government arbitrarily refused to condemn vehicles that could have been used to mitigate the delays and that it changed its quality assurance representative numerous times during the work, resulting in conflicting interpretations of the contract, additional work and delays. Appellant alleges that the Government's conduct constituted a breach of contract. The claim consists of five parts: (1) $1,897,980.40, "the net profit that would have been realized . . . had there not been government-caused delays and all work assignments had been directed to the Contractor;" (2) $427,004.74 in financial losses as of 31 March 1998 caused by "additional staff, overtime, interest paid to the bank and vendors, excessive phone bills, additional computer equipment, software modifications and wasted labor and overhead" and losses on another contract; (3) $500,000 for "damage to reputation with bank, vendors, and other government agencies, loss of other contracts and of loss of future profits because Contractor lost adjacent property for expansion and the government is now weighing past performance

heavier than price so future contracts may be lost;" (4) an "amount to be proven" for material, labor and other costs incurred after 31 March 1998 resulting from Government delays; and (5) $14,196.60, the balance allegedly due under a partially paid invoice. (R4, tab 11)

6. On 23 October 1998, the contracting officer denied the claim with the exception of $14,196.60, which has been paid (R4, tab 17).

7. Appellant appealed the contracting officer's decision on 21 December 1998.

DECISION

The Government moves for summary judgment, alleging that there are no disputed issues of material fact and that it is entitled to judgment as a matter of law. The Government argues that appellant cannot maintain an action for breach of contract because the contract clauses provide a remedy for Government delay, that it was not required to order the maximum quantities specified under an indefinite quantity contract and that consequential damages and lost profits are not recoverable as a matter of law. In addition, the Government argues that the Board lacks jurisdiction over appellant's unquantified delay claim and that appellant's claim for the balance of a partially paid invoice is moot. With the exception of the partially paid invoice, appellant opposes the motion arguing that there are disputed issues of material fact which preclude summary judgment.

For ease of reference, we have divided appellant's claim into five parts. Part 1 consists of a claim for $1,897,980.40 for "the net profit that would have been realized . . . had there not been government-caused delays and all work assignments had been directed to the Contractor." Part 2 of the claim is for $427,004.74 in financial losses incurred up to 31 March 1998. Appellant alleges that these losses were caused by "additional staff, overtime, interest paid to the bank and vendors, excessive phone bills, additional computer equipment, software modifications and wasted labor and overhead" and losses on another contract. Part 3 of the claim is for $500,000 for "damage to reputation with bank, vendors, and other government agencies, loss of other contracts and of loss of future profits because Contractor lost adjacent property for expansion and the government is now weighing past performance heavier than price so future contracts may be lost." Part 4 of the claim is for material, labor and other costs incurred after 31 March 1998 in an "amount to be proven." Part 5 of the claim is for $14,196.60, the balance due under a partially paid invoice.

The Government first argues that appellant may not maintain a claim for breach of contract because the subject contracts contain FAR 52.212-15 GOVERNMENT DELAY OF WORK (APR 1984), which provides a remedy for Government delay. We agree with the Government's statement of the law as far as it goes. *See Triax Pacific, A Joint Venture*, ASBCA No. 36353, 91-2 BCA ¶ 23,724 at 118,747, *aff'd*, 958 F.2d 351 (Fed. Cir. 1992) (contractor not allowed to maintain a breach claim for delayed issuance of a notice to proceed because relief was available under the contract); *Mega Constr. Co., Inc. v. United*

States, 29 Fed. Cl. 396, 415 (1993) (the contract clauses convert what would be deemed a breach of contract into a claim for an equitable adjustment).

However, in some unusual cases, the breach has been so profound that it was deemed to be outside the scope of the contract and, therefore, not remediable under the contract clauses. *E.g., Edward R. Marden Corp.*, 442 F.2d 364 (Ct. Cl. 1971) (reconstruction costing $3.7 million); *Air-A-Plane Corp. v. United States*, 408 F.2d 1030 (Ct. Cl. 1969) (1,000 changes to a manufacturing contract); *Saddler v. United States*, 287 F.2d 411 (Ct. Cl. 1961) (100 percent increase in amount of earth moved). Although the foregoing cases are based on Government changes, the same logic would seem to dictate that Government delays of like magnitude should be treated in the same fashion. *See Allied Materials & Equipment Co., Inc. v. United States*, 569 F.2d 562, 564 (Ct. Cl. 1978) ("There is no need to read the [cardinal change] doctrine so restrictively as to hold that it applies only to deviations which are specifically within the conventional changes clause.") Furthermore, even if the Government is correct that the claim is not properly stated as one for breach of contract, that would not entitle the Government to judgment. It would limit appellant to the damages provided in the relevant clause.

In any event, there are disputed issues of material fact which preclude us from granting summary judgment on this issue. Discovery has not yet commenced and the number of delays, the duration of the delays and the impact that the delays had on performance of the contract are all in dispute. Appellant also points out that the cause of the delays and the applicability of clause H-13 are in dispute. In the final analysis, appellant has pled a claim for breach of contract based on Government delays and we are unable to say that, as a matter of law, the alleged breach was not material.

The Government secondly argues that summary judgment should be granted because appellant's claim is based on the erroneous assumption that the Government was required to order the maximum quantities specified in the contracts. Part 1 of appellant's claim seeks payment of $1,897,980.40 for the "the net profit that would have been realized . . . had there not been government-caused delays and all work assignments had been directed to the Contractor." It is well-established that the Government is only required to order the minimum quantities specified in an indefinite quantity contract. *C.F.S. Air Cargo, Inc.*, ASBCA No. 40694, 91-2 BCA ¶ 23,985 at 120,040, *aff'd*, 972 F.2d 1353 (Fed. Cir. 1992) (table); *Crown Laundry & Dry Cleaners, Inc.*, ASBCA No. 39982, 90-3 BCA ¶ 22,993 at 115,481, *aff'd*, 935 F.2d 281 (Fed. Cir. 1991) (table); *Mason v. United States*, 615 F.2d 1342, 1347 (Ct. Cl. 1980), *cert. denied*, 449 U.S. 830 (1980). It is undisputed that the Government ordered the minimum quantities here. Accordingly, we grant summary judgment with respect to part 1 of appellant's claim to the extent it is premised on the loss of orders for more than the minimum quantity.

The Government next moves for summary judgment with respect to parts 2 and 3 of the claim, alleging that these costs are not recoverable because they are consequential damages. Part 2 seeks $427,004.74 in financial losses caused by "additional staff,

overtime, interest paid to the bank and vendors, excessive phone bills, additional computer equipment, software modifications and wasted labor and overhead" and losses on another contract. Of these items, all but interest and losses on another contract are potentially recoverable. Interest on borrowings and losses on other contracts are too remote and speculative to be recovered. *Ramsey v. United States*, 101 F. Supp. 353 (Ct. Cl. 1951) *cert. denied*, 343 US 977 (1952); FAR 31.205-20; FAR 31.205-23. Part 3 of the claim seeks $500,000.00 for "damage to reputation with bank, vendors, and other government agencies, loss of other contracts and of loss of future profits because Contractor lost adjacent property for expansion and the government is now weighing past performance heavier than price so future contracts may be lost." These damages are not recoverable because they are too remote and speculative. *Cox & Palmer*, ASBCA Nos. 37328 *et al*., 89-3 BCA ¶ 22,197 at 111,664-66; *Olin Jones Sands Co*., 225 Ct. Cl. 741, 742-43 (1980); *Ramsey*, 101 F. Supp. at 357. We grant summary judgment to the extent indicated with respect to parts 2 and 3.

The Government next argues that part 4 of the claim must be dismissed for lack of jurisdiction because it is unquantified. Part 4 of the claim consists of delay costs incurred after 31 March 1998. It is well established that a monetary claim must be quantified before we can take jurisdiction under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601 *et seq;* FAR 33.201; *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575-76 (Fed. Cir. 1995) (*en banc*). Accordingly, appellant's delay claim as to the period after 31 March 1998 is dismissed without prejudice to its right to resubmit a quantified claim to the contracting officer for a final decision. In the event the contracting officer's decision is adverse, appellant may appeal.

Lastly, the Government argues that part 5 of the claim is moot. Part 5 consists of a claim for $14,196.60, the balance due under a partially paid invoice. Since appellant does not dispute that, as the contracting officer's final decision indicates, this amount has been paid, we grant summary judgment with respect to part 5.

The Government's motion for summary judgment is granted in part and denied in part in accordance with the foregoing.

Dated: 14 December 2000

ELIZABETH A. TUNKS
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 Appeal in ASBCA Nos. 51939, Appeal of Godwin Equipment, Inc., rendered in conformance with the Board's Charter.

Dated:

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