ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Astor Bolden Enterprises, Inc.	)	ASBCA No. 52377
	)	
Under Contract No. F09650-97-C-0213	)	

APPEARANCES FOR THE APPELLANT: John E. Menechino, Jr., Esq.
Dorsey R. Carson, Jr., Esq.
Smith, Currie & Hancock, LLP
Atlanta, GA

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
CAPT Gregory A. Baxley, USAF
CAPT Christopher J. Aluotto, USAF
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE TUNKS
ON APPELLANT'S MOTION FOR SANCTIONS, CROSS-MOTIONS FOR SUMMARY JUDGMENT AND APPELLANT'S MOTION TO STRIKE

This appeal arises from the contracting officer's determination that appellant's termination settlement proposal was untimely. Appellant moves for sanctions due to the Government's alleged failure to timely file an answer. The Government moves to dismiss for failure to state a claim upon which relief may be granted and appellant cross moves for summary judgment, asserting that the Government's motion to dismiss must be treated as a motion for summary judgment. Lastly, appellant moves to strike the Government's second reply to appellant's cross-motion for summary judgment. We deny the motions.

FINDINGS OF FACT
FOR PURPOSES OF THE MOTIONS

1. On 9 December 1997, the Government awarded Contract No. F09650-97-C-0213 to appellant to test, clean, and repair sanitary sewer lines at Robins Air Force Base, Georgia (R4, tab 1).

2. The contract incorporated FAR 52.249-2 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED PRICE) (ALTERNATE I) (SEP 1996) by reference. Among other things, FAR 52.249-2 provides that the contractor may recover its allowable, reasonable and allocable costs upon submission of a certified termination settlement proposal. The

proposal must be submitted within "1 year from the effective date of the termination, unless extended in writing by the Contracting Officer." If the contractor fails to submit a proposal within the one-year period, the contracting officer may unilaterally determine the amount due. The clause also allows the contracting officer discretion to act on an untimely proposal. (R4, tab 1)

3. On 4 March 1998, the Government suspended work due to a possible bid mistake. After advising appellant that the contract might be terminated for convenience, the Government requested it to prepare an estimate of its costs. (R4, tab 3)

4. On 10 March 1998, appellant submitted a "ballpark" estimate of $97,738. The submission grouped the costs by category and listed a dollar amount for each category. The submission was not identified as a proposal and was not on the standard form for termination settlement proposals. In addition, it was not certified. (R4, tab 5)

5. The contracting officer terminated the contract for the convenience of the Government effective 20 March 1998 (R4, tab 6).

6. On 3 April 1998, appellant advised that it would "begin the process of preparing a . . . proposal" once its "related costs are fully known" (R4, tab 7).

7. Thereafter, appellant's counsel, Mr. John E. Menechino, Jr., telephoned the contracting officer and reiterated that his client "could not finalize its . . . cost information until all its costs were known." According to Mr. Menechino, the contracting officer informed him during the conversation that negotiations could proceed based on the data already provided. (Menechino affidavit) The contracting officer denies Mr. Menechino's assertion (2nd Sneed affidavit).

8. On 29 June 1998, the Government deobligated all but $97,738 of the contract price (R4, tab 1, Modification No. P00001).

9. On 5 November 1998, appellant submitted an invoice for post-termination work ordered by the Government. The invoice reserved its right to "any amounts that may be due in connection with the . . . proposal to be submitted by Astor . . . ." (R4, tab 14)

10. On 16 November 1998, the contracting officer requested supporting documentation for part of the invoice, indicating that the "documentation . . . may be submitted with your . . . proposal at your earliest convenience" (R4, tab 15).

11. On 15 January 1999, the contracting officer inquired as to when appellant was going to submit its proposal. The letter did not specify a deadline. (Moore affidavit)

12. Appellant did not reply to the Government's 15 January 1999 letter because it understood "that . . . final negotiations relating to [its] termination for convenience costs could be engaged in based on the information already supplied . . . and . . . that there was no time limit on the supply of any final paperwork" (Moore affidavit).

13. On 25 March 1999, the contracting officer advised appellant that if it could show that it mailed its proposal within one year, "it will be considered timely" (R4, tab 17). According to appellant, "[t]his was the first time the Government ever contended that [it] had not complied with any timeliness requirements or that any timeliness requirements were applicable to the matter" (Moore affidavit).

14. On 5 April 1999, appellant's counsel wrote the contracting officer that he and his client were "confused" by the Government's 25 March 1999 letter "in light of the settlement proposal information previously submitted to [the Government] as well as the negotiations . . . that have taken place within the last year." Counsel also indicated that the effective date of the termination was unclear and that, while not sure that "an extension [was] required," he requested an extension of time in which to file any additional information that was necessary (R4, tab 18).

15. On 28 April 1999, the contracting officer settled the contract for $0, on the basis that appellant failed to submit a timely termination settlement proposal.

16. On 1 June 1999, appellant submitted a certified "supplement" to its 10 March 1998 submission. The supplement reduced the amount of appellant's termination claim from $97,738.00 to $38,095.38. Appellant did not submit its proposal on the standard form because the Government had previously accepted proposals in a letter format. (R4, tab 19)

17. Appellant appealed the contracting officer's deemed denial of its termination settlement claim and thereafter filed its complaint on 22 October 1999 (Bd. corr. file).

18. On 25 October 1999, the Board sent out a notice indicating that it had received the complaint with the following notation: "Encl - Appellant mailed copy direct" (*id*.).

19. Although it received the Board's notice on 27 October 1999, the Government did not file an answer within the 30 days prescribed by Board Rule 6 because it did not receive a copy of the complaint from Astor (Baxley and Cairo Affidavits).

20. On 15 December 1999, the Board ordered the Government to file an answer within 21 days of the date of the order or by 5 January 2000. The Government did not file its answer by 5 January 2000 (Bd. corr. file).

21. On 21 January 2000, Mr. Kenneth Hyde, a Board staff attorney, telephoned the Government and asked if the Government had answered the complaint. The Government indicated that it had not received a copy of the complaint and asked Mr. Hyde to telefax a copy. The Government received the complaint via telefax on 21 January 2000. (Baxley affidavit)

22. The Government did not file an answer as directed by the Board's 15 December 1999 order because it did not receive a copy of the order in the mail (Baxley and Cairo Affidavits).

23. On 25 January 2000, appellant moved for sanctions pursuant to Board Rule 35 on the basis that the Government had failed to follow a Board order (Bd. corr. file).

24. The Government filed its answer on 26 January 2000 (Bd. corr. file).

25. On or about 28 January 2000, the Government received appellant's motion for sanctions, whereupon it called the Board and requested a copy of the 15 December 1999 order (Baxley affidavit).

26. On 29 February 2000, the Government moved to dismiss for failure to state a claim upon which relief may be granted, alleging that appellant's proposal was untimely (Bd. corr. file).

27. On 3 April 2000, appellant moved for summary judgment, alleging that appellant's 10 March 1998 submission was a timely termination settlement proposal (*id*.).

28. The Government filed two replies to appellant's motion for summary judgment (*id*.).

29. On 28 June 2000, appellant moved to strike the Government's second reply (*id*).

DECISION

I. APPELLANT'S MOTION FOR SANCTIONS

Appellant first moves for sanctions against the Government based on the Government's failure to timely file its answer. Appellant maintains that sanctions are warranted because the Government failed to abide by the Board's rules of procedure and did not comply with the Board order dated 15 December 1999.

The Board normally imposes sanctions only if a party fails or refuses to obey a Board order (see Board Rule 35). Here the Government filed its answer promptly upon actual receipt of the complaint. With respect to the Government's failure to respond to the Board's order of 15 December 1999, the Government has presented unrebutted evidence that it did not receive that order. Thus, while the Government has failed to follow a Board order, we conclude that it would not be appropriate to impose sanctions under these circumstances.

Appellant's motion for sanctions is denied.

II. THE CROSS-MOTIONS FOR SUMMARY JUDGMENT

Appellant points out that the Government's motion to dismiss for failure to state a claim should be treated as a motion for summary judgment because it includes affidavits and citations to the Rule 4 file instead of being limited to the pleadings. We agree. *Southern Systems, Inc.,* ASBCA Nos. 43797, 43798, 00-1 BCA ¶ 30,762 at 151,922. Thus, we treat the motions of the parties as cross-motions for summary judgment.

In ruling on cross-motions for summary judgment, we must evaluate each party's motion on its own merits, taking care to draw all reasonable inferences against the party whose motion is under consideration. The fact that both parties have moved for summary judgment does not require us to grant judgment as a matter of law for one side or the other. Finally, judgment in favor of either party is not proper if disputes remain as to material facts. *Mingus Constructors, Inc. v. United States,* 812 F.2d 1387, 1391 (Fed. Cir. 1987).

The primary function of a termination settlement proposal is to foster negotiations between the parties. *Bravo Manufacturing, Inc.,* ASBCA No. 41838, 92-1 BCA ¶ 24,514 at 122,336; *Cubic Defense Systems, Inc.,* ASBCA No. 39859, 91-2 BCA ¶ 23,748 at 118,919. Thus, a proposal which is initiated within the one-year period, but which contains flaws may be valid if the flaws are not so severe as to render the proposal meaningless for purposes of negotiation and are remediable within a reasonable time. *Marine Instrument Co.,* ASBCA Nos. 41370, 46295, 97-2 BCA ¶ 29,082 at 144,778; *Harris Corp.,* ASBCA No. 37940, 89-3 BCA ¶ 22,145 at 111,462.

The Government argues that it is entitled to summary judgment because the 10 March 1998 submission was not a valid proposal. According to the Government, the submission was defective in that: (1) it was not labeled as a proposal; (2) it was submitted prior to the termination for convenience; (3) it was not on the standard form designated by the FAR; (4) it was not certified; (5) it was only a "ballpark" estimate of appellant's costs; and (6) it was not perceived, even by appellant, as a comprehensive proposal. Appellant cross-moves for summary judgment, arguing that the submission was

a valid proposal because it contained the essential elements of a proposal and was detailed enough to serve as the basis for negotiations.

In our opinion, neither party is entitled to summary judgment. The parties disagree as to whether the contracting officer told appellant after the termination that the 10 March 1998 submission was adequate for purposes of negotiation (finding 7), whether the contracting officer's 16 November 1998 request for supporting documentation extended the time for submitting a proposal (finding 10) and what negotiations took place prior to the expiration of the one-year period (finding 14).

Accordingly, the cross-motions for summary judgment are denied.

III. APPELLANT'S MOTION TO STRIKE

Appellant lastly moves to strike the Government's second reply to appellant's motion for summary judgment because it was filed without leave of the Board. Usually, a party is allowed only one reply. In this case, however, appellant has not alleged that it was prejudiced by the second filing and our review of the record did not reveal any prejudice. Accordingly, we see no reason to strike the reply.

Appellant's motion to strike is denied.

Dated: 18 September 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 Appeals in ASBCA No. 52377, Appeal of Astor Bolden Enterprises, Inc., rendered in conformance with the Board's Charter.

Dated:

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