ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Mitch Moshtaghi	)	ASBCA No. 53711
	)	
Under Contract No. 110-100-90C-0010	)	

APPEARANCES FOR THE APPELLANT: Louis A. Galuppo, Esq.
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OPINION BY ADMINISTRATIVE JUDGE COLDREN
ON MOTION TO STRIKE

This appeal was taken from a final decision of the contracting officer denying appellant's claim for the undepreciated value of improvements appellant made to Government property in operating an oil change facility at the Navy Exchange Service Command, Naval Station 32nd Street, San Diego, California. The Government has filed a motion to strike appellant's entire certified first amended complaint for lack of jurisdiction, leaving the initial complaint as appellant's pleading. The Government alleges that new allegations were added by the amended complaint which had not been considered by the contracting officer in his final decision, and, in addition, that most of these new allegations involve matters which are not within the subject matter jurisdiction of this Board. Appellant opposes the motion.

FINDING OF FACTS FOR PURPOSE OF MOTION ONLY

1. On 11 September 1990, the Navy Resale and Services Support Office (Government) entered into the captioned contract with Mach-10, Inc. granting Mach-10 an on-base quick lube concession at the Naval Station in San Diego, California with Mach-10 paying the Government a commission of 5.89% of its concession sales. Paragraph 6 of Part I A of the contract provided that the concession was for a term of 10 years commencing with the first sale after the opening of the quick lube concession. The first

paragraph of the contract incorporates the General Provisions, NAVRESSO Publication No. 61, by reference. (R4, tab 2)

2. Paragraph 22 of the General Provisions described in finding 1 is entitled "Disputes (1983 FEB)" and provides as follows:

> (a) This contract is subject to the Contract Disputes Act of 1978 (P. L. 95-563).
>
> (b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved in accordance with this clause.
>
> (c) (1) As used herein, "claim" means a written demand or assertion by one of the parties seeking, as a matter of right, the payment of money, adjustment, or interpretation of contract terms, or other relief, arising under or relating to this contract. However, a written demand by the Contractor seeking the payment of money in excess of $50,000 is not a claim until certified in accordance with (d) below.
>
> . . . .
>
> (3) A claim by the Contractor shall be made in writing and submitted to the Contracting Officer for decision. A claim by the Government against the Contractor shall be subject to a decision by the Contracting Officer.
>
> (d) For contractor claims of more than $50,000, the Contractor shall submit with the claim a certification that the claim is made in good faith; the supporting data are accurate and complete to the best of the Contractor's knowledge and belief; and the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable. The certification shall be executed by the Contractor if an individual. When the Contractor is not an individual, the certification shall be executed by a senior company official in charge at the Contractor's plant or location involved, or by an officer or general partner of the Contractor having overall responsibility for the conduct of the Contractor's affairs.

(R4, tab 1 at 10-11)

3. Paragraph 3 of Part I C of the concession contract states that Mach-10 is responsible for all costs of design, construction or conversion of the site as well as the furnishing and installation of the equipment required to provide a complete, permanent, and functional quick lube facility on the base. Paragraph 14 of Part II H authorizes Mach-10 to make only those improvements approved by base public works or the contracting officer (R4, tab 2).

4. Paragraph 17 (a) of Part II H provides that Mach-10 retains title to those improvements during contract performance. Paragraph 17 (b) states that at the time of termination or expiration of the contract, Mach-10 has the obligation to restore the land to its original condition or the Government instead has the option to take title to those improvements, except for signage or other hardware not affixed or attached to the land. It also indicates that compensation shall be determined in accordance with the clause entitled "COST-REIMURSEMENTS." (R4, tab 2)

5. Paragraph 22 of Part II H of the concession contract provides as follows:

> 22. <u>TERMINATION - REIMBURSEMENT</u>
>
> (a) IN THE EVENT OF TERMINATION OF THIS CONTRACT AND ANY EXTENSION THEREOF IN WHOLE OR IN PART AT THE CONVENIENCE OF THE GOVERNMENT, THE RESALE ACTIVITY WILL PAY THE CONCESSIONAIRE FOR THE UNDEPRECIATED VALUE OF IMPROVEMENTS. THIS PAYMENT SHALL REFLECT THE LOWER OF UNDEPRECIATED VALUE ARISING FROM (a) TEN (10) YEAR STRAIGHT LINE DEPRECIATION OR (b) ACCELERATED TAX DEPRECIATION UNDER THE IRS GUIDELINES UTILIZED BY THE CONCESSIONAIRE IN EACH OF THE CONTRACT YEARS PRIOR TO THE TERMINATION.
>
> (b) SHOULD THIS CONTRACT BE TERMINATED FOR DEFAULT (FAILURE TO PERFORM) OR TERMINATED BY THE CONCESSIONAIRE, IN WHOLE OR IN PART, NO PAYMENT FOR CONCESSIONAIRE IMPROVEMENTS WILL BE EFFECTED.
>
> (c) UPON EXPIRATION OF THIS CONTRACT SHOULD THE GOVERNMENT ELECT TO TAKE TITLE TO THE IMPROVEMENTS INSTALLED BY THE CONCESSIONAIRE, ALL SUCH IMPROVEMENTS SHALL PASS TO THE GOVERNMENT FOR A TOTAL SUM OF $1.00, OR THE

UNDEPRECIATED VALUE OF IMPROVEMENTS AS SET FORTH IN PARAGRAPH (a), WHICHEVER IS GREATER.

(d) IN THE EVENT THAT TITLE PASSES TO THE GOVERNMENT UNDER (a), (b), OR (c) THE RESALE ACTIVITY RESERVES THE RIGHT TO USE THE QUICK LUBE FACILITIES OR OFFER THEM TO A NEW CONCESSIONAIRE.

(R4, tab 2 at 29 of 42)

6. By a letter dated 26 February 1991, Mach-10 wrote the contracting officer stating that Mach-10 had entered into an agreement with Mitch Moshtaghi who will construct and operate the fast oil and lube service center as a licensee of Mach-10 (R4, tab 15). The letter indicates that Mitch Moshtaghi was a founding director of Mach-10. It also provides that Mitch Moshtaghi has agreed to fulfill all concession requirements on behalf of Mach-10.

7. By contract Modification No. M001 dated 7 April 1991, the parties added a coin-operated self-service car washing facility with five self wash stalls and one automatic wash stall to the quick lube concession (R4, tab 3). This modification was signed by Stanley L. Urlaub as chairman of Mach-10 and by the contracting officer.

8. Appellant has included a depreciation schedule in the record which indicates that appellant placed the quick lube concession improvements in the amount of $272,479 in service in June 1991 (SR4, tabs 4, 5). That schedule indicates that appellant chose a useful life of 31.5 years and claimed $4,685 for 6 1/2 months of 1991 (SR4, tab 5). Depreciation schedules for 1992 through 2000 indicate that appellant claimed $8,650 each year for depreciation (SR4, tabs 6, 11, 15-19, 22, 23). Thus, appellant claimed total depreciation in the amount of $82,535, leaving $189,944 of the $272,479 as the undepreciated value of these improvements.

9. The Government sent proposed contract Modification No. M002 dated 30 March 1992 to Mach-10 (R4, tab 4). A Government memorandum dated 17 April 1992 states that a Government representative telephoned Mach-10 Chairman four times over the period from 7-17 April 1992 seeking to determine why Modification No. M002 had not been executed and returned (R4, tab 19).

10. By a letter dated 29 September 1992, the Government advised Mach-10 of its attempts to contact Mach-10, that Mitch Moshtaghi, who was operating the concession on the base, claimed to the Government that Moshtaghi was the owner of the contract, that if ownership of the contract had changed, the contract had to be novated, and requested that Mach-10 advise the Government of its status with respect to the contract (R4, tab 20). By certified mail, return receipt requested, the Government again mailed contract Modification

No. M002 to Mach-10 and requested that the modification be signed and returned (R4, tab 21). The Government also re-sent by certified mail, return receipt requested, the letter dated 29 September 1992 requesting that Mach-10 advise the Government of its contract status and re-dated it 12 February 1993 (R4, tab 22).

11. By a letter dated 3 March 1993 to Commander John D'Amico at the 32nd Street, Naval Station, Mitch Moshtaghi of Quiki Oil Change requested approval to construct and operate an addition to the Quiki Oil Change Building to add a lane to provide for changing automatic transmission fluid and to flush and fill automobile radiators (SR4, tab 7). Attached to the letter is a drawing of this improvement. The Government sent this letter and drawing to the Staff Civil Engineer for review and comment. The Staff Civil Engineer approved the Moshtaghi proposed improvements provided Moshtaghi made certain modifications to maintain proper traffic flow. (SR4, tab 9)

12. Contract Modification No. M006 signed by Mitch Moshtaghi on 18 May 1994 and the contracting officer on 1 June 1994 added the automatic transmission fluid and radiator flush and fill to the concession services (R4, tab 8; see finding 16).

13. Appellant has included a depreciation schedule in the record which indicates that appellant placed the automatic transmission and radiator flush concession improvements in the amount of $79,454 in service in November, 1993 (SR4, tabs 10, 11). That schedule indicates that appellant chose a useful life of 39 years and claimed $255 for 1 1/2 months of 1993 (SR4, tab 11). Depreciation schedules for 1994 through 2000 indicate that appellant claimed $2,037 each year for depreciation of the 1993 improvements (SR4, tabs 15-19, 22, 23). Thus, appellant claimed total depreciation in the amount of $14,514 for the 1993 improvements, leaving $64,940 of the $79,454 as the undepreciated value of these 1993 improvements. The total undepreciated value of the 1991 quick lube improvements plus 1993 improvements was $254,884 (findings 8, 13).

14. By a letter dated 24 March 1993, the Government sent proposed contract Modification No. M003 to Mach-10 and requested that the modification be executed and returned (R4, tab 23). It also sent by a letter dated 25 May 1993 proposed contract Modification No. M004 to Mach-10 and requested that it be executed and returned (R4, tab 24).

15. By letters dated 7 and 22 December 1993, the Government advised Mach-10 that even though Mach-10 had been notified that it would be terminated for default for its failures to respond, the Government had decided not to default terminate the contract as its apparent agents, Mitch Moshtaghi and Michael Icaza, were performing satisfactorily (R4, tabs 25, 26). The letter also stated all future contacts would be with these agents unless Mach-10 objected by 31 December 1993.

16. All contract modifications commencing with Modification No. M005 dated 9 May 1994 were signed by Mitch Moshtaghi, owner (R4, tabs 7-10). These modifications

listed Mitch Moshtaghi, doing business as Quiki Oil Change, as contractor, rather than Mach-10 and contained a provision above the signature block stating that except for the language of the modification, all other provisions of the contract remain unchanged (*id.*).

17. By a letter dated 1 February 2000 from his counsel, appellant offered to continue its concession for an additional 10 years at a higher commission of 12% of sales (R4, tab 28). The Government refused appellant's proposed 10 year extension because it was "obligated to seek competition to the maximum extent practicable" (R4, tab 29). However, the Government indicated that it would consider a short extension past contract expiration.

18. By contract Modification No. M012, the parties agreed to extend the concession period from 28 June 2001 to 29 July 2001 (R4, tab 14).

19. Appellant submitted a proposal in response to a Request for Proposals dated 15 March 2001 to operate the quick lube concession at the Naval Station from 30 July 2001 through 29 July 2006 (SR4, tab 24 at 5). By a letter dated 29 May 2001, the contracting officer notified appellant that its proposal of a commission of 12.1% was not acceptable and that the successful offeror was RFG Oil, Inc. (SR4, tab 24 at last page).

20. By a letter dated 29 August 2001, appellant submitted a claim in the amount of $255,780 to the contracting officer seeking the undepreciated value of the improvements appellant made at the Naval Station in constructing the quick lube facility (R4, tab 35). The contracting officer replied in a letter dated 24 September 2001 that the claim had not been certified as required by the Disputes clause and that appellant had not explained why the claim was valid in light of the contract clauses involving title to improvements and payment for those improvements (R4, tab 36).

21. By a letter dated 12 October 2001, appellant submitted a certified claim for the undepreciated value of the initial improvements in constructing the quick lube facility in 1991 and for the 1993 improvements to that facility (R4, tab 38). The claim letter sought $189,944 for the initial improvements in 1991. See finding 8. It claimed $65,836 for the 1993 improvements. See finding 13 for a calculation of $64,940 using appellant's records. The basis of the claim is that the concession contract only permits the Government to obtain title to the improvements if it pays for their undepreciated value at the termination of the contract. Appellant argued that the term "undepreciated value" should be determined by what was allowed by the United States Internal Revenue Service and not by the terms of the concession agreement which are "unreasonable, unfair and unjust." (R4, tab 38 at 4)

22. By a final decision dated 11 December 2001, the contracting officer denied appellant's claim for the undepreciated value of the improvements appellant made at the Naval Station in constructing the quick lube facility (R4, tab 39). The decision points out that the contract expired by its own terms and was not terminated by either party. It points to the "Termination - Cost Reimbursement" clause which it claims only requires the

Government to pay for undepreciated value of improvements if the contract is terminated early by the Government. It claims the contract provides this by using 10 year straight line deprecation unless appellant has used accelerated depreciation which would result in an even lower undepreciated value. However, it admits that appellant did not receive 10 years of straight line depreciation for the 1993 improvements but claims that these 1993 improvements were not approved by the contracting officer as required by the contract.

23. Appellant filed an appeal dated 5 March 2002 from the final decision of the contracting officer which was received by this Board on 6 March 2002.

24. Appellant filed a Complaint with this Board on 3 April 2002 challenging the final decision of the contracting officer. The Complaint seeks the undepreciated value of the quick lube initial improvements of 1991 and the additional ones in 1993. It defines undepreciated value as the unrealized depreciation not yet allowed by the United States Internal Revenue Service. It alleges three bases for recovery of the undepreciated value: *quantum meruit;* illegal contract*;* and unconscionable contract of adhesion. On 10 June 2002, appellant requested permission to file an amended complaint and it was agreed that the Government's answer would be due subsequent to receipt of that complaint.

25. Appellant filed a first, amended Complaint with this Board on 24 July 2002, which had been certified by Mr. Moshtaghi. It contains five counts based upon contract theories: (a) breach of contract seeks breach damages for the Government's failure to pay the unrealized depreciation not yet allowed by the United States Internal Revenue Service for the quick lube initial improvements of 1991 and the additional ones in 1993 as required by the terms of the concession agreement; (b) breach of implied covenant of good faith and fair dealing when the Government failed to permit appellant to depreciate the improvements in accordance with the Internal Revenue Code and then at the expiration of the contract to pay appellant for the remaining unrealized depreciation for these improvements; (c) *quantum meruit* in that appellant furnished improvements for the benefit of the Government for which there is an implied-in-fact promise by the Government to pay an amount measured by the unrealized depreciation for the quick lube improvements; (d) illegal contract in that the concession contract in defining undepreciated value as the unrealized depreciation after applying the <u>lower</u> of 10 year straight line depreciation or accelerated, if used by appellant, was illegal as being in violation of the depreciation rules of the Internal Revenue Code and that this contract provision must be reformed to reflect the rules of the Internal Revenue Code; and (e) unconscionable contract of adhesion in that the contract provision defining undepreciated value was a one-sided, standard provision mandated by a party with superior bargaining power in violation of the Internal Revenue Code.

26. Appellant's amended Complaint adds tort, real property, and constitutional counts to its original Complaint, stating that these matters may be beyond the jurisdiction of this Board, and it reserves its right to pursue them in other *fora*. Three of the counts seek rent as damages and a fourth fair market value as compensation for the use of the

improvements: (a) conversion seeks rent for the Government's unlawful use of the improvements when title for these improvements remains with appellant since the Government has not paid the contractually required undepreciated value for these improvements; (b) trespass like conversion seeks rent for the Government's unlawful use of the improvements when title remains with appellant; (c) ejectment also like conversion and trespass seeks rent for being deprived of the improvements when title remains with appellant; and (d) taking without just compensation is also for the unlawful use of the improvements when title remains with appellant but is limited to acts of the United States where compensation is determined under the takings clause of the United States Constitution.

27. Two other counts of torts and real property were added by the amended Complaint. The first unfair business dealings and business practices is based upon California law rather than Federal contract law in alleging that the concession contract mandated 10 year straight line depreciation when the Internal Revenue Code did not thereby depriving appellant from being paid the undepreciated value of the improvements, and causing it to be unable to compete for the follow-on contract. The quiet title count is based upon appellant having title to the improvements because the Government never paid for these improvements which appellant constructed on Government land. This count appears to be in equity in that appellant is seeking to quiet title to the quick lube facility improvements.

DECISION

The Government does not question appellant's standing as a contractor but has moved to strike the amended Complaint for lack of jurisdiction because it adds counts or new allegations which have not been considered by the contracting officer in his final decision. Section 605(a) of the Contract Disputes Act (CDA) provides that "[a]ll claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision." 41 U.S.C. § 605(a). It is well established that the linchpin of our jurisdiction is a valid claim and final decision of the contracting officer. *Paragon Energy Corp. v. United States*, 645 F.2d 966 (Ct. Cl. 1981).

The test as to whether a claim before us is the same as the one submitted to the contracting officer is whether it "involves proof of a common or related set of operative facts." *Placeway Construction Corp. v. United States*, 920 F.2d 903, 909 (Fed. Cir. 1990). The claim presented to the contracting officer is that appellant made improvements on the base, the Government agreed to pay for the undepreciated value of those improvements at the end of contract performance, the Government failed to make such a payment, and the appellant claims that it is entitled such a payment (finding 21). Further, our jurisdiction is limited to cases which are essentially contractual in nature.

We hold that all of the counts of the amended Complaint which seek the undepreciated value of the quick lube improvements and sound in contract meet this test and

the ones arising in tort, real property, or the Constitution do not. Thus, we have jurisdiction over the counts seeking *quantum meruit* (implied-in-fact), illegal contract, unconscionable contract of adhesion, breach of contract, and breach of the implied covenant of good faith and fair dealing (finding 25). We lack jurisdiction over the other counts and grant the motion to strike them from the amended Complaint (findings 26, 27).

We deny the Government's motion to strike the entire amended Complaint but strike for lack of jurisdiction all of the counts in that amended Complaint which do not arise in contract as set forth above.

Dated: 4 June 2003

JOHN I. COLDREN, III
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 No. 53711, Appeal of Mitch Moshtaghi, rendered in conformance with the Board's Charter.

Dated:

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