ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeal of -- | ) | |
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| C. J. Machine, Inc. | ) | ASBCA No. 54249 |
| | ) | |
| Under Contract No. F41608-00-M-1401 | ) | |

APPEARANCE FOR THE APPELLANT: Theodore M. Bailey, Esq.
Bailey & Bailey, P.C.
San Antonio, TX

APPEARANCES FOR THE GOVERNMENT: COL Anthony P. Dattilo, USAF
Chief Trial Attorney
MAJ Tishlyn E. Taylor, USAF
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY
ON GOVERNMENT'S MOTION TO DISMISS

At issue is the government's motion to dismiss for lack of jurisdiction which has been fully briefed by the parties. We deny the motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

Appellant was awarded Contract No. F41608-00-M-1401 by the Department of the Air Force on 17 August 2000 for the repair/overhaul and test of ground handling trailers. The Defense Contracts Management Command (DCMC) in San Antonio, TX, was designated to be the contract administration office. DCMC subsequently became the Defense Contracts Management Agency (DCMA). (R4, tab 1) By Modification No. P00001, issued on 16 January 2001, the contract was transferred from Kelly Air Force Base (AFB), TX to Robins AFB, GA. No change was made to the contract administration office designation. (R4, tab 2)

Effective 3 October 2001, the contract was terminated for convenience by Modification No. P00003 issued on Standard Form (SF) 30. Paragraph 8 of Block 14 of the modification stated:

> THE CONTRACT ADMINISTRATION OFFICE NAMED IN THE CONTRACT WILL IDENTIFY THE CONTRACTING OFFICER WHO WILL BE IN CHARGE OF THE SETTLEMENT OF THIS TERMINATION AND WHO WILL, UPON REQUEST PROVIDE THE

NECESSARY SETTLEMENT FORMS. MATTERS NOT COVERED BY THE NOTICE SHOULD BE BROUGHT TO THE ATTENTION OF THE CONTRACTING OFFICER SPECIFIED IN BLOCK 16D OF THE SF 30.

There is no Block 16D on the SF 30; however, Block 16A identified Mr. Gregory McClure as the Robins AFB contracting officer and he executed the termination modification in that capacity in Block 16B. (R4, tab 5)

When the DCMA contract administration office in San Antonio did not identify the contracting officer who would be in charge of the termination settlement, appellant, through counsel, submitted a termination settlement proposal, dated 30 September 2002, seeking $75,522.37 to Mr. McClure at Robins AFB. The cover letter stated that appellant had "not been informed as to who was appointed as TCO as provided for in modification p00003 [sic]" and requested that the proposal be forwarded to the "appropriate contracting officer." (R4, tab 20) There is disagreement between the parties as to whether submitting the proposal to Mr. McClure was consistent with information counsel received from government representatives at Robins AFB in April 2002 (app. resp., ex. 1; gov't reply, ex. 2).

Nevertheless, by a letter dated 1 October 2002, Mr. McClure advised appellant's counsel that the proposal should be sent to Ms. Ida Ramirez, the DCMA administrative contracting officer, in San Antonio, TX (R4, tab 21). According to the affidavit of counsel, Ms. Ramirez, in a telephone conversation two days later, represented that she had "nothing to do with that contract" and that the proposal should be submitted to Mr. McClure (app. resp., ex. 1). A letter dated 4 October 2002, sent by counsel via fax to Mr. McClure, recounts this conversation with Ms. Ramirez and requests that he process the proposal (app. resp., ex. 2). Although there is a transmission verification report for the fax, Mr. McClure has no record, or recollection, of ever having received the letter and there is no evidence of any response by him to it (app. resp., ex. 2; gov't reply, exs. 1, 2). Additionally, Ms. Ramirez avers that she told counsel that the termination settlement proposal had to be processed by the "DCMA Dallas termination officer" and that she is "fairly confident" that she referred him to Mr. Charles McIntosh, the DCMA termination contracting officer in the Dallas-Ft. Worth office (gov't reply, ex. 3). Neither appellant nor Mr. McClure provided a copy of the termination settlement proposal to anyone at DCMA.

We find that, under the circumstances, the termination settlement proposal was properly submitted to Mr. McClure and further that the 4 October 2002 letter sent by fax to him was received by the contracting office at Warner AFB.

The record does not reflect any further communications between the parties regarding the matter until 17 March 2003, when counsel sent a letter to Mr. McClure

referencing appellant's 30 September 2002 termination settlement proposal and requesting that it be considered a claim and that a final decision be issued within 60 days (R4, tab 23). The record contains no evidence of any response to appellant's 17 March 2003 letter. This appeal from a deemed denial was docketed on 15 July 2003.

The government represents that Mr. McIntosh has now been named as the DCMA termination contracting officer. It further represents that DCMA has not indicated any unwillingness to negotiate a termination settlement with appellant. Appellant has not disputed either of these representations, although it points out that as of 2 January 2004 it has not received any official written notification of Mr. McIntosh's appointment.

## DISCUSSION

The government's motion to dismiss contends that DCMA has the sole authority to negotiate the termination settlement, or issue the final termination decision. Relying upon *James M. Ellett Construction Company v. United States*, 93 F.3d 1537 (Fed. Cir. 1996), the government further asserts that the Board lacks jurisdiction over this appeal because the termination settlement proposal was not a claim under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601 *et seq*., when submitted and the facts do not establish that there was an impasse in negotiations between appellant and DCMA.

Appellant disputes the government's contention that the termination settlement proposal should have been submitted to DCMA. But, relying upon *Rex Systems, Inc. v. Cohen*, 224 F.3d 1367 (Fed. Cir. 2000), it contends that the office to which the proposal was submitted is irrelevant and that we need not resort to an inquiry into whether there was an impasse in negotiations because the proposal became a CDA claim on 17 March 2003, when it explicitly requested a contracting officer's final decision (app. resp. at 4-5).

In *Rex Systems*, the contractor filed a claim for CDA interest after an agreement had been reached with the government on its termination for convenience settlement proposal. We held that the contractor had failed to establish that it had a claim upon which interest was due because the evidence established there was no impasse in the negotiations. *Rex Systems, Inc.*, ASBCA No. 49502, 99-1 BCA ¶ 30,179 at 149,316, *aff'd on recons*. 99-1 BCA ¶ 30,377. On appeal, the court first confirmed that the question presented was whether, under *Ellett*, the parties had reached an impasse such that the settlement proposal had ripened into a CDA claim, an inquiry it described as one which "turns on the facts of each appeal." 224 F.3d at 1371 *quoting Rex Systems*, 99-1 BCA ¶ 30,179 at 149,316. It then reiterated that "[s]ettlement proposals submitted under the termination for convenience clause of the FAR are by their very nature merely negotiating tools and not claims." *Rex Systems*, 224 F.3d at 1371.

It went on to summarize the *Ellett* decision and subsequent cases at the Court of Federal Claims and the ASBCA, observing that, in each, the "objective" facts and

evidence had been examined to determine whether negotiations had reached an impasse. *Id*. at 1372-73. It stated:

> . . . Objective evidence that negotiations had been abandoned by the parties is necessary before the negotiations can be found to have reached an impasse. To require anything less would leave far too much ambiguity in the definition of an impasse and allow a finding of an impasse even though both parties were going through further negotiations.

The court further noted that "[a]n impasse requires a stalemate or a break-down in negotiations" and concluded that it was necessary to "look to the parties' actions and statements with regard to the negotiations initiated by the termination settlement proposal" to determine whether the negotiations had reached an impasse. *Id.* at 1373. *See also Central Environmental, Inc.*, ASBCA No. 51086, 98-2 BCA ¶ 29,912, where we stated at 148,080: "The determination of impasse is an inherently factual question. Impasse means deadlock; the point where an objective, reasonable third-party observer would conclude that resolution through continued negotiations is unlikely and continued negotiation is unwarranted."

Applying the guidelines of *Ellett, Rex Systems* and *Central Environmental*, our examination of the objective factual evidence in this record establishes that, when appellant submitted its 17 March 2003 letter requesting that its termination settlement proposal be treated as a CDA claim, there had been no communication whatsoever regarding its termination settlement proposal from either DCMA or the Robins AFB contracting office following appellant's 4 October 2002 letter to Mr. McClure. We found above that appellant properly submitted the proposal to Mr. McClure at Robins AFB and we are of the view that it was his responsibility to forward the proposal on to the DCMA termination contracting officer. Instead of doing so, he advised appellant to send the proposal to Ms. Ramirez in the DCMA contract administration office in San Antonio, TX. And, for whatever reasons, he never responded to appellant's 4 October 2002 letter which advised him that Ms. Ramirez claimed to have "nothing to do with the contract." Further, there is no evidence of any response by either DCMA or the Robins AFB contracting office to appellant's 17 March 2003 request to have its termination proposal converted into a CDA claim.

Under FAR 49.105, the termination contracting officer is obliged to take prompt action on a contractor's termination settlement proposal. This did not occur here. We cannot say on this record whether the government's abject failure to address appellant's termination settlement proposal was by design or maladministration; however, it is clear that no action on the proposal was going to be taken by either DCMA or Robins AFB and that settlement negotiations were not going to take place.

Appellant contends that the government's failure to act upon its proposal constitutes a constructive impasse between the parties and that its 17 March 2003 letter satisfies the *Ellett* requirement for a request for a contracting officer's final decision. *Ellett*, 93 F.3d at 1544. We agree. As we observed in *Central Environmental*, 98-2 BCA at 148,080: "[An]n impasse can exist without either party taking a firm position in opposition to the other. Passage of time without resolution can constitute an impasse when one party evidences a desire to begin the disputes process." *See also Medina Construction, Ltd. v. United States*, 43 Fed. Cl. 537, 549-552 (1999) (termination settlement proposal ripened into CDA claim when contractor, by fax, explicitly requested a contracting officer's final decision where no negotiations had been conducted because a pending fraud investigation precluded the contracting officer from negotiating a settlement).

That Mr. McIntosh has apparently now been identified as the termination contacting officer and DCMA has not now indicated any unwillingness to negotiate with appellant does not change the fact that an impasse had been reached before his appointment and that appellant acted within its rights by converting its settlement proposal into a CDA claim when it explicitly requested that the proposal be considered to be a CDA claim and that a contracting officer's final decision be issued on it in 60 days.

CONCLUSION

For the foregoing reasons, we deny the government's motion to dismiss.

Dated: 16 January 2004

CAROL N. PARK-CONROY
Administrative Judge
Armed Services Board
of Contract Appeals

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. 54249, Appeal of C. J. Machine, Inc., rendered in conformance with the Board's Charter.

Dated:

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