

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Environmental Systems, Inc.) ASBCA No. 53283
)
Under Contract No. DAAB07-98-C-Y007)

APPEARANCE FOR THE APPELLANT: Ross W. Dembling, Esq.
Holland & Knight LLP
McLean, VA

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
MAJ Richard L. Hatfield, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PAUL

This appeal involves a contract for the supply of air conditioners. The contract was partially terminated for default. During the course of this appeal, the Government moved to amend its answer to include allegations that appellant had falsified requests for progress payments. In a letter Order, the Board granted respondent's motion to amend. Appellant has requested reconsideration of the Order.

FINDINGS OF FACT FOR THE PURPOSES OF THE MOTION

The Government awarded Contract No. DAAB07-98-C-Y007 to Environmental Systems, Inc. (ESI) in April 1998 (compl. & answer, ¶ 8). The contract required ESI to supply a maximum of 1,500 horizontal and 150 vertical air conditioners (compl. & answer, ¶ 10).

On 31 January 2001, the Government partially terminated the contract for default (compl. & answer, ¶ 23). ESI filed a timely appeal from the termination in February 2001. That appeal was docketed as ASBCA No. 53283.

On 1 July 2002, the Government filed a motion to amend its answer. Respondent stated that in June 2002 the contracting officer learned that a company that appellant had identified as a supplier of sheet metal housings may not have done so. Respondent stated that it presently believed that appellant's progress payment requests, based on alleged costs incurred for sheet metal housings purchased from the supplier, might be false and in violation of the contracts progress payment provisions set forth at FAR 52.232-16. As a result, respondent requested permission to amend its answer to allege that, if proven, these

acts constituted (1) a material breach justifying default termination of the entire contract and (2) an affirmative defense to appellant's complaint. (Gov't mot. at 4-5)

The Government's proposed amendment added paragraphs 75 through 91 to the existing answer. Paragraphs 75 through 85 consisted of a narrative of the alleged events relating to the supplier, culminating in the allegation that "[s]ubmission of falsified progress payment requests is a material breach of contract justifying default termination of the entire contract" (am. answer ¶ 85). Paragraphs 86 through 91 were headed "PART III - AFFIRMATIVE DEFENSE - FRAUD." After incorporating by reference the allegations above, Part III alleged:

88. On information and belief, Appellant knowingly presented, or knowingly caused to be presented to an officer or employee of the government, or a member of the United States Armed Forces, false or fraudulent claims for payment or approval.

89. On information and belief, Appellant knowingly made, used, or caused to be made or used, false records or statements, to get false or fraudulent claims paid or approved.

....

91. Appellant, therefore, may have committed progress payment fraud by filing false claims for payment. These possible fraudulent acts taint the entire contract and are a complete defense to this appeal.

(Am. answer at 30)

In July 2002, ESI opposed the Government's motion to amend and moved for a protective order, in which it sought to avoid responding to discovery relating to the fraud allegations that were the subject of the Government's motion to amend.

On 26 September 2002, the Board granted the Government's motion to amend its answer. In the same Order, the Board denied appellant's request for a protective order. ESI now seeks reconsideration of that Order.

DECISION

Appellant argues that the motion to amend should have been denied because the Board lacked jurisdiction over the fraud allegations in the proposed amendment. In its original brief, ESI simply argued that the Contract Disputes Act, 41 U.S.C. §§ 601-613, as

amended (CDA), precluded Board jurisdiction over fraud. ESI relied on the last sentence of 41 U.S.C. § 605(a), which states that the Act does not “authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud,” and decisions interpreting that provision. In its request for reconsideration, appellant cites *Nexus Construction Co., Inc.*, ASBCA No. 51004, 98-1 BCA ¶ 29,375, and *Environmental Safety Consultants, Inc.*, ASBCA No. 53485, 02-2 BCA ¶ 31,904. Appellant contends that these decisions stand for the proposition that, in appeals involving allegations of fraud, the Board can only decide issues that it otherwise has jurisdiction over and that can be “carved out” of the fraud allegations. In *Nexus* and *Environmental Safety*, there were such issues - whether certain costs were allowable or recoverable. The issue that the Government seeks to add here is whether ESI’s requests for progress payments were fraudulent. There is, appellant contends, no question that can be separated out of that issue over which the Board has jurisdiction.

The Government responds that its amendment “merely incorporates allegations that preserve its ability to defend the termination for default upon additional grounds.” It says that “[w]e do not attempt to invoke criminal or civil remedies under the False Claims Act, 31 U.S.C. §§ 3729-33, which fall outside this Board’s jurisdiction.” (Gov’t resp. at 3)

We conclude that each party is partially correct. Paragraphs 75 through 85 of the amended answer ask the Board to determine whether appellant submitted falsified progress payment requests, in violation of the standard payment clauses, and whether, if so, there was a material breach of contract justifying default termination of the entire contract. We have jurisdiction to determine whether appellant breached the contract by submitting false payment progress requests and is subject to termination for default for that reason. *Nexus Construction Co., Inc.*, ASBCA No. 51004, 98-1 BCA ¶ 29,375 at 146,017; *M&M Services, Inc.*, ASBCA No. 28712, 84-2 BCA ¶ 17,405.

The new affirmative defense set forth in paragraphs 86 through 91, on the other hand, would effectively require us to determine whether appellant submitted a false claim in violation of the False Claims Act, 31 U.S.C. § 3729. Thus, 31 U.S.C. § 3729(a) states that any person who “(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval” or “(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government” is liable to the United States Government for a civil penalty. It is apparent that paragraphs 88 and 89 of the Government’s proposed amendment closely track the quoted language. Paragraph 91 concludes, based on the foregoing, that appellant filed “false claims.” As the Government admits, the Board does not have jurisdiction to determine whether a contractor has violated the False Claims Act. *Martin J. Simko Construction, Inc. v. United States*, 852 F.2d 540, 547-48 (Fed. Cir. 1988). The fact that the Government’s amendment stops short of demanding the penalties set forth in

the Act does not vest the Board with jurisdiction to determine whether the requirements of subparagraphs (a)(1) and (a)(2) of 31 U.S.C. § 3729 are otherwise met.

CONCLUSION

The Government's motion to amend its answer by adding paragraphs 75 through 85 is granted. The Government's motion to amend its answer by adding paragraphs 86 through 91 is denied. The parties shall confer concerning the scope of discovery in light of this decision.

Dated: 23 January 2003

MICHAEL T. PAUL
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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. 53283, Appeal of Environmental Systems, Inc., rendered in conformance with the Board's Charter.

Dated:

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