ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Lockheed Martin Corporation	)	ASBCA No. 53798
	)	
Under Contract No. F01620-95-D-0001	)	

APPEARANCE FOR THE APPELLANT: Steven L. Briggerman, Esq.
Seyfarth Shaw
Washington, DC

APPEARANCES FOR THE GOVERNMENT: COL Anthony P. Dattilo, USAF
Chief Trial Attorney
Leonard M. Cohen, Esq.
MAJ Jeffrey A. Renshaw, USAF
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE DELMAN
ON MOTION FOR SUMMARY JUDGMENT

The Government moves for summary judgment with respect to appellant's claim for breach of contract on behalf of its subcontractor. Invoking the "Severin doctrine," the Government contends that appellant is barred from sponsoring a breach claim since appellant has no liability to its subcontractor for a breach. Appellant opposes the motion, and contends that under its agreement with its subcontractor it is liable to the subcontractor for a Government breach, and hence the "Severin doctrine" does not apply. The record, insofar as pertinent to this motion, includes the subcontract agreement and its attachments and a declaration from the subcontractor's contract administration manager who executed the agreement.

STATEMENT OF UNDISPUTED FACTS FOR PURPOSES OF MOTION

1. On 1 May 1995, the Air Force awarded Contract No. F01620-95-D-0001 to Loral Federal Systems Co. (R4, tab 1). Lockheed Martin Corporation, Lockheed Martin Systems Integration Division (appellant) is the successor in interest to the contract. The contract included work for the modernization of the DOD Defense Message System. Included in the work was the delivery of Profiling User Agent (PUA) software to the Government under CLIN 0002, which was used in the receipt, decryption, profiling, re-encryption, and dissemination of organizational e-mail. (R4, tab 1, § C, ¶ C.3.3.1.1.3) This portion of the work was to be provided on an Indefinite Delivery, Indefinite Quantity (IDIQ) basis (R4, tab 1, § B, ¶ B.3). A guaranteed minimum order amount was set out for the IDIQ work (R4, tab 1, § B, ¶ B.2).

2. On or about 11 March 1996, appellant entered into a subcontract with Xerox Special Information Systems (XSIS or subcontractor). Under the subcontract, XSIS was to provide appellant with the PUA software for delivery to the Government. The subcontract also included standard FAR clauses that were passed through from the prime contract, including insofar as pertinent, FAR 52.249-2 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) clause. (Miller decl., ex. 2, LFSC Terms and Conditions at 12)

3. During the course of performance the Government ordered PUA software from appellant, but the number of orders decreased when the Government began using a product it obtained from Government channels called the "Defense Message Dissemination System" (DMDS), which it used in lieu of the PUA software.

4. Appellant submitted a certified claim to the contracting officer on behalf of its subcontractor. Appellant contended, *inter alia*, that the Government's use of DMDS in lieu of PUA software was a violation of various representations made by the Government at the bidders' conference and was a breach of contract. (R4, tabs 6, 10, 14) The contracting officer denied the claim, contending, *inter alia*, that the Government's duty to appellant was fulfilled when it ordered the guaranteed minimum amounts under the IDIQ provisions of the contract (R4, tab 16). Appellant's appeal was docketed as ASBCA No. 53798.

5. The Government relies upon the following provisions in the prime/subcontractor agreement which it contends precludes any liability of appellant to XSIS for a Government breach of contract (Miller decl., ex. 2):

LFSC TERMS AND CONDITIONS, LORAL DOCUMENT NO. 96-DMS-TC2, DATED 14 NOV 1995 at 12:

32. EXCLUSIVITY

> 32.1 Excepting those sales by Seller to Buyer for delivery under Buyer's Prime Contract, Seller agrees to pay Buyer royalties in accordance with the following provision: Until Seller has sold 1,250 DMS GOSIP certified Profiling User Agents, Seller will pay Buyer a royalty fee of $2,595.00 for each sale, made by Seller or Seller's Agent(s), of the Seller's DMS GOSIP certified Profiling User Agent.
>
> 32.2 Excepting those sales by Buyer of Seller's Profiling User Agent for delivery under Buyer's Prime Contract, Buyer agrees to pay Seller royalties in

accordance with the following provision: Until Seller has sold 1,250 DMS GOSIP certified Profiling User Agents, Buyer will pay Seller a royalty fee of $2,595.00 for each sale, made by Buyer or Buyer's Agent(s), of aDMS [sic] GOSIP certified Profiling User Agent not manufactured by Seller.

32.3 Seller's Profiling User Agent product sold in accordance with Section 32.1, above, shall be supported by the Buyer in the same manner as if the product had been sold under the Buyer's Prime Contract. After the sale of 1,250 DMS GOSIP certified Profiling User Agents, Seller will have to negotiate with Buyer for any Buyer support for units not sold under Buyer's Prime Contract.

32.4 Sections 32.1 and 32.2, above, shall not apply when:

(i) a formal U. S. Government directed change requires Buyer to provide Profiling User Agents from a manufacturer other than Seller; and,
(ii) Seller and Buyer jointly agree to pursue other sales vehicles for Seller's Profiling User Agent products.

DMS LICENSE AGREEMENT at 11:

Neither Party is responsible for failure to fulfill its obligations under this Agreement, if such failure is caused by flood, extreme weather, fire or other natural calamity, *act or* [sic] *government*, or similar causes beyond the control of such Party. [Emphasis added]

The Government contends that an "act of Government" for which appellant would not be responsible under this last provision would include a Government breach of the prime contract as alleged by appellant here, and absent such responsibility to XSIS, the Severin doctrine would apply to bar this claim.

6. In support of its position opposing the motion, appellant provided a declaration from Mr. Waldamar W. Miller, the subcontractor's manager for contract administration, who executed the subcontract/purchase order and participated in the negotiations. Insofar as pertinent, Mr. Miller stated as follows with respect to the above provisions:

8. . . . The reciprocal provisions set forth in paragraphs 32.1 and 32.2 of that clause obligated [appellant] and XSIS to deal exclusively with each other regarding the first 1,250 PUA's that the government was obligated to order from [appellant] under the prime contract. Paragraph 32 enforced this obligation by stating that in the event [appellant] or XSIS either bought units from, or sold units to, any other contractor prior to providing 1,250 units to the government, that party would be liable to the other in the amount of $2,595 for each such purchase or sale. The [appellant] purchase order did not contain any provision limiting XSIS's damages in the event [appellant]'s failure to order PUA's resulted from, as here, the Air Force's breach of the [appellant] prime contract. Thus, the Air Force had a documented obligation to buy PUA's from [appellant] under the prime contract and [appellant] had a corresponding duty to purchase those PUA's (up to 1,250 units) from XSIS under its purchase order requirement. If [appellant] did not do this, it would be financially liable to XSIS.

. . . .

11. I understand that the Air Force also contends that an unnumbered clause constituting the third full paragraph on page 11 of the DMS License Agreement excuses [appellant] from liability for an "Act of Government" situation.

. . . .

12. As a participant in the subcontract negotiations, we accepted the clause merely as a typical *force majeure* provision. Its purpose was to excuse either party from the effects of events extraneous to the purchase order activity that would effectively inhibit or make performance impossible. . . . [W]e understood "Act of Government" to refer to something such as the passage of a new statute or regulation with application to the public.

. . . .

13. Certainly, I *did not* [emphasis in original] comprehend the phrase to refer to actions of the government taken in its role as a contracting party under [appellant]'s prime contract. Such interpretation is not logical because it is tantamount to giving

> the government permission to breach its contract with [appellant], even thought [sic] that action might cause XSIS substantial damage without recourse against either [appellant] or the government. I am convinced that neither party ever suggested this view. If this interpretation had been proposed during negotiations, I can truly state that XSIS would never have agreed to it.

DECISION

The Government relies on the "Severin doctrine" in support of its position that it is entitled to judgment as a matter of law. This doctrine, taken from *Severin v. United States*, 99 Ct. Cl. 435 (1943), *cert. denied*, 322 U.S. 733 (1944), generally precludes a prime contractor from sponsoring a subcontractor claim against the Government if the prime contractor is not liable to the subcontractor for the costs or damages in question and thus has incurred no injury arising from the matter. This doctrine is grounded on principles of sovereign immunity. The Government has consented to be sued contractually only by those with whom it has privity of contract and who are aggrieved by Government conduct related to a contract. Hence, in order for a prime contractor to sponsor a subcontractor claim against the Government, the prime must have some liability to the subcontractor and thus, too, stand aggrieved by the Government conduct in question. *E.R. Mitchell Construction Co. v. Danzig*, 175 F.3d 1369, 1370 (Fed. Cir. 1999).

The Government has the burden to show that the Severin doctrine applies (*id*.). The Government must show an iron-clad release or contract provision that clearly immunizes the prime contractor from any and all liability to the subcontractor for the conduct in question. If the contract is otherwise silent on the issue, sponsorship will be allowed. *Cross Construction Co., Inc. v. United States*, 225 Ct. Cl. 616, 618 (1980); *E.R. Mitchell, supra*.

Having considered the evidence presented by the parties at this early stage in the proceedings and the Government's burden under the governing law, we are not presently persuaded that the Government has shown that appellant is barred from sponsoring this subcontractor claim under the Severin doctrine. Specifically, we are not persuaded that the Exclusivity provision serves to bar appellant's liability to XSIS for a Government breach, nor are we persuaded that the so-called "force majeure" clause precludes appellant's liability to XSIS for a Government breach. A better-defined record may shed further light on these and other relevant provisions and the parties' understanding of them.

Moreover, the Government's wrongful failure to order a contract product or service may under certain circumstances be viewed as a constructive convenience termination under the Termination for Convenience clause of the contract, as suggested in appellant's motion papers. Although appellant's claim did not expressly seek recovery on a

"constructive convenience termination" basis, a contractor may advance a legal theory on appeal that was not expressly raised in the claim if it relates to the same set of operative facts as the claim, which is the case here. *J & J Maintenance, Inc.*, ASBCA No. 50984, 00-1 BCA ¶ 30,784. Hence, if appellant can establish that the Government constructively terminated the prime contract, appellant's liability to XSIS could be established under the Termination for Convenience clause in the subcontract. Under such circumstances the Severin doctrine clearly would not apply.

For reasons stated, the Government's motion for summary judgment is denied.

Dated: 9 June 2003

JACK DELMAN
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. 53798, Appeal of Lockheed Martin Corporation, rendered in conformance with the Board's Charter.

Dated:

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