ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
International Technology Corporation	)	ASBCA No. 54136
	)	
Under Contract No. N62474-93-D-2151	)	

APPEARANCE FOR THE APPELLANT: Peter B. Jones, Esq.
Jones & Donovan
Newport Beach, CA

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
James T. DeLanoy III, Esq.
Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DELMAN

Appellant, International Technology Corporation, has moved for summary judgment on entitlement, seeking a ruling that it is entitled to recover cost overruns on behalf of itself and a subcontractor without regard to the cost limits of the Limitation of Cost clause of the contract. The government has filed an opposition to appellant's motion. We believe that appellant has not established entitlement as a matter of law on the present record, and we deny the motion.

STATEMENT OF FACTS FOR PURPOSES OF MOTION

1. The contract was awarded to appellant on 23 February 1994 in the amount of $800,000 by the Department of the Navy, Western Division, Naval Facilities Engineering Command (government). Section C, paragraph 1.1 of the contract describes the work generally as follows:

> The objective of this procurement is to obtain services for performing remedial actions at environmentally contaminated sites predominately located at Department of Navy and Marine Corps installations and other Government Agencies. These site locations range throughout the states of California and Nevada. These sites consist of those ranked on the Superfund National Priority List (NPL) as well as non-NPL sites, Resource Conservation and Recovery Act (RCRA), Underground Storage Tanks UST, and other sites which might be determined to require remedial action.

(R4, tab 1 at C-1) The contract term was for one base year, with four option periods. The contract was an indefinite delivery indefinite quantity cost-plus-award-fee type contract, which included the clause entitled FAR 52.232-20, LIMITATION OF COST (APR 1984) (LOC) (R4, tab 1 at I-2).

2. The work under the contract was to be authorized through the issuance of delivery orders, each of which was to contain the LOC clause. Section G, paragraph G3 provided in pertinent part as follows:

> G3 ORDERING PROCEDURES
>
> . . . .
>
> (e) Each delivery order shall include as a minimum:
>
> (1) The date of the order;
>
> (2) Contract and Order number;
>
> (3) Statement of Work, including references to applicable specifications;
>
> (4) The delivery date or period of performance;
>
> (5) Accounting and appropriation data; and
>
> (6) An estimated cost of performance and award fee. **Under no circumstances shall the contractor exceed 100% of the estimated costs (excluding award fee) without prior written authorization by the Contracting Officer.** [Emphasis added]
>
> . . . .
>
> (f) The contractor shall notify the Contracting Officer if any apparent difficulties with regard to performance according to the terms of the order are anticipated or any time difficulties in performance arise. Each delivery order shall be deemed to include the clauses LIMITATION OF COSTS [sic] (FAR 52.232-20) and LIMITATION OF FUNDS (FAR 52.232-22) which are located in Section I1, and such clauses shall be applicable to each delivery order individually. The Contractor shall notify the Contracting Officer 60 days in advance of reaching 75% of the estimated cost of the delivery

> order. If at any time during performance of an order, it appears that additional funds shall be required to complete performance of the delivery order, the contractor shall promptly notify the Contracting Officer in writing. Such notification shall include the costs expended, an estimate of costs required to complete the order, and an explanation of why the originally negotiated estimated cost was not adequate. The Government shall have the right to require the contractor to continue performance up to the originally estimated cost level and to suspend work thereafter; to negotiate a new set of work priorities to be completed within the remaining funds; or to modify the order, increasing the estimated cost to the level appropriate for completion of the work without additional fee. Fee may be increased only if there is an increase to the original scope of the order. [Emphasis in original]

(R4, tab 1 at G-1, G-2)

3. Delivery Order (DO) No. 102 was issued to appellant on 29 August 1997 in the amount of $1,267,842 for Line Item 1, Base Effort, "Treatment of DDT-Contaminated Soil, Naval Communication Station, Stockton, California." The period of performance for the DO was 395 calendar days, commencing on 1 September 1997 and concluding on 30 September 1998. The estimated cost was established at $1,228,409 in accordance with the LOC clause. (R4, tab 39)

4. Under this DO appellant was to treat DDT-contaminated soil at a number of sites using a solvent extraction technology. The DO referenced a "*Focused Feasibility Study for DDT-Contaminated Soil* dated December 1996." This study contained data summary tables, including summaries of site investigations that described the contents of a number of soil samples from the sites, including clay content. The DO also referenced a "*Terra Kleen Solvent Extraction Technology Evaluation Report* dated December 1996," which also contained a description of certain samples of soil from the sites and their composition, including clay content. (Responses to RFA Nos. 5, 6)

5. On or about 17 April 1998, over 7 months after the award of the delivery order to appellant, appellant entered into a subcontract with Terra Kleen Response Group, Inc. ("subcontractor") for the treatment of the soil under the delivery order (R4, tab 56).

6. During performance of the DO, appellant sought, and the government granted a number of time extensions and increases in the estimated cost of the delivery order. By bilateral contract modification dated 3 May 2000, the estimated cost of the delivery order, excluding fee, was $2,830,553, with a contract completion date of 15 July 2000 (R4, tab 49).

7. According to appellant's final post-construction report, it completed demobilization of the work during the week of 26 June 2000, and the project was accepted as complete on or about 30 June 2000 (R4, tab 82 at 3-9). The government, however, denies that appellant reduced the measured levels of DDT in the soils to the levels required by the DO (response to RFA No. 27). The government disposed of the soil at the Port of Stockton on or about 29 September 2003 (response to RFA No. 28).

8. On 27 May 2000, towards the end of the work on this delivery order, appellant provided the government with a "Notice of Potential Impact" to the delivery order based upon, *inter alia*, unanticipated soil conditions—excessive clay content of the soil—encountered by the subcontractor. However, appellant indicated that at this time it "does not require any response from the Navy." (R4, tab 67 at 1, 2)

9. By letter to the contracting officer dated 8 August 2000, appellant advised "we now believe that the Subcontractor may be entitled to an additional payment roughly in the range of between $100,000 and $900,000." Appellant sought guidance from the contracting officer, but did not seek additional funding for the DO in any sum certain, nor did it advise that within the next 60 days it would exceed 75 percent of the estimated cost under the DO, nor did it provide a revised estimate of the total cost of performing the contract. (R4, tab 68 at 1) It appears that appellant had already completed the work under the DO by this date.

10. On 10 August 2000, two days after sending the above letter to the government, appellant advised its subcontractor in writing that its request for additional compensation had "considerable weaknesses" (R4, tab 69 at 3). Appellant advised, *inter alia*, that there was no basis for a differing soil condition claim, and that "[t]he final Subcontract SOW [statement of work] expressly contemplated that significant clay would be encountered" (*id*. at 1).

11. By letter to the government dated 3 January 2001, appellant submitted an REA on behalf of its subcontractor, and requested additional funding above the established cost limitation in the delivery order, in the amount of $923,833 (R4, tab 74). According to the government, these subcontractor cost overruns were incurred prior to any written authorization by the government. According to the appellant, it made the government aware of delay and additional cost relating to clay content pursuant to contract performance reports and a power point presentation in March 1999 (R4, tabs 59, 60, 92).

12. By letter to the contracting officer dated 21 November 2001, appellant submitted an REA in the amount of $1,181,535, including $965,347 of additional costs purportedly incurred by its subcontractor and $216,188 of additional costs purportedly incurred by appellant. (R4, tab 75) The contracting officer denied the REA by letter dated 29 November 2001, stating that there was no support for appellant's claim of differing site conditions (R4, tab 76).

13. In or about March 2002, appellant filed a petition for reorganization under federal bankruptcy law. By Order dated 24 June 2002, the bankruptcy court authorized the subcontractor to act on behalf of appellant in the prosecution of this REA. (R4, tab 80, Agreement at 2-4)

14. The REA was audited by the Defense Contract Audit Agency (DCAA). The audit report is not part of the record. According to appellant, "DCAA reported that [the subcontractor's] equitable adjustment proposal was an acceptable basis for negotiation of a fair and reasonable price; DCAA questioned $73,054 of [the subcontractor's] proposed costs of $940,262, leaving an unquestioned difference of $867,208 (exclusive of profit)" (app. mot. at 7, ¶ 26). It appears that the government admits that the report contained this language (response to RFA No. 24).

15. By letter to the contracting officer dated 26 August 2002, appellant submitted a certified claim in the amount of $1,148,545 and demanded a final decision. Mr. Frank C. Rice, Vice President and "Authorized Agent" signed the claim certification for appellant. Mr. Rice certified, *inter alia*, that he was "duly authorized to certify the claim on behalf of IT Corporation." (R4, tab 84)[1] The contracting officer did not issue a decision within 60 days, nor did she advise appellant when such a decision would be

[1] By memorandum dated 20 March 2004, the government challenged the legality of this claim certification for purposes of our jurisdiction. The government contends that: (1) the subcontractor failed to provide a proper certification; (2) appellant failed to furnish the certification prior to filing bankruptcy; (3) the bankruptcy court did not sign or authorize the certification; and (4) the subcontractor's prosecution of this appellant-sponsored claim constitutes an assignment of claim in violation of 41 U.S.C. § 15(a).

The government's position is without merit. Appellant, as the entity in privity with the government, is obligated to certify its claim and any subcontractor claim that it sponsors in accordance with the Contract Disputes Act of 1978 (CDA), 41 U.S.C §§ 601-613, as amended. *St. Paul Fire and Marine Insurance Company*, ASBCA No. 53228, 02-2 BCA ¶ 32,025. Mr. Rice, appellant's Vice President and Authorized Agent, certified that he was duly authorized to certify the claim on behalf of appellant, and the government provides no evidence indicating otherwise. A contractor need not furnish the claim document and the certification simultaneously, so long as a certified claim is furnished to the CO for decision in accordance with the CDA, which was done here. A subcontractor's prosecution of a claim with the consent and sponsorship of its prime contractor is the well-settled procedure by which such claims are adjudicated under the CDA. *St. Paul Fire and Marine*, *supra*. The statutory prohibition against the assignment of contracts and claims to third parties under 41 U.S.C. § 15(a) has no application under these circumstances.

issued within 60 days of receipt of the claim. Pursuant to Board Rule 1(e), appellant requested an order from the Board directing the issuance of a decision within 30 days. The government replied that it would issue a decision by 3 March 2003, and the Board so ordered. (*See* ASBCA No. 54002-891 and related documents in the official Bd. file.)

16. The contracting officer issued a decision dated 28 February 2003, denying the claim. Insofar as pertinent, the contracting officer advised as follows (notice of appeal dated 14 March 2003, attach. 2 at 8):

> IT [appellant] seeks an adjustment that exceeds the cost limitation in the delivery order but it did not provide the required notice to the Contracting Officer in advance of the costs being incurred. The Government is not obligated under the contract to pay for unauthorized costs that exceed the cost limitation.

This appeal followed.

17. The subject contract and delivery order contained the LOC clause and there is a suggestion in the record that the subcontract agreement also contained this clause, but the record does not contain a complete copy of the subcontract. Insofar as pertinent, the LOC clause states as follows:

> LIMITATION OF COST (APR 1984)
>
> (a) The parties estimate that performance of this contract, exclusive of any fee, will not cost the Government more than (1) the estimated cost specified in the Schedule . . . .
>
> (b) The Contractor shall notify the Contracting Officer in writing whenever it has reason to believe that—
>
> (1) The costs the contractor expects to incur under this contract in the next 60 days, when added to all costs previously incurred, will exceed 75 percent of the estimated cost specified in the Schedule; or
>
> (2) The total cost for the performance of this contract, exclusive of any fee, will be either greater or substantially less than had been previously estimated.
>
> (c) As part of the notification, the Contractor shall provide the Contracting Officer a revised estimate of the total cost of performing this contract.

(d) Except as required by other provisions of this contract, specifically citing and stated to be an exception to this clause—

(1) The Government is not obligated to reimburse the Contractor for costs incurred in excess of (i) the estimated cost specified in the Schedule . . . and

(2) The Contractor is not obligated to continue performance under this contract (including actions under the Termination clause of this contract) or otherwise incur costs in excess of the estimated cost specified in the Schedule, until the Contracting Officer (i) notifies the Contractor in writing that the estimated cost has been increased and (ii) provides a revised estimated total cost of performing this contract. . . .

(e) No notice, communication, or representation in any form other than that specified in subparagraph (d)(2) above, or from any person other than the Contracting Officer, shall affect this contract's estimated cost to the Government. In the absence of the specified notice, the Government is not obligated to reimburse the Contractor for any costs in excess of the estimated cost . . . .

. . . .

(g) Change orders shall not be considered an authorization to exceed the estimated cost to the Government specified in the Schedule, unless they contain a statement increasing the estimated cost.

(h) If this contract is terminated or the estimated cost is not increased, the Government and the Contractor shall negotiate an equitable distribution of all property produced or purchased under the contract, based upon the share of costs incurred by each.

18. Paragraph G4 of the contract provides in pertinent part as follows:

G4 NOTIFICATION REQUIRED UNDER LIMITATION OF COST AND LIMITATION OF FUNDS CLAUSES

LIMITATION OF COST, FAR 52.232-20, and LIMITATION OF FUNDS, FAR 52.232-22, incorporated by reference in

> Section I1, are applicable to each delivery order individually. Limitation of Cost applies if the delivery order is fully funded at the time of issuance. Limitation of Funds applies if the delivery order is incrementally funded. "Delivery Order" is substituted for "Schedule" wherever that word appears in the clauses. The contractor shall notify the Contracting Officer in writing whenever it has reason to believe:
>
> (a) For LIMITATION OF COST:
>
> (1) The costs the contractor expects to incur under the delivery order in the next 60 days (unless varied in the delivery order) when added to all costs previously incurred, will exceed 75 percent (unless varied in the delivery order) of the estimated cost specified in the delivery order;
>
> (2) The total cost for the performance of the delivery order, exclusive of any fee, will be either greater or substantially less than had been previously estimated. [Emphasis in original]
>
> (b) For LIMITATION OF FUNDS:
>
> . . . .
>
> NOTE: Notification requirements aspects of LIMITATION OF COST and LIMITATION OF FUNDS are restated here for emphasis.

(R4, tab 1 at G-3)

DECISION

We grant summary judgment where no material facts are in dispute and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Inferences must be drawn in favor of the party opposing summary judgment. *Hughes Aircraft Co.*, ASBCA No. 30144, 90-2 BCA ¶ 22,847. We are not to resolve factual disputes, but to ascertain whether disputes of material fact are present. *General Dynamics Corp.*, ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851.

Appellant contends that based upon the reports referenced in the DO, the government misrepresented soil conditions at the sites, thereby breaching the DO and

entitling appellant to its additional costs. (Appellant frames its case in terms of breach of contract since the contract did not include a Differing Site Conditions clause.) However, there is evidence of record indicating that there was no misrepresentation of soil conditions (finding 10). This is a dispute of material fact. The record also is unclear as to whether appellant, as the entity in privity with the government, relied upon any soil representations in the reports to price DO No. 102, or otherwise relied upon its subcontractor's understanding for this purpose.

Based upon the foregoing, we are not persuaded that summary judgment for appellant is appropriate on the question of soil condition misrepresentation.

Assuming, *arguendo*, that appellant can make out a *prima facie* case of soil misrepresentation and a breach of contract resulting in cost overruns, it must still establish that these costs are recoverable in accordance with the LOC and related clauses, or are otherwise recoverable without regard to these clauses. *See generally Advanced Materials, Inc. v. Perry*, 108 F.3d 307 (Fed. Cir. 1997). *Cf. Ebasco Services, Inc. v. United States*, 37 Fed. Cl. 370, 382 (1997) (contractor may be able to recover costs above cost ceiling under LOF clause that resulted from government's bad faith or unfair conduct). The parties dispute whether the government breached the DO, whether a recovery of damages for a breach of this nature is subject to the LOC clause, and if the clause applies, whether appellant complied with its terms under the circumstances. The record as it currently exists does not support a grant of summary judgment for appellant on any of these issues.[2]

Alternatively, appellant contends that if the LOC is enforceable by the government, it is entitled as a matter of law to an equitable distribution of "all property produced or purchased under the contract," pursuant to FAR 52.232-20(h). In *SMS Agoura Systems, Inc.*, ASBCA Nos. 51441 *et al*., 99-2 BCA ¶ 30,524 at 150,740, we set forth the elements of this claim as follows:

> . . . The elements of proof of a claim for equitable distribution of non-severable property under the LOC clause are: (1) the contractor incurred allowable costs that overran the contract's total estimated cost on a given date, (2) the CO did not fund such cost overrun, (3) the contractor produced or purchased property of an identifiable value in part before and

[2] We can, however, dispose of one of appellant's arguments at this time. We see no merit in appellant's contention that by providing notice of a subcontract claim under the clause entitled FAR 52.244-2(h), SUBCONTRACTS (COST REIMBURSEMENT AND LETTER CONTRACTS) (JUL 1985) — ALTERNATE I (APR 1985) (R4, tab 1 at I-3), it had no need to provide timely notice of cost overruns under the LOC clause. These clauses serve different purposes and are neither conflicting nor mutually exclusive.

> in part after the cost limit was reached, (4) such property is not severable from other property delivered under the contract without making the item or system unworkable, and (5) the Government retained and continued to use such property.

We believe the present record does not establish elements (3), (4) or (5) above. It appears that DO No. 102 was primarily for services (findings 1, 4). The record requires further development as to whether there were any property items produced or purchased by appellant that were delivered under the DO that can satisfy the foregoing elements. *See Systems Engineering Associates Corp.*, ASBCA Nos. 38592 *et al.*, 91-2 BCA ¶ 23,676 at 118,578 (equitable distribution under LOC clause does not apply to services).

For reasons stated, appellant's motion for summary judgment is denied.[3]

Dated: 27 April 2004

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

[3] Appellant has also moved for sanctions and a ruling that its requests for admissions (RFAs) be deemed admitted because the government was roughly 14 days late in reply to the RFAs. We believe that appellant has not shown any material prejudice, nor has it shown a violation of any Board order. Appellant's requests are denied. *Morris Guralnick Associates, Inc.*, ASBCA No. 41888, 91-2 BCA ¶ 23,859.

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. 54136, Appeal of International Technology Corporation, rendered in conformance with the Board's Charter.

Dated:

DAVID V. HOUPE
Acting Recorder, Armed Services
Board of Contract Appeals