

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
Range Technology Corporation ) ASBCA No. 51943  
 )  
Under Contract No. MDA908-97-C-0016 )

APPEARANCE FOR THE APPELLANT: Duane Brummett, Esq.  
Niceville, FL

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.  
Acting Chief Trial Attorney  
CPT Jennifer S. Zucker, JA  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY

At issue is the Government's motion for leave to amend its answer to assert the affirmative defense of fraud, which has been opposed by appellant. We grant the motion.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

Contract No. MDA908-97-C-0016 was awarded to appellant on 10 March 1997 for delivery of a Bofors RBS-70 anti-aircraft missile defense system at a price of \$600,000.00. The Equipment Delivery clause of the contract established a 16-day delivery window which began "no sooner than 30 days after US Government acceptance of all system documentation but not later than 45 days after Government acceptance of the documentation. The exact date and time is to be determined at the discretion of the US Government." (R4, tab 1 at 8)

Appellant made arrangements through its employee, Mr. William Chastain, to purchase the missile system from a military general in Venezuela (R4, tab 2).

Bilateral Modification No. P00001, executed 8 April 1997, authorized an advance payment of \$330,000.00 to appellant (R4, tab 8). The delivery date was extended to 31 July 1997, via bilateral Modification Nos. P00002 and P00003 (R4, tabs 15, 26).

By a letter dated 4 August 1997, appellant submitted an invoice in the amount of \$203,200.00 and requested an "equitable adjustment . . . due to [G]overnment-caused delay." The invoice reflected a payment of \$150,000.00 for the "cost of goods." The letter stated: "In consideration of the [G]overnment-proffered equitable adjustment, Range Technology Corporation waives the right to claim any future cost overruns on this

contract.” It concluded with a request for a delivery extension to 30 September 1997. (R4, tab 33)

On 21 August 1997, the parties executed bilateral contract Modification No. P00005, which authorized an additional payment of \$203,200.00 and extended contract performance to 10 September 1997. The contracting officer, Mr. Andrew Bewick, relied upon the invoice when he authorized the additional payment (Gov’t mot., tab 2 at 2). There is evidence that Mr. Chastain paid only \$120,000.00 for the “goods” (Gov’t mot., tab 1 at 7-8, 12, 15).

The delivery date was further extended to 31 December 1997, via bilateral Modification Nos. P00006, P00007 and P00008 (R4, tabs 36, 38, 40). The Government offers evidence that, contrary to appellant’s representations, the general only offered to make delivery on three occasions: 21 July 1997, 13-14 September 1997, and sometime in October 1997 (Gov’t mot., tab 1 at 18, 33, 41-42). Delivery of the system was never accomplished and, by a letter dated 30 January 1998, the contracting officer terminated the contract for default and asserted entitlement to repayment of \$533,140 (R4, tab 67).

On 30 September 1998, appellant submitted a claim seeking \$1,270,549 and conversion of the termination for default into one for convenience of the Government (R4, tab 75). The claim was denied by the contracting officer in a final decision dated 18 December 1998, which also demanded repayment of \$533,140 (R4, tab 79). This timely appeal followed.

Throughout this litigation, the Government has sought to take the depositions of appellant’s primary officers, Mr. Chris Hanson, its president, and Mr. Timothy D. Lacey, its chief operating officer. However, because of an ongoing criminal investigation, both men were advised by counsel not to testify in this appeal and both asserted their Fifth Amendment right against self-incrimination. By a copy of a letter dated 15 April 2003 addressed to counsel for appellant, the Government advised the Board that both men have recently agreed to give sworn deposition testimony in this appeal.

The Government’s answer to the complaint raised the following affirmative defense:

### III

#### AFFIRMATIVE DEFENSE - RELEASE

Modifications P00003, P00005, and P00006 contain releases that preclude [appellant] from recovering for increased costs that might be caused by U.S. caused delays.

In its motion for leave to amend its answer, the Government requests that its answer be amended as follows:

### III

## AFFIRMATIVE DEFENSE - RELEASE & FRAUD

Modifications P00003, P00005, and P00006 contain releases that preclude [appellant] from recovering for increased costs that might be caused by U.S. caused delays.

On information and belief, [appellant] through Mr. Chastain, paid a total of \$120,000 to the foreign general for the “goods.” [Appellant’s] invoice submitted to convince the contracting officer to authorize the second advance payment indicated that \$150,000 had been paid. Additionally, the foreign general offered delivery on only three dates, contrary to representations by [appellant]. These representations may constitute fraud in the obtaining of the second advance payment and delivery extensions. The Government intends to conduct further discovery into possible fraudulent actions by [appellant].

### DISCUSSION

Board Rule 7 provides in relevant part: “The Board may, in its discretion, and within the proper scope of the appeal, permit either party to amend its pleading upon conditions fair to both parties.”

Appellant’s opposition to the Government’s motion contains allegations of undue delay and assertions that the Government has acted in bad faith. We find no merit to either of these contentions. As to the issue of undue delay, the Government’s motion for leave to amend was filed approximately 18 months after its original answer. Discovery is still ongoing. The Government has yet to complete discovery, in part because two of appellant’s principal officers, Messrs. Hanson and Lacey, asserted their Fifth Amendment right against self-incrimination. As to the issue of bad faith, appellant’s opposition is, at best, conjecture and speculative argument.

Appellant further contends that the basis of the Government’s fraud allegation is not material to the claims that are at issue in this appeal. Again, we find no merit to this contention. Appellant seeks an equitable adjustment and conversion of the termination for default into one for convenience of the Government. The Government bears the burden of establishing that the default was appropriate. *See Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987). It alleges that appellant made misrepresentations about the amount Mr. Chastain paid for the system and the possible delivery dates which may constitute fraud in obtaining the second advance payment and the delivery time extensions. A termination for default will be upheld if there are grounds that would justify the termination, even if other grounds were relied upon in the contracting officer’s final decision. *See Kelso v. Kirk Bros. Mechanical Contractors, Inc.*, 16 F.3d

1173, 1175 (Fed. Cir. 1994). The Government's allegations are, therefore, relevant and material to the default termination issue in this appeal.

Further, we do not read the Government's proposed fraud defense to require us to decide whether appellant has violated the False Claims Act, 31 U.S.C. §§ 3729-31, a determination we would have no jurisdiction to render. Rather, the proposed defense requires us to decide whether appellant breached the contract by submitting a false invoice and making false representations about its ability to make delivery which induced the Government to make the second advance payment and to extend the delivery schedule. *See Environmental Systems, Inc.*, ASBCA No. 53283, 03-1 BCA ¶ 32,167, *aff'd on recon.* (4 April 2003).

The Government's proposed amendment is within the proper scope of this appeal. For the reasons stated, it is not unfair to permit the Government to amend its answer.

#### CONCLUSION

The Government's motion for leave to amend its answer is granted.

Dated: 23 June 2003

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CAROL N. PARK-CONROY  
Administrative Judge  
Armed Services Board  
of Contract Appeals

(Signatures continued)

I concur

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I concur

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MARK N. STEMLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

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. 51943, Appeal of Range Technology Corporation, rendered in conformance with the Board's Charter.

Dated:

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