ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Environmental Safety Consultants, Inc.	)	ASBCA No. 51722
	)	
Under Contract No. N62470-95-C-2399	)	

APPEARANCE FOR THE APPELLANT: Mr. Peter C. Nwogu
President

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
Ellen M. Evans, Esq.
Trial Attorney
Engineering Field Activity
Chesapeake
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE DICUS
ON THE GOVERNMENT'S MOTION TO DISMISS

Environmental Safety Consultants, Inc. (ESCI) contracted to remove storage tanks and contaminated materials from the Naval Weapons Station at Yorktown, Virginia. The contract was terminated for default and ESCI filed this appeal. The Government has moved to dismiss appellant's affirmative monetary claim. As discussed more fully below, the motion is granted.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. The Department of the Navy operates a Naval Weapons Station near Yorktown, Virginia. In 1995, the Government issued an Invitation for Bids for the removal of storage tanks and contaminated materials from the Yorktown Weapons Station. A contract for this work, No. N62470-95-C-2399, was awarded to appellant in November 1995. (R4, tab 1)

2. In Clause I.43, the contract incorporated by reference FAR 52.249-10 DEFAULT (FIXED - PRICE CONSTRUCTION) (APR 1984). This clause gave the Government the right to terminate the contract for failure to make progress or to complete the work in the time specified by the contract. It also provided that if, after termination for default, it was determined that the contractor was not in default or that its delay was excusable, the rights and obligations of the parties would be the same as if the contract were terminated for convenience. (R4, tab 1)

3. In Clause I.42, the contract incorporated by reference FAR 52.249-2 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED - PRICE) (APR 1984) ALTERNATE I. This clause provided that if the contract were terminated for convenience, the contractor might recover costs it incurred before termination, as adjusted by the profit or loss position of the contract, and certain other expenses. (R4, tab 1)

4. The initial contract completion date was 26 August 1996 (R4, tab 2; Mod. P00001). By 27 June 1996, less than 25% of the contract work had been completed (R4, tab 5). The Government sent appellant a cure notice in September 1996 (R4, tab 6). In October 1996, the Government stated that it was considering terminating the contract for default unless appellant could show that its failure to complete was beyond ESCI's control and without its fault (R4, tab 8). Appellant responded on 7 and 22 October 1996. Appellant proposed using subcontractors and requested four to five weeks to complete the contract. (R4, tabs 9, 10)

5. The contract was not terminated and, in March 1997, the Government proposed certain changes to the contract. The Government asked appellant for a cost proposal. (R4, tab 11) ESCI responded on 7 April 1997 (R4, tab 12). In June 1997, the Government and appellant entered into Modification P00006. The modification made a number of additions and deletions to the work to be performed. The net increase in the contract amount was $109. The contract completion date was extended from 26 August 1996 to 30 June 1997. (R4, tab 2; Mod. P00006)

6. At some point, appellant failed to pay its subcontractors who were paid by the surety, Gulf Insurance Company (R4, tab 15). As a result, payment disputes arose involving appellant, the surety, and the subcontractors (R4, tabs 16-18). It appears that appellant did no work after June 1997 (compl., ¶ 8).

7. On 30 September 1997, the Government issued a cure notice based on appellant's failure to make progress on the contract (R4, tab 19). Appellant responded in November 1997 (R4, tab 22). A second cure notice was issued on 6 January 1998 (R4, tab 23). The Government subsequently notified appellant that it was considering a termination for default (R4, tab 24). Appellant responded in January and February 1998 (R4, tabs 25-27). The Government sent a second letter dated 8 May 1998 indicating that it was considering a termination for default. Appellant responded with a proposal forwarded by letter of counsel dated 13 May 1998. (R4, tabs 31-32) The contract was terminated for default on 12 June 1998. The termination was based on appellant's failure to make progress and to complete the contract by the contract completion date. (R4, tab 2; Mod. P00007)

8. ESCI appealed the termination by notice of appeal dated 26 August 1998. In its initial complaint, appellant requested that the termination for default be converted into a termination for the convenience of the Government. Appellant also requested an award of $334,687.85 which ESCI said it was owed for work done through June 1997.

9. The Government filed an answer and partial motion to dismiss dated 4 December 1998. In part, the motion sought dismissal of ESCI's request for additional compensation. The Government said that the Board did not have jurisdiction over the request because it had not been presented to a contracting officer as required by the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended. Following an 18 December 1998 conference call with the parties' representatives, the Board issued a 30 December 1998 Memorandum of Telephone Conference documenting the Government's agreement to resubmit an answer and, if it wished to renew its motion to dismiss, to do so in a more complete form. Thereafter, the Board issued another 30 December 1998 Order stating that only the propriety of the termination for default was properly before the Board. However, the Board afforded to appellant the opportunity to provide proof that it had submitted a claim in accordance with the CDA. ESCI's deadline was 20 days after it received the Government's amended answer. We said that if ESCI failed to provide timely proof, the affirmative monetary claim would be stricken from the complaint. The amended answer was filed on 20 January 1999 without a motion to dismiss. In our 17 March 1999 election order we stated that only the termination for default was before us. A review of the record shows that appellant did not attempt to provide proof that it had submitted an affirmative money claim until 15 March 2002.

10. Appellant filed voluntary bankruptcy proceedings in 1999, and the appeal was suspended until 15 March 2001 when the bankruptcy court lifted an automatic stay. On 23 March 2001, the Board again requested the parties' elections. The letter again specifically stated that only the propriety of the default termination was before the Board. There is no indication in the record that ESCI challenged the statement of the issues before the Board until early 2002.

11. On 11 January 2002, the Board held a conference call to discuss discovery issues. During the call, appellant's representative stated that he intended to pursue the payment of money owed appellant for work done. In an 11 January 2002 letter memorializing the call, we reiterated that only the propriety of the termination was before the Board.

12. On 15 March 2002, ESCI filed an amended complaint. In the amended complaint, appellant asserted that its affirmative monetary claim of $334,687.85 should be before the Board. Appellant also raised new allegations regarding the Government's administration of the contract. On 25 April 2002, the Government filed a motion to dismiss the amended complaint, a motion to strike the new allegations, and a motion to compel. Appellant has responded to the motions.

13. There is no evidence that ESCI attempted to provide a CDA certification for its submissions seeking an affirmative monetary adjustment.

DECISION

The motion to strike and motion to compel have been addressed in a separate Order dated 1 July 2002. The motion to dismiss requires us to decide whether appellant's affirmative monetary claim is properly before the Board. The Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended, states that claims must be in writing and requires that they be submitted to a contracting officer for a decision. 41 U.S.C. § 605(a). It further requires that claims over $100,000 be certified in accordance with 41 U.S.C. § 605(c)(1). While a defective certification can be remedied after submission, the complete lack of a certification may not. *Eurostyle Inc.*, ASBCA No. 45934, 94-1 BCA ¶ 26,458. These requirements must be met even if a monetary claim arose under a terminated contract and the termination was properly appealed. *See Elektro Radio Klein*, ASBCA No. 36514, 88-3 BCA ¶ 21,168; *Bailey*, PSBCA No. 3638, 95-1 BCA ¶ 27,447.

In December 1998, we directed ESCI to provide proof that its monetary claim of $334,687.85 met the requirements of the CDA (finding 9). When the requested proof was not forthcoming, the appeal proceeded for the next three years subject to the bankruptcy stay as a challenge to the propriety of the termination for default (findings 10-12). Appellant has failed to identify, and we cannot find, anything in the record that shows that a certified claim in the amount of $334,687.85 was ever presented to a contracting officer.

Appellant appears to argue that it never received the Board's 30 December 1998 Order. The Order followed a conference call that included appellant's Rule 26 representative and involved the same issue (finding 9). The Order was addressed and sent to ESCI's representative and there is no indication that he did not receive it in a timely manner. In addition, the Board's conclusion that only the propriety of the termination for default was before the Board was reiterated in the request for elections dated 23 March 2001 that was also sent to appellant's representative (finding 10). We see no basis for excusing appellant's failure to furnish proof that its monetary "claim" met the requirements of the CDA, or to belabor the matter further in this appeal.

Finally, FED. R. CIV. P. 15, which we look to for guidance, provides that, once a responsive pleading has been filed, a party may file an amendment only with leave of court or the other party's permission. Appellant has obtained neither. While such amendments are usually liberally permitted, we deny the amended complaint here as we have no jurisdiction over the affirmative claim. Moreover, we believe any benefit from permitting the amendment is far outweighed by the confusion that would result from an attempt to sort out portions which might arguably apply to the termination for default.

We hold that appellant has not demonstrated that its monetary "claim" was certified or presented to a contracting officer. We conclude we do not have jurisdiction over the affirmative monetary "claim" for $334,687.85 and dismiss it without prejudice to appellant's right to submit a properly certified claim to the contracting officer.

Accordingly, the only issue before the Board is the propriety of the termination for default. The Government's motion to dismiss the amended complaint is granted.

Dated: 8 July 2002

CARROLL C. DICUS, JR.
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. 51722, Appeal of Environmental Safety Consultants, Inc., rendered in conformance with the Board's Charter.

Dated:

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