ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Eurasia Heavy Industries, Inc.	)	ASBCA No. 52878
	)	
Under Contract No. F4108-87-C-1511	)	

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OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY

Three appeals (ASBCA Nos. 52278, 52878 and 52879) have been filed by appellant Eurasia Heavy Industries, Inc. and consolidated. At issue in ASBCA No. 52878 is appellant's motion for summary judgment or dismissal. We deny the motion.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

On 21 September 1987, the Government awarded contract F4108-87-C-1511 in the amount of $2,653,776 to appellant Eurasia Heavy Industries, Inc. (EHI) to erect two enclosed noise suppressor hangers at Clark Air Force Base in the Philippines. The contract contained the standard TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (APR 1984) clause, FAR 52.249-2, which provides in paragraph (b)(8): "[[T]he contractor shall] [t]ake any action that may be necessary, or that the Contracting Officer may direct, for the protection and preservation of the property related to this contract that is in the possession of the Contractor and in which the Government has or may acquire an interest." It also contained a progress payments clause, FAR 52.232-16 (APR 1984) (DEVIATION). (ASBCA No. 52278, R4, tab 2M)

In December 1989, the contracting officer suspended progress payments based upon EHI's alleged failure to meet quality assurance requirements (*id.*, compl. and answer ¶ 14). The propriety of this suspension is disputed (ASBCA Nos. 52878 and 52879, compl. and

answer ¶¶ 14, 15). According to the original and supplemental affidavits of Mr. Edison S. Deza, EHI's former Manager for Purchasing, Planning and Control, the suspension prevented EHI from making payments to its subcontractors and caused material to be unclaimed (app. resp. to Gov' t mot., ex. B at ¶ 11; app. mot., ex. 1 at ¶ 11). The Government disputes his statement based upon Audit Report No. 7201-0F175001, dated 26 November 1990, issued by the Defense Contract Audit Agency (DCAA) regarding progress payments 13 through 18, which suggests that EHI could not pay its subcontractors because it advanced "approximately $2.9 million of its funds to affiliated companies" (ASBCA No. 52278, R4, tab 5X attach. 1 at 5).

On 14 May 1993, the contracting officer issued Modification No. P00005, terminating EHI's contract for the convenience of the Government. With respect to the termination inventory, the modification provided:

> (1) As instructed by the Contracting Officer, transfer title and deliver to the Government all termination inventory of the following types or classes, including subcontractor termination inventory that you have the right to take: NONE.
>
> (2) To settle your proposal, it will be necessary to establish that all prime and subcontractor termination inventory has been properly accounted. For detailed information, see FAR Part 45.

(R4, tab 2C)

The "Statement of Facts, Termination for Convenience Contract F41608-87-C-1511" prepared by the contracting officer that same day provides:

> Approximately $1.5 million in material was consigned to the U.S. Government by various subcontractors for performance under this contract. Some of this material may still be in storage in the port of Manila. The Contracting Officer has requested a legal opinion on the U.S. Government's liability for and/or title to this property. The majority of this property was apparently removed. Also, the property was not shipped until after the [Administrative Contracting Officer] ACO had stopped progress payments, and the subcontractors were never paid by the prime. The disposition of the property being held at the Port of Manila to which the U.S. Government may have title (or liability for storage fees) will be the delegated responsibility of the Terminating Contracting Officer if found to be necessary.

> After discussions with the Program Manager and engineer, it was determined that the Government did not wish to take delivery of any possible termination inventory at the base or the port. This is based on the following reasons:
>
> a) The Government currently has excess, inactive Noise Suppressor systems which could be cannibalized for parts and or materials
>
> b) Any remaining material which may have been on Clark AB was apparently destroyed by the [Mount Pinatubo] volcano
>
> c) Due to the withdrawal of U.S. forces from the Philippines, we do not have access to the base, nor sufficient personnel in country to research the disposition of property or arrangement for its shipment
>
> d) Materials at the port would likewise be difficult to remove, are not required, and any claim to title thereof would result in the Government having to pay apparently substantial (approximately $250,000) charges for storage/demurrage fees
>
> If an amount payable is determined to be owed the contractor, the price for any inventory retained, purchased, or otherwise disposed of by the contractor will be deducted from any amount payable in accordance with FAR 49.204.

(App. mot., ex. 3)

According to the supplemental affidavit of Mr. Deza, the Government did not perform an audit or review EHI's termination inventory and did not instruct EHI to take any specific actions to preserve, protect or dispose of it (app. mot., ex. 1 at ¶ 7). The Government identified and explained evidence which it believes demonstrates that the inventory was abandoned, lost or removed before the contract was terminated (Gov' t resp. to app. mot. at 4-5; ASBCA No. 52278, R4, tabs 5L attach. 3, 5SS, 5QQQ, 5SSS; ASBCA Nos. 52878 and 52879, R4, tabs 5G through 5I). A 26 October 1994 report of a trip taken by Messrs. Carl E. Wilson, property administrator, and Primo C. Correa, Quality Assurance Specialist, from the Defense Contract Management Agency, Kuala Lumpur, to the Philippines on 17-21 October 1994 is among the documents identified. One of the objectives of this trip was to determine disposition of material that had been shipped to Manila. (ASBCA No. 52278, R4, tab 5SS)

On 29 April 1994, EHI submitted a termination settlement proposal to the contracting officer in the amount of $7,851,732.94 (ASBCA No. 52278, R4, tab 3V). The proposal was audited by DCAA which, in audit reports dated 11 May 1995 and 14 February 1996, questioned the entire proposal as "unsubstantiated," and further noted in the 14 February 1996 report that it had "found indications that EHI had fabricated and altered documentation to support its claimed costs" (*id*., R4, tabs 5X, 5O). The matter was referred to the Air Force Office of Special Investigations (OSI) for further investigation (*id*., R4, tab 5I). The affidavit of Mr. Luciano C. Lim, EHI's Vice President of Finance, however, states that the irregularities noted by DCAA can be explained and provides details regarding certain of the alleged accounting irregularities (app. resp. to Gov' t mot., ex. A at ¶¶ 16, 17).

On 7 September 1998, EHI submitted a revised termination settlement proposal seeking $8,570,626 (ASBCA No. 52278, R4, tab 3C). The DCAA audit report of the revised proposal, issued on 3 December 1998, questioned $7,479,252, most of which ($5,311,764) related to costs claimed for post-termination interest, penalties and professional fees relating to EHI loans. DCAA stated that it did "not believe the proposal was an acceptable basis for negotiation of a fair and reasonable settlement amount" because of "the significance of the questioned costs and inadequate supporting documentation." The report again noted that there were indications that EHI had fabricated and altered documents to support claimed costs. (*Id*., R4, tab 5E)

On 8 January 1999, the Air Force issued Notices of Debarment to EHI and several other affiliated companies and individuals finding that EHI and three individuals, including Messrs. Deza and Lim, had submitted a fraudulent claim and fabricated false supporting records (*id*., R4, tab 5D).

On 30 April 1999, the terminating contracting officer rejected EHI's termination settlement proposal in its entirety for lack of authority under 41 U.S.C. § 605(a) and FAR 33.210(b) "[d]ue to the involvement of fraud" (*id*., R4, tab 1A). An appeal from this decision was filed on 26 July 1999, and docketed as ASBCA No. 52278.

On 2 October 1999, EHI submitted (by fax) to the contracting officer a certified claim dated 30 September 1999 seeking $1,969,180 in termination costs and requested a contracting officer's final decision. The costs claimed included $1,354,082 which had not been questioned by DCAA in the 3 December 1998 audit report, together with additional professional fees and profit totaling $615,098. (ASBCA Nos. 52278 and 52279, R4, tab 3I) On 20 April 2000, DCAA issued an audit report which attached a copy of the 3 December 1998 audit report, but made no mention of any irregularity associated with EHI's 30 September 1999 claim. The report questioned $532,271 of the additional amounts claimed. (*Id*., R4, tab 5B)

On 19 May 2000, the contracting officer issued a two part final decision. In Part I, she denied $1,922,447 of the amount claimed by EHI primarily because of alleged unresolved disputes between EHI and its subcontractors and found that EHI was entitled to only $46,733. In Part II, she asserted a Government claim in the amount of $723,305 relating to termination inventory. This amount was offset against the $46,733 due EHI, resulting in a net Government claim in the amount of $676,572. (*Id*., R4, tab 1A)

The appeal from Part I of the contracting officer's decision was docketed as ASBCA No. 52879 and the appeal from Part II of the decision was docketed as ASBCA No. 52878.

The Government had not previously asserted a claim related to the termination inventory (app. mot., ex. 1 at ¶ 10). Nor did the Government advise EHI at any time during termination settlement discussions that it attached any value to the termination inventory or that it would pursue a claim for costs associated with it (*id*. at ¶ 12; ASBCA Nos. 52878 and 52879, comp. and answer ¶ 46).

Mr. Deza's affidavit states that "[m]any of the individuals who were most knowledgeable about the termination inventory . . . and many of the relevant documents pertaining to materials receiving/issuing reports are no longer available given the passage of seven years since the termination" (app. mot. ex. 1 at ¶ 12). The Government identified both the documentary evidence that it believes is relevant to the termination inventory as well as contractor and Government personnel it believes can explain what happened to the inventory and asserts that it expects to obtain additional information during discovery (Gov' t resp. at 6-7).

DISCUSSION

EHI's motion for summary judgment asserts that the Government's claim in ASBCA No. 52878 is barred by the equitable doctrines of laches and estoppel. In the alternative, it seeks dismissal for lack of jurisdiction on grounds it had no notice of the claim before the issuance of the contracting officer's 19 May 2000 final decision. (App. mot. at 8)

Summary judgment is appropriate where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one which may affect the outcome of the appeal. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Further, we must draw inferences in favor of the party opposing the motion. *Hughes Aircraft Co.*, ASBCA No. 30144, 90-2 BCA ¶ 22,847.

The Government first argues that the laches and estoppel defenses are not available to EHI. It asserts that, under *United States v. Summerlin*, 310 U.S. 414 (1940), the remedy of laches may not be invoked against the Government and that the court of appeals

created an impermissible exception to the rule when it decided *S.E.R. Jobs for Progress, Inc. v. United States*, 759 F.2d 1 (Fed. Cir. 1985). EHI responds, and we agree, that the Government is simply arguing that we should not follow *S.E.R. Jobs for Progress* despite the fact that it remains good law. *See JANA, Inc. v. United States*, 936 F.2d 1265, 1269 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 1030 (1992). The Government similarly asserts that the estoppel defense should not be applied against it under *OPM v. Richmond*, 496 U.S. 414 (1990). EHI responds, and again we agree, that the doctrine of equitable estoppel is a permissible defense to a Government monetary claim based upon a contract. *See Burnside-Ott Aviation Training Center, Inc. v. United States*, 985 F.2d 1574, 1581 (Fed. Cir. 1993).

We likewise reject the Government's argument that EHI is precluded from asserting the defenses of laches and estoppel because it has "unclean hands" (Gov' t resp. at 9). "[O]ne who seeks equity must do equity." *Shockley v. Arcan, Inc.*, 248 F.3d 1349, 1361 (Fed. Cir. 2001) *quoting Manufacturers' Finance Co. v. McKey*, 294 U.S. 442 (1935). Thus, the unclean hands doctrine "closes the door of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief." *ABF Freight System, Inc. v. NLRB*, 510 U.S. 317, 329 (1994).

Here, the Government's assertion of unclean hands is based upon EHI' s termination settlement proposals and its 30 September 1999 claim, the 26 November 1990, 11 May 1995, 14 February 1996, and 3 December 1998 DCAA audit reports of EHI' s progress payments and its proposals and the fact that EHI was investigated by OSI and debarred. ASBCA No. 52878, however, is an appeal from a Government claim for the costs of the termination inventory asserted by the contracting officer's 19 May 2000 final decision. Apart from the offset against the $46,733 the contracting officer found due EHI, it has very little to do with EHI's termination settlement proposals or its claim. Thus, even assuming the Government can prove its contention that EHI's settlement proposals and its claim are based upon "bogus and fraudulent records" (Gov' t resp. to app. reply at 8), we cannot say that EHI is tainted with respect to the Government's claim for the costs of the termination inventory. *See Ciba-Geigy Corp. v. Bolar Pharmaceutical Co., Inc.*, 747 F.2d 844, 855 (3d Cir. 1984), *cert. denied*, 471 U.S. 1137 (1985) (unclean hands requires showing of inequitable conduct involving the subject matter of the claims at issue).

Turning to the merits of EHI's motion, we are satisfied that the Government has presented sufficient evidence to establish genuine issues of material facts relating to both EHI's laches and estoppel defenses to the Government's claim. *See Anderson*, 477 U.S. at 254-55 (1986).

In order to prevail upon its laches defense, EHI must demonstrate: (1) unreasonable and inexcusable delay by the Government; and (2) prejudice, either economic or defense, *i.e.*, "impairment of the ability to mount a defense due to circumstances such as a loss of records, destruction of evidence or witness unavailability." *JANA*, 936 F.2d at 1269-70.

See also A.C. Aukerman Co. v. R.L. Chaides Const. Co., 960 F.2d 1020, 1032-33 (Fed. Cir. 1992).

As to the first element, the Government asserts that, at best, the 14 May 1993 memorandum prepared by the contracting officer indicates that he thought that there might have been some inventory in the port and that the earliest date he had information regarding the disposition of the contract materials came from the 26 October 1994 trip report. Guided by the six-year statute of limitations for contractual claims asserted by either the Government or contractors established by § 2351 of the Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355, 108 Stat. 3243, as an amendment to § 6(a) of the Contract Disputes Act (CDA), 41 U.S.C. § 605(a), the Government further asserts that the passage of less than six years (26 October 1994 to 19 May 2000) is not an unreasonable period of time. However, determination of whether the Government's delay in asserting its claim is unreasonable must be based upon a consideration of all of the particular facts and circumstances of the case. *Aukerman*, 960 F.2d at 1032. Here, there are genuine issues of fact regarding the reasonableness of the Government's delay.

As to the second element of laches, EHI asserts that it has lost the opportunity to deliver the termination inventory to the Government and that it has suffered defense prejudice as a result of the loss of records and the inability to locate witnesses. In response, the Government points to Rule 4 file records which it asserts show that the inventory was removed from the port, abandoned or otherwise disposed of before contract termination. It points to other records which it further asserts show precisely what was ordered, how much it cost, when and where it was shipped from, when and where it arrived, and what happened to the materials. The Government also asserts correctly that EHI has not identified all the witnesses it is unable to locate or explained why they are important to the case. We again are satisfied that there are genuine issues of fact regarding whether EHI has been prejudiced by the Government's delay.

The same is true of EHI's estoppel defense. It is settled that EHI must establish the following elements: (1) the Government knew the facts; (2) the Government intended that its conduct be acted upon or its conduct was such that EHI reasonably believed that it was so intended; (3) EHI was ignorant of the facts; and (4) EHI relied to its detriment upon the Government's conduct. *Emeco Industries, Inc. v. United States*, 485 F.2d 652, 657 (Ct. Cl. 1973); *see American Electronic Laboratories, Inc. v. United States*, 774 F.2d 1110, 1113 (Fed. Cir. 1985). The Government challenges EHI's assertions as to the last three elements (Gov' t resp. at 16).

With regard to the second and third elements, EHI asserts that the Government intended for it to ignore the termination inventory, that it reasonably interpreted the Government's lack of interest in the inventory to mean it would not seek a deduction for the associated costs, and that it was ignorant of the facts. The Government counters that, under the termination for convenience clause, EHI was responsible for accounting for the termination inventory and that its termination settlement proposal only informed the

Government about items located at Clark Air Force Base, and further that under both the termination for convenience and progress payments clauses, EHI was responsible for protecting the inventory. Given the requirements of the termination for convenience and progress payments clauses, there are genuine issues of fact in dispute regarding the Government's intent, the reasonableness of EHI's interpretation of its intent and whether EHI was ignorant of the facts.

The arguments advanced by the parties as to the fourth element, reliance, are essentially the same as those raised in conjunction with the prejudice requirement of the laches defense. Our conclusion, therefore, is also the same. Nor are we convinced that the present record permits us to decide that the Government is only entitled to the scrap value of the lost inventory, as EHI also contends, because such a conclusion requires a factual finding that the materials were of no significant value to the Government. *See General Dynamics Corporation*, ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851 (Board does not resolve factual disputes on motion for summary judgment).

EHI's final argument is that ASBCA No. 52878 should be dismissed because the Government did not give it notice of the claim and an opportunity to agree or disagree, absent which there was no dispute between the parties. It relies upon *Instruments & Controls Service Co*., ASBCA No. 38332, 89-3 BCA ¶ 22,237. The Government responds and we agree, that under *Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995) (*en banc*), there need not be a preexisting dispute before a non-routine Government claim can be asserted under the CDA. *Aerojet Ordnance Tennessee*, ASBCA No. 36089, 95-2 BCA ¶ 27,922 at 139,436. Contrary to EHI's reply, *REX Systems, Inc. v. Cohen*, 224 F.3d 1367 (Fed. Cir. 2000) does not require a different result. The issue there was whether there was an impasse such that the contractor's termination settlement proposal had ripened into a CDA claim. *Id*. at 1372.

CONCLUSION

EHI's motion for summary judgment or to dismiss ASBCA No. 52878 is denied.

Dated: 31 July 2001

CAROL N. PARK-CONROY
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. 52878, Appeal of Eurasia Heavy Industries, Inc., rendered in conformance with the Board's Charter.

Dated:

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