ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Texas Engineering Solutions	)	ASBCA Nos. 53669, 54087
	)	
Under Contract No. F29601-95-C-0173	)	

APPEARANCE FOR THE APPELLANT: Mr. A.E. Pevler
President

APPEARANCES FOR THE GOVERNMENT: Thomas B. Pender, Esq.
Chief Trial Attorney
Bernice A. Pasternak, Esq.
Trial Attorney
Defense Contract Management
Agency, Boston

OPINION BY ADMINISTRATIVE JUDGE REED
ON GOVERNMENT MOTION TO DISMISS IN PART ASBCA NO. 53669

The Government terminated Contract No. F29601-95-C-0173 (the contract) for the convenience of the Government. Texas Engineering Solutions (appellant or TES) submitted a so-called "partial settlement proposal" in response to the termination for convenience (TFC). After declaring the TFC settlement process at impasse, TES submitted a claim for TFC costs.

The termination contracting officer (TCO) denied appellant's claim. The TCO also demanded that TES return all payments made under the contract.

TES appealed the denial of its TFC claim and the Government claim for return of money disbursed under the contract. The appeal related to appellant's TFC claim was docketed as ASBCA No. 53669. Appellant's appeal from the Government claim was docketed as ASBCA No. 54087. The appeals have been consolidated and the pleadings under ASBCA No. 53669 are to be considered under ASBCA No. 54087.

TES alleged in its complaint under ASBCA No. 53669, among other things, that the Government, in bad faith, intended inappropriately to use appellant's "invention" in space-based applications and then to terminate TES. Appellant avers that such use was probably later made by the Government. TES also alleges that it is entitled to reinstatement of the contract because the TFC "was arbitrary and capricious, contrary to the Aviation Security Improvement Act of 1990 [Public Law No. 101-604 (the ASIA)], misrepresented to Congressional investigators, and in bad faith." (Compl. ¶¶ 2.6.1, 3.2)

The Government, by "Respondent's Motion to Dismiss in Part Appellant's Appeal," dated 10 October 2002 (the motion), seeks to have the Board "dismiss, in part, Appellant's appeal [under ASBCA No. 53669] as enunciated in [¶¶] 2.6.1 and 3.2 of Appellant's Complaint . . . for lack of subject matter jurisdiction" (Gov't mot. at 1). Concerning ¶ 2.6.1 of the complaint, the Government asserts that the averments presented in that paragraph have never been submitted to the CO for a decision. Regarding ¶ 3.2 of the complaint, the Government contends that "the Board has no jurisdiction or authority to order the reinstatement of the contract under the Contract Disputes Act, 41 U.S.C. § 601 et seq." (Gov't mot. at 1-2)

Appellant's *pro se* representative twice requested additional time within which to respond to the motion. During a telephone conference among the Board, appellant's *pro se* representative, and Government counsel, TES made a preliminary oral response to the motion and agreed to a schedule for providing a written response to the motion. As extended, appellant's written response to the motion was to be filed not later than 21 March 2003. Except for the requests for additional time within which to respond to the motion, which we allowed and the substance of which the Board will consider here, no written response by TES to the motion has been received by the Board.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. The cost-plus-fixed-fee contract was awarded to TES by the Department of the Air Force on behalf of Phillips Laboratory (PL), Kirtland Air Force Base (AFB), New Mexico on 2 May 1995. TES was to perform services to accomplish the Statement of Work which was made a part of the contract (Contract Line Item No. 0001 (CLIN 1)), to provide associated data (CLIN 2), and to produce an operational prototype sensor of an airline radio frequency threat monitor (CLIN 3). The contract incorporated by reference, among other standard provisions, the clauses entitled FAR 52.216-7 ALLOWABLE COST AND PAYMENT (JUL 1991), FAR 52.233-1 DISPUTES (MAR 1994), and FAR 52.249-6 TERMINATION (COST-REIMBURSEMENT) (MAY 1986). (R4, tabs G-29, G-183)

2. By Modification No. P00006 to the contract dated 6 February 1997, the contract was terminated for the convenience of the Government (R4, tab G-7).

3. In a letter to the CO dated 19 February 1997, TES questioned the rationale for the termination. Among other things, the letter stated that "a consideration in all design decisions of this project has been the protection of space based assets. This clearly is a major mission of [PL]. While the technology is intended to initially protect commercial aircraft, [Advanced Weapons & Survivability Contracting Division] personnel have already requested quotations for high volume production of these sensors for Space Command interests." The letter neither stated that it was a claim nor alleged any extra costs or damages on account of an allegation that the Government, in bad faith, intended

inappropriately to use appellant's "invention" in space-based applications and then to terminate the contract. (R4, tab G-138)

4. By letter dated 7 April 1997, TES forwarded a certified "partial" termination for convenience settlement proposal (TFCSP) in the amount of $694,411.66, including all previous payments by the Government plus $127,239.21. Subtotals are listed and described on Standard Form (SF) 1437, Settlement Proposal for Cost-Reimbursement Type Contracts, for direct material, direct labor, indirect factory expense, and other costs (no additional detail concerning the Government's use of appellant's "invention" was attached to or explained on the SF 1437), accompanied by entries on SF 1439, Schedule of Accounting Information, including only one specific entry describing depreciation of a vehicle. The cover letter implied that additional costs not stated on the forms would be claimed for legal fees, office lease termination, remaining patent costs, and the personal income taxes of Mr. Pelver, the president of TES. The partial TFCSP did not mention that the Government, in bad faith, intended inappropriately to use appellant's "invention" in space-based applications and then to terminate appellant's contract. (R4, tab G-24)

5. TES forwarded to the Government additional correspondence concerning the termination for convenience, the partial TFCSP, and other potential claims. TES also submitted an Inventory Schedule and continuation sheets, SF 1428 and SF 1429, with supporting documentation. None of that correspondence, including several letters to be more particularly described below, specifically mentioned anything related to allegations that the Government, in bad faith, intended inappropriately to use appellant's "invention" in space-based applications and then to terminate TES. (AR4, tab A-19; R4, tabs G-26, -27, -30, -33, -38, -41, -44, -45, -50, -51, -55, -56, -58, -60, -130, -134, -136, -143, -152, -155 through -158, -167, -170, -172, -174)

6. In the context of the averred failure by the Government to provide timely Government-furnished equipment and appellant's assertion "that PL may be attempting to illegally exploit my intellectual property," appellant's *pro se* representative wrote a letter dated 6 May 1997 to the PL commander, Colonel Michael Heil. The letter speaks of perceived risk to low-earth orbit satellites and contends that the Government contracted with TES to develop a product "that would be deployable first on aircraft, and build a foundation for further refinement for space applications." Prospective legal actions against the Government are mentioned in the letter; however, there is no explicit or implied reference to a claim under the contract, no specified amount of extra costs under the contract or breach damages, and no indication that the letter was intended for consideration by a CO as a contract claim. The letter does not state a contract claim alleging that the Government, in bad faith, intended inappropriately to use appellant's "invention" in space-based applications followed by termination. (AR4, tab A-15 at 2-3)

7. A TES letter dated 18 November 1997 responded to letters from the TCO to appellant. The TCO, in her letters, gave notice of her intent to issue a unilateral

determination concerning the partial TFCSP and characterized certain post-termination actions by TES as a failure to comply with the terms and conditions of the contract and as uncooperative. In its letter, TES generally argued that "the Government has breached [the] contract, has illegally terminated it and has dealt in bad faith since that termination." The allegations of pre-termination breach, illegal termination, and/or post-termination bad faith are not fleshed out in the letter with specific contentions and/or damages. The alleged breach and bad faith do not specifically assert that the Government, in bad faith, intended inappropriately to use appellant's "invention" in space-based applications followed by termination. (R4, tabs G-46, -48, -49)

8. On 13 February 1998, TES "faxed" to the TCO its certified claim pursuant to the termination provision of the contract in the amount of $1,017,116.89. Attached to the claim letter were a revised SF 1437 and SF 1440, Application for Partial Payment. TES again generally asserted "that [the] Government has acted in bad faith in other aspects of the subject contract and its termination process." The "other aspects" described in the claim letter and attached forms do not touch upon alleged inappropriate use of appellant's "invention" in space-based applications followed by termination of the contract. The claim amount is comprised of costs for direct material, direct labor, indirect factory expense, general and administrative expense, fee, settlement expenses, and settlement expenses with subcontractors, minus a credit for previous payments by the Government under the contract. TES forwarded to the Government other correspondence concerning the TFCSP claim and other potential claims. None of that correspondence specifically mentioned that the Government, in bad faith, intended inappropriately to use appellant's "invention" in space-based applications and then to terminate TES. (AR4, tab A-31; R4, tabs G-62, -66, -68, -69, -70, -78, -79, -80, -82, -83, -85, -90, -92, -93)

9. A TES letter dated 20 May 1998, addressed to a CO at Kirtland AFB, quoted internal Government documents that, in relevant part, allude to use of the technology allegedly being employed under the contract as "a tool to identify that . . . space systems [have] come under attack." However, appellant's letter does not go on to state a claim that the Government, in bad faith, intended inappropriately to use appellant's "invention" in space-based applications followed by termination. The main topic of this letter from TES was the Government's "breach" by failure to provide Government-furnished equipment and the use of termination procedures "to cover up the inequity of the breach." (R4, tab G-159 at 2)

10. A letter written by appellant's *pro se* representative, dated 24 October 1999, to an Assistant United States Attorney, accuses the Air Force of stealing "the technology I invented and patented;" however, no claim under the contract on that basis is expressed. (R4, tab G-173 at 1)

11. In her final decision dated 18 October 2001, the TCO denied appellant's claim for TFCSP costs and asserted the Government's claim for return of all funds disbursed to

TES under the contract. At no place in the TCO's final decision did she address, make determinations, or even mention allegations that the Government, in bad faith, intended inappropriately to use appellant's "invention" in space-based applications and then to terminate TES. (R4, tab G-99)

12. By "e-mail" to the TCO's supervisor dated 17 January 2002, appellant's *pro se* representative stated his intention to appeal to the Board the TCO's final decision. By letter dated 18 January 2002, TES appealed to the Board. (R4, tabs G-90, -101, -102; Board corres. file).

13. Appellant's complaint, in relevant part, asserts:

> **2.6.1 Intent to use invention in space from beginning**
>
> As shown in the Phase I [Small Business Innovation Research] proposal evaluation written by the Air Force, ([AR4,] Tab [A-]2) their intent from the beginning was to use the technology in satellite applications. Discussions at the [Preliminary Design Review] centered around their previous failed attempts to build what Appellant had successfully designed. Appellant's letter shortly after termination to the Commanding Officer went unanswered, and suggested that his organization might be inappropriately using the technology. ([AR4,] Tab [A-]15) That group has now announced that they have developed a Radio Frequency Threat Warning Attack Receiver System. ([AR4,] Tab [A-] 30) Since FOIA requests have been unsuccessful in obtaining additional information on RFTWARS, Appellant considers the strong probability that the suspicions raised in the May 6, 1997 letter to Col. Heil were very prophetic and will use discovery in this case to obtain more information.
>
> The Air Force may have intended to behave outlandishly from the beginning. Faced with political survival pressures to justify their existence and contain costs, the Air Force may have seen the individual entrepreneur with the wherewithal to solve both political and technical problems. After wringing all the information and networking capabilities out of the entrepreneur, they simply buried Appellant in bureaucracy. Few would be sufficiently tenacious to force the issue before the Board and bring this outlandish behavior to light.
>
> The existence of such a strategy would further the Appellant's contention of bad faith by the Government. Documents will be

> requested that may show the existence of such a plan. Requests for known documents under the Freedom of Information Act have been deflected.
>
> . . . .
>
> **3.2 Reinstate contract**
>
> Appellant claims a right to contract reinstatement, since the Government's termination was arbitrary and capricious, contrary to the Aviation Security Improvement Act of 1990, misrepresented to Congressional investigators, and in bad faith.

(Compl.; AR4, tab A-28)

14. During a telephone status conference on 4 February 2003 among the Board, appellant's *pro se* representative, and Government counsel, among other topics, the definition of a claim was discussed, principally by reference to FAR 33.214. Upon further discussion of appellant's response to the Government's pending motion for partial dismissal, TES conceded, and agreed to confirm in writing, that it had not submitted a proper claim to the CO for the subject matter of ¶ 2.6.1 of the complaint but reserved the right to do so in the future. Concerning ¶ 3.2 of the complaint and the Government's motion, appellant's *pro se* representative agreed to identify the portions of appellant's discovery request that related to that issue. Government counsel agreed to expedite the Government's responses to those portions of the discovery request such that TES could respond to the motion. (Board Telephone Conference Memorandum and Order, ¶¶ IV.A., IX.A., D.-E. dated 6 February 2003)

DECISION

Scope of the Appeals

ASBCA No. 53669 is an appeal by a contractor from the denial by the CO of the contractor's claim for costs and expenses pursuant to the termination for convenience provision of the contract. ASBCA No. 54087 is an appeal from the Government's demand that TES return all payments made under the contract. Statement of Facts 1-2, 4, 8, 11-12.

Government Bad Faith Use of Appellant's "Invention" Followed by Termination

The Government argues that the Board lacks jurisdiction over appellant's allegations in ¶ 2.6.1 of the complaint because no claim was presented to the CO for consideration and decision. TES conceded during a telephone conference with the Board and Government counsel that it had not submitted a claim related to the subject matter of ¶ 2.6.1 of the

complaint; however, TES never confirmed that concession in writing as agreed during the telephone conference (Statement of Facts 14).

Pursuant to the Contract Disputes Act of 1978, as amended, 41 U.S.C. §§ 601-13 (the CDA), and the Disputes provision of the contract, a contractor's claim must first be submitted to the CO for decision as a condition precedent to Board jurisdiction. A claim cannot properly be raised for the first time in the pleadings before the Board. 41 U.S.C. § 605(a); *D.L. Braughler Co., Inc. v. West*, 127 F.3d 1476, 1480 (Fed. Cir. 1997); *Consolidated Defense Corp.*, ASBCA No. 52315, 03-1 BCA ¶ 32,099 at 158,668; FAR 52.233-1 (Statement of Facts 1).

Prior to submitting its complaint, TES had not submitted a written demand or assertion seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract with regard to its assertions that the Government had breached the contract by, in bad faith, inappropriately using appellant's "invention" in space-based applications followed by termination. Indeed, at no time, even in the complaint, has TES ever specified any amount of extra costs under the contract, breach of contract damages, or other relief related to the contract vis-a-vis the assertions in ¶ 2.6.1 of the complaint. FAR 33.201; Statement of Facts 3-10, 13.

In a request for additional time within which to respond to the motion, TES states that "[d]ata that should have been provided under the [Freedom of Information Act] request would have refuted the allegations in [the motion], insofar as it would have included corroboration that Appellant had raised the issue of exploitation of Appellant's technology in space-based applications before the contract was terminated." Appellant's Second Motion for Extension of Time to File Response to Respondent's Motion to Dismiss in Part Appellant's Appeal, ¶ 6 at 3. However, even if true, the matter has not been set forth as an affirmative claim by appellant arising under or relating to the contract.

Documents generated by the Government and which are discoverable under the Board's Rules may be evidence in support of appellant's potential claim. However, if TES had submitted a claim in writing as required, it would or should have a copy of such a claim. We have examined the record before the Board, including all of appellant's correspondence, but have failed to locate any claim for the subject matter of ¶ 2.6.1 of the complaint.

The Board presently has no authority to adjudicate appellant's potential claim related to assertions that the Government breached the contract by, in bad faith, inappropriately using appellant's "invention" in space-based applications followed by termination. No such claim, as defined by the applicable regulation, has been submitted to the CO. Accordingly, to that extent, we grant the Government's motion to dismiss in part. The Board presently is without jurisdiction to resolve a contractor claim on the basis stated in ¶ 2.6.1 of the

complaint. The Board's partial dismissal is without prejudice to appellant's ability to submit a proper claim to the CO[*] and/or the TCO.

ASBCA No. 54087, the Government's claim that appellant must return all payments under the contract, seems to assert that appellant did no contract work and/or provided nothing of value under the contract. To the extent that ¶ 2.6.1 of the complaint in ASBCA No. 53669, available for consideration under ASBCA No. 54087, can be read to assert that appellant performed some work and/or provided something of value under CLINs 1-3 of the contract, it may constitute a defense to the Government's claim under ASBCA No. 54087. Therefore, we decline the Government's suggestion to strike ¶ 2.6.1 of the complaint. (Statement of Facts 1)

Reinstatement of the Contract

By asking the Board to direct the Government to reinstate the contract, TES is requesting a form of injunctive relief or specific performance of the contract. The Board lacks the authority to do either. *Applied Ordnance Technology, Inc.*, ASBCA Nos. 51297, 51543, 98-2 BCA ¶ 30,023 at 148,543. Specifically, the Board has neither authority nor jurisdiction to order a contract reinstated. *Old Hickory Engineering & Machine Co., Inc.*, ASBCA No. 28663, 84-1 BCA ¶ 17,192 at 85,611.

We have reviewed the ASIA. That Act neither expands the Board's jurisdiction nor grants the Board authority to reinstate contracts terminated by the Government.

SUMMARY

We grant, in part, the Government's motion. We are without jurisdiction under ASBCA No. 53669 to hear an affirmative contractor claim under ¶ 2.6.1 of the complaint, although without prejudice to contractor's ability to submit such claim. We do not strike ¶ 2.6.1 as it gives notice of an aspect of appellant's defense under ASBCA No. 54087. We also are without jurisdiction over the matters set forth in ¶ 3.2 of the complaint; therefore, that much of ASBCA No. 53669 is dismissed for lack of jurisdiction and ¶ 3.2 is stricken from the complaint.

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[*] In response to a letter from appellant concerning the TFC, a CO for PL stated by letter dated 24 March 1997, that "[f]urther communication on this subject is counterproductive since we have no contractual relationship with your company. As stated in previous correspondence and telephone conversations, the termination action for your contract has been delegated to [a TCO]" (R4, tab G-145). However, TES may submit any potential claim arising under or related to the contract to the CO and/or the TCO. Those officials would then be obliged to coordinate and to determine which Government official had the primary responsibility for a response.

Dated: 28 May 2003

STEVEN L. REED
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

JACK DELMAN
Administrative Judge
Acting 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. 53669 and 54087, Appeals of Texas Engineering Solutions, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ

Recorder, Armed Services
Board of Contract Appeals