ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
CACI International, Inc.	)	ASBCA Nos. 53058, 54110
	)	
Under Contract No. DCA200-94-H-0015	)	

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OPINION BY ADMINISTRATIVE JUDGE DICUS

These appeals involve a Department of Defense license agreement with CACI International, Inc. (CACI). CACI asserts a breach of the license agreement and seeks damages for the claimed breach.[1] The government has filed a motion to dismiss parts of appellant's claims. The motion is denied.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. In December 1993, the Department of Defense (DoD) Electronic Commerce in Contracting Process Action Team (PAT) reported that DoD had been considering Electronic Commerce (EC) and Electronic Data Interchange (EDI) to support its procurement processes since at least 1988 (R4, tab 27 at 000002);[2] *GAP Instrument*, 01-1 BCA ¶ 31,358, finding 4. Even then, however, the implementation of EC/EDI transactions within the procurement community was described as fragmented (R4, tab 27 at 000119); *GAP Instrument*, 01-1 BCA ¶ 31,358, finding 5.

2. The PAT report recommended rapid implementation of EC within DoD in order to present a "single face to industry." The plan identified procurements of $25,000 or less as the best target for the EDI initiative and called for the addition of certified Value Added

[1] The Board has a number of appeals from a number of contractors relating to the same license agreement. In 2001, we ruled for GAP Instrument Corporation, on entitlement, in one of those appeals. *GAP Instrument Corporation*, ASBCA No. 51658, 01-1 BCA ¶ 31,358.

[2] Rule 4 page numbers refer to the numbers stamped on the lower right corner of the Rule 4 documents.

Networks (VANs) "to exchange EC/EDI transactions with trading partners external to DoD." The PAT plan provided for a phased execution with timetables ranging from six months to two years. (R4, tab 27 at 000004-06, 000017-18, 000023, 000056, 000289, 000291); *GAP Instrument*, 01-1 BCA ¶ 31,358, findings 6, 7.

3. Appendix B of the PAT report contained a draft VAN license agreement. Paragraph 2.1 of Addendum A to the draft agreement provided the following:

> All contractors desiring to conduct business with participating DoD activities electronically must register as participating contractors and will be required to exchange all electronic transactions via a participating EDI VAN Provider. DoD activities participating in this approach will be phased into it in accordance with a DoD-wide implementation plan.

(R4, tab 27 at 000277) The license agreement called for DoD Distribution Points to provide DoD transactions offered under the agreement only to VANs that signed the license agreement. The plan was approved by the Deputy Secretary of Defense in January 1994. (R4, tab 27 at 000265-280); *GAP Instrument*, 01-1 BCA ¶ 31,358, finding 7.

4. In January 1994, Constance Jackson, a government contracting officer, forwarded a revision to the proposed license agreement. In pertinent part, the revision included the following:

> 2.1 Contractor Use of VAN Services
>
> DoD will require all contractors desiring to electronically conduct business to only do so with a participating, fully tested EDI VAN Provider. Any contractor may also exchange transactions by other means (i.e., not electronic) in accordance with the FAR and other applicable regulations.
>
> DoD will require registered vendors to exchange all electronic transactions via a participating EDI VAN Provider. DoD activities participating in this approach will be phased into it in accordance with a DoD-wide implementation plan.

GAP Instrument, 01-1 BCA ¶ 31,358, finding 8.

5. Also in January 1994, Ms. Jackson forwarded additional answers to questions raised at a December 1993 presolicitation conference. Among other things, the answers explained that no EDI communication within DoD or between government agencies would be exchanged through the VANs and identified the December 1993 PAT report as the plan referred to in the draft license agreement. *GAP Instrument*, 01-1 BCA ¶ 31,358, finding 9.

We found, in *GAP Instrument*, that the PAT report was the plan referred to in the license agreement. *Id.*

6. The Defense Information Systems Agency (DISA) assumed responsibility for establishing and maintaining hardware and telecommunications for EC/EDI in March 1994. In an April 1994 memorandum, the Deputy Secretary stated that implementation of the PAT plan over the next two-year period would enable the use of EC/EDI to support small purchases. The Deputy Secretary also stated that the use of nonstandard EC/EDI capable small purchase systems would be discontinued as soon as the standard DoD-wide EC/EDI system was fully operational at a particular activity. *GAP Instrument*, 01-1 BCA ¶ 31,358, findings 10, 11.

7. CACI asserts that it has developed products designed to assist Federal agencies and the United States Army in Electronic Commerce. SACONS-EDI, an EC/EDI system, was used by the U.S. Army. (Compl., ¶¶ 3-5) CACI also alleges that it sold its QuickBid software to Army vendors which allowed them to access Army procurement information. This software allowed vendors to conduct EC transactions over the General Electric Information Systems (GEIS) network. (Compl., ¶ 4) CACI and GEIS had entered into a Memorandum of Understanding (MOU) regarding EC in 1992. Under the MOU, they agreed to "jointly demonstrate, explain and display, to the Government and Government related marketplaces their proprietary electronic computer software products and services both as they currently exist and also as they may be jointly used, interfaced or made compatible with certain proprietary products and services of the other party." (Gov't mot., ex. 8 at 1)

8. CACI contends that the EC system proposed in the PAT report provided it with two business opportunities. One was to continue marketing QuickBid software to Army vendors in conjunction with its agreement with GEIS and to expand its sales of the software to other DoD vendors. The second was for CACI to become a VAN provider so that it could sell VAN provider services to DoD vendors. (Compl., ¶ 13)

9. Appellant contacted DISA to obtain a copy of the VAN license agreement (compl., ¶ 14; gov't mot., ex. 15, ¶ 6). CACI asserts that it understood it could sign the license agreement at any time and then schedule testing. It further asserts that it intended to schedule testing for 1 July 1994 and that it expected completion by 15 July 1994. (Compl., ¶ 15) Appellant received a copy of License Agreement No. DCA200-94-H-0015 and signed it on 24 June 1994. The Defense Information Technology Contracting Organization's (DITCO) contracting officer, Ms. Jackson, signed the license agreement on 2 September 1994. (R4, tab 2, ex. I; compl., ¶ 17; gov't mot., ex. 15, ¶ 7) The government asserts that the contracting officer signed the license agreement after making a contractor responsibility determination and that CACI knew that it had to complete testing and be certified as a VAN provider before the Agreement "came into force" (answer, ¶ 17; gov't mot. at 13-14, ex. 15, ¶¶ 6, 7, ex. 27, ¶ 7; *see also* app. opp'n at 28-29). The term of the

original license agreement was one year with four one-year options (R4, tab 2, ex. I, article. 2 at 000011).

10. The introductory paragraph of the Agreement states that "This license agreement is effective as of the 2nd day of September 1994, between the UNITED STATES OF AMERICA (hereinafter called the Government), and CACI, INC.-FEDERAL (hereinafter called the EDI VAN Provider)." The date is apparently initialed "cj" and appears to have been filled in by the government when the contracting officer, Constance Jackson, signed the Agreement. (R4, tab 2, ex. I at 000011). Article 8 of the license agreement provides that the "agreement shall be effective the date the Government signs the agreement . . . " (R4, tab 2, ex. I at 000013).

11. The license agreement included a Technical Scope of Work (TSW) and an addendum A. Paragraph K of the TSW said that services "as specified in the addendum(s) may begin after successful testing" of connectivity between the contractor and DoD hubs, relevant standards, and other requirements of the Agreement. Testing was to commence after the DoD technical representative informed the EDI VAN provider that it was ready and the provider responded that it was ready. The technical representative was to provide a detailed, written test plan to the provider. (R4, tab 2, ex. I, ¶ K at 000020-021) Paragraph N of the TSW required that all DoD-to-contractor transactions exchanged as part of the EC program be exchanged via a participating EDI VAN provider. It also stated that DoD activities would be phased into the program in accordance with a DoD-wide plan. (*Id*., ¶ N at 000022) As noted, the plan referred to was the implementation plan in the PAT report. *GAP Instrument*, 01-1 BCA ¶ 31,358, finding 9. At various points, the license agreement envisioned certain small or simplified purchases to be made using participating EDI VAN providers.

12. Appellant says that in October 1994, it received a fax from DISA indicating that CACI was a "DECCO certified" VAN (compl., ¶ 21; gov't mot., ex. 28 at 25, ex. 29). The government says that the fax does not list CACI as "active" and does not indicate that CACI had received "Transaction Certification" (answer, ¶ 21; gov't mot. at 16, ex. 29).

13. In June 1995, DISA asked the contracting officer to contact those VANs that had not provided the requirements to test with the network entry points (NEPs), including CACI, and determine whether they intended to participate with the agreement (gov't mot. at 17, ex. 32; app. opp'n at 37). The following month, the contracting officer wrote to appellant and indicated that it had been a year since there had been any activity in its files and the files would be placed in the government's inactive records (R4, tab 5). CACI responded in September 1995 stating that it was interested in becoming an EDI VAN provider and was "preparing to complete testing in the very near future" (R4, tab 16).

14. In late 1995, the government was in the process of revising the VAN license agreement. Because it was also revising the VAN testing procedures, it suspended testing in November 1995. (Gov't mot. at 18, ex. 15, ¶ 8; app. opp'n at 41) Testing under the

original test procedures resumed in January 1996. The VANs who tested at that time were later required to retest under the revised test procedures. (Gov't mot. at 18-19, ex. 15, ¶ 8; R4, tab 18) CACI began testing in January 1996. It completed the VAN certification testing under License Agreement No. DCA200-94-H-0015 on 10 July 1996. (Gov't mot., exs. 21, 27, ¶ 8; R4, tab 23) A new DITCO contracting officer, Debra Santoro, signed a "corrected" License Agreement No. DCA200-94-H-0015 on 10 July 1996 (R4, tab 1 at 000005; gov't mot., ex. 27, ¶ 8).[3] It appears that the only "corrections" made to the license agreement were the inclusion of the new contracting officer's signature, a change in the date of the contracting officer's signature from 2 September 1994 to 10 July 1996, and a change in the effective date at the beginning of the license agreement to 10 July 1996 (R4, tab 1 at 000006, 000009, tab 22). The government states that appellant did not have a network or hardware and was not connected to the DoD hubs before 10 July 1996 (gov't mot. at 15, ¶ 18). It also says that CACI did not have a customer as a DoD EDI VAN until August 1996 (gov't mot. at 21, ¶ 31).

15. Following a procedure similar to that used with respect to the original license agreement, CACI requested the revised license agreement from the government. Appellant signed License Agreement No. DCA200-97-Z-0031 in October 1996. (R4, tabs 7, 8, 9; gov't mot. at 21-22, ¶ 33; app. opp'n at 47) CACI apparently completed the revised testing requirements, and the contracting officer signed License Agreement No. DCA200-97-Z-0031 on 22 April 1998 (R4, tab 10). License Agreement No. DCA200-97-Z-0031 replaced License Agreement No. DCA200-94-H-0015 (compl., ¶ 18).

16. Appellant filed its original certified claim under License Agreement No. DCA200-94-H-0015 in May 2000. The claim sought damages in the amount of $73,208,257. Damages were calculated from October 1994 into April 1998. (R4, tab 2, ex. VI at 000211) The contracting officer denied the claim in August 2000. CACI filed an appeal which was docketed as ASBCA No. 53058.

17. Appellant filed a revised claim in December 2002. CACI asserted damages of $91,051,195 which were calculated from April 1994 into April 1998. (R4, tab 11 at 000006-07) The new starting date was based on the implementation plan in the PAT report (compl., ¶ 32). In general terms, the revisions to the amount claimed were based on the *GAP Instrument* decision, discovery in the appeal, and an analysis by appellant's expert (compl., ¶ 28). The revised claim was denied in February 2003 (R4, tab 12). CACI filed a new appeal, ASBCA No. 54110, later the same month. Appeals 53058 and 54110 have been consolidated. Damages models have been filed in support of appellant's claims which include pre-certification costs and costs related to GEIS (R4, tab 2, exs. VI, VII).

[3] Tab 1 of the Rule 4 file contains the license agreement signed in July 1996 by Debra Santoro. Exhibit I to tab 2 of the Rule 4 file contains the license agreement signed by Constance Jackson in September 1994.

18. Appellant filed a new complaint in the consolidated appeals in March 2003. The new complaint superseded CACI's earlier complaint. In the revised complaint, appellant asserts that the government breached the original license agreement in three respects. Based on paragraph K of the license agreement, CACI says that the government's technical representative failed to contact appellant to conduct testing, that the government failed to provide a written test plan, and that the government notified appellant that it was a "DECCO certified" VAN provider scheduled to be connected to the Columbus, Ohio DoD hub in October 1994. Based on paragraph N of the license agreement, CACI says that the Government failed to transfer listed activities to the DoD hubs and failed to transfer all listed activities to the hubs as required by the implementation plan set out in the PAT report. Based on the "exclusivity provisions" of the license agreement, CACI says that the government failed to conduct all EC transactions with vendors through VAN providers such as CACI. (Compl., ¶¶ 19-25)

19. The government has moved for dismissal of parts of the appeal, and CACI has responded.

DECISION

Appellant asserts that the government violated the testing, implementation, and exclusivity provisions of the license agreement (finding 18). CACI's revised claim calculates damages starting 1 April 1994 and extending into April 1998. The 1 April 1994 starting date is based on the implementation plan in the PAT Report. (Finding 17).[4]

The government has moved to dismiss a part of the appeals. It contends that the Board does not have jurisdiction to award damages accruing before 10 July 1996. That is the date CACI completed certification testing to be a VAN provider and the government re-signed the license agreement (finding 14). In further support of the motion, the government argues that CACI's arrangement with GEIS, which was a VAN provider, was not related to CACI's license agreement. Moreover, even if there were some relationship between the arrangement with GEIS and the license agreement, appellant could, at best, be considered a GEIS subcontractor, and GEIS has not sponsored these appeals. Alternatively, the government maintains that damages cannot be awarded for any period before the date it first signed the license agreement, 2 September 1994.

The Board has jurisdiction, under the Contract Disputes Act (CDA), to hear appeals relating to contracts with executive agencies. 41 U.S.C. §§ 602(a), 607(d); *see also* 41 U.S.C. § 605(a); *Tolson Oil Co.*, ASBCA No. 28327, 84-3 BCA ¶ 17,576 at 87,571; *Valley View Enterprises, Inc.*, ASBCA Nos. 48246 *et al.*, 98-1 BCA ¶ 29,461 at 146,232.[5] We

[4] The original claim measured damages starting in October 1994 which was the first month after the government first signed the license agreement.

[5] In the context of the government's motion, whether there was a contract and whether appellant has standing as a contractor are essentially the same question. *See* 41

have previously held that the license agreement is a contract for purposes of the CDA. *GAP Instrument*, 01-1 BCA ¶ 31,358 at 154,865. The point of the Government's motion appears to be that there could be no contract, and appellant could not become a contractor, before CACI completed certification testing and the Government re-signed the license agreement. Because the government challenges the factual bases for the Board's jurisdiction, those facts are subject to our fact finding. *E.M. Scott & Associates*, ASBCA No. 45869, 94-3 BCA ¶ 27,059 at 134,837; *cf. Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993), *cert. denied*, 512 U.S. 1235 (1994).

Based on the record and the facts adduced by appellant, we have no difficulty finding that there was a contract between the government and CACI from the date the government first signed the license agreement, 2 September 1994. The license agreement was signed on that date by a government contracting officer. (Finding 9) The government does not contend that the contracting officer did not have authority to bind the government, and there is nothing is the record that would indicate a lack of authority. Instead, the government relies on the assertion that the license agreement did not "come into effect" until appellant completed certification testing. (*See*, *e.g.*, Gov't. br. at 34)[6]

It is correct that paragraph K of the Technical Scope of Work attached to the license agreement stated that services could be provided under the Agreement only after successful testing of specified matters (finding 11). There is nothing in that section, however, that conditions the existence of the license agreement on successful testing. In fact, the language of the Agreement specifically provides otherwise. Article 8 of the license agreement states that the "agreement shall be effective the date the Government signs the agreement." In addition, when it first signed the license agreement, the government, apparently, filled in the date in the Agreement's introductory paragraph which then read: "This license agreement is effective as of the 2nd day September 1994, between the UNITED STATES OF AMERICA (hereinafter called the Government), and CACI, INC.-FEDERAL (hereinafter called the EDI VAN Provider)" (finding 10). There is no basis for the argument that there was no contract, or that the contract/license agreement was not effective, before July 1996.

The fact that the government signed the license agreement a second time on 10 July 1996 does not change the fact that there was a contract by 2 September 1994. The government does not explain why it was necessary to re-sign the license agreement. The Agreement does not call for either party to sign again after the completion of testing, and

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U.S.C. § 601(4) (a "contractor" is a party to a government contract other than the government).

[6] The government also notes that the license agreement was signed after the contracting officer made a determination of contractor responsibility. How that might have limited the contracting officer's authority or rendered the Agreement ineffective is not explained. If anything, it is consistent with our view that there was a contract when the contracting officer signed the agreement.

we have been shown no other reason for either party to re-sign. Based on the record before us, we conclude there is no jurisdictional significance to the second signing of the license agreement by the government.

In summary, we hold that there was a contract between the parties as of 2 September 1994. Having found that a contract existed on 2 September 1994, there is no jurisdictional impediment to our review of appellant's claims to damages accruing at least from that date. Whether testing, or the lack thereof, should affect the recovery or amount of damages are issues best left to the hearing on the merits.

The government's alternative argument is that we do not have jurisdiction over appellant's claim to damages that accrued before 2 September 1994.[7] Although it follows from our ruling above that there was no contract, and CACI was not a contractor, before that date, our authority to award damages is not necessarily limited to the time period after 2 September 1994.

There was a CDA contract as of 2 September 1994. The critical issue for jurisdictional purposes thus becomes whether appellant's claim relates to that contract. *LaBarge Products, Inc. v. West*, 46 F.3d 1547, 1550-51 (Fed. Cir. 1995). A claim may relate to a contract even though it is based on events occurring before the existence of the contract. *Id.* at 1552-53. The legal theories behind CACI's claim are specifically based on provisions of the license agreement (findings 17, 18) and thus clearly relate to that contract. Under those circumstances, the fact that appellant seeks damages for the five months prior to September 1994 does not preclude the Board from exercising jurisdiction. *Flight International, Inc.*, ASBCA No. 45300, 94-1 BCA ¶ 26,311 at 130,868 (the Board had jurisdiction, based on a July 1991 contract, over a claim for costs incurred from March 1990 to May 1991).[8]

As for the GEIS arrangement, appellant does not predicate jurisdiction on that. Whether it can prove damages arising from a breach of the license agreement relating to GEIS is not jurisdictional. We have found jurisdiction based on the license agreement

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[7] In setting out this argument, the government makes the assertion that when appellant signed the license agreement in June 1994 it was simply offering to become a VAN provider and that the offer was not accepted until CACI completed testing. It is not clear how that statement applies to the present argument. In any event, we have already ruled that the existence of a contract was not conditioned on the completion of testing.

[8] Our decision is limited to a ruling, based on the government's motion and appellant's response, that the Board has subject matter jurisdiction of the entirety of CACI's claim. Whether the theories underlying the claim have legal merit and whether appellant can prove them are issues not presently before us, and we express no opinion on them. We also note that we recognize the continuing duty to assure ourselves of our subject matter jurisdiction.

independent of the relationship between GEIS and CACI. As to the government's assertion that CACI is at best a GEIS subcontractor and GEIS has not sponsored CACI's claim, we are not persuaded that this argument has merit.

CONCLUSION

In accordance with the discussion above, the government's motion to dismiss is denied.

Dated: 10 October 2003

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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 Nos. 53058, 54110, Appeals of CACI International, Inc., rendered in conformance with the Board's Charter.

Dated:

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