ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeal of -- | ) | |
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| Ryste & Ricas, Inc. | ) | ASBCA No. 54514 |
| | ) | |
| Under Contract No. DADW35-97-C-0024 | ) | |

APPEARANCE FOR THE APPELLANT: James S. DelSordo, Esq.
Cohen Mohr LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: COL Samuel J. Rob, JA
Chief Trial Attorney
CPT Sunny S. Ahn, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE YOUNGER
ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

In a previous decision, we converted the default termination of appellant's construction contract to one for the convenience of the government. Thereafter, appellant submitted a termination settlement proposal, which the contracting officer regarded as untimely. Appellant brought this appeal after the contracting officer refused to act on the proposal. Respondent moves for summary judgment. We grant the motion and deny the appeal.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. By date of 29 September 1997, respondent awarded appellant Contract No. DADW35-97-C-0024 for the repair and renovation of a building at Ft. Belvoir, Virginia (R4, tabs 1, 4, 5).[1]

2. The contract incorporated various standard clauses, including FAR 52.249-2, TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (SEP 1996) - - ALTERNATE I (SEP 1996) and FAR 52.249-10, DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) (R4, tab 1 at 00700-4).

[1] We refer to the Rule 4 file submitted in the earlier appeal from the default termination, ASBCA No. 51841, as R4. We refer to the Rule 4 file as supplemented in this appeal as SR4.

3. The contracting officer subsequently notified appellant that its contract was terminated under the DEFAULT clause "[e]ffective 4:30 p.m. est., 14 August 1998" (R4, tab 69). Appellant timely appealed to the Board. By decision dated 29 May 2002, we sustained the appeal and converted the default termination into a termination for the convenience of the government. *Ryste & Ricas, Inc.*, ASBCA No. 51841, 02-2 BCA ¶ 31,883. The Recorder's office sent the decision by certified mail, return receipt requested, to appellant's then counsel, and it appears from the copy of the return receipt in the Board's files that he received the decision on 8 June 2002. (SR4, tab 76)

4. We find that one year from receipt of our decision by appellant's previous counsel, computed to the nearest business day, was 9 June 2003. It is undisputed that appellant neither submitted a termination settlement proposal, nor requested a time extension, by that date.

5. The date on which appellant submitted its termination for convenience settlement proposal is disputed. In its amended complaint, appellant alleges that it submitted the proposal to the contracting officer on 23 July 2003, which respondent denies. (App. am. compl., ¶ 6; gov't answer, ¶ 6; *see also* SR4, tabs 77a, 77b, 77c) The record includes a cover letter from appellant's president to the contracting officer dated 23 July 2003 transmitting appellant's "Termination Settlement Proposal and Request for Equitable Adjustment," which is said to be on Standard Form 1436 and associated documents. (SR4, tab 77b) The letter then stated that appellant "requests a final decision from the contracting officer on its settlement proposal and [request for equitable adjustment]" (*id.*). The letter also contained a certification in accordance with FAR 33.207 (*id.*).

6. By letter to the contracting officer dated 23 October 2003, appellant's counsel enclosed appellant's termination settlement proposal. We find that, in transmitting the proposal, he also enclosed a copy of the 23 July 2003 cover letter (SR4, tabs 77a, 77b, 77c, 80, ¶ 4).

7. It is undisputed that the contracting officer took no action on either a 23 July 2003 termination settlement proposal or the 23 October 2003 proposal. By letter to the contracting officer dated 30 January 2004, appellant's present counsel stated that the contracting officer had:

> [f]ailed to respond to my client's settlement proposal. I presume that you have rejected the proposal and that we are at an impasse over this matter. If I do not here [sic] from you by February 15, 2004, I presume you are not interested in negotiating a resolution to this matter. I will then proceed to take this matter up with the . . . Board . . . .

(SR4, tab 78)

8. It is undisputed that the contracting officer did not issue a final decision on appellant's July 2003 or October 2003 proposals by 15 February 2004, or thereafter. (App. am. compl., ¶ 3; gov't answer, ¶ 3) We find no evidence that the contracting officer communicated with appellant before or after 15 February 2004. By date of 23 February 2004, appellant brought this appeal, invoking our "deemed denied" jurisdiction under 41 U.S.C. § 605(c)(5).

9. Respondent has supported its motion with the declaration of the contracting officer, who states in part:

> 3. For well over one year after the Board's decision in ASBCA No. 51841 [*see* finding 3], no representative of appellant made any contact with me or my staff regarding submission of a termination settlement proposal or any other matter relating to [the contract]. Nor during this same period did any representative of appellant contact me or my staff to seek an extension of the deadline set forth in FAR 52.249-2 for submission of a termination settlement proposal.
>
> 4. . . . The first communication from appellant regarding submission of a termination settlement proposal was received by this office not earlier than 23 October 2003. . . .
>
> . . . .
>
> 6. Several months after the October 2003 package [*see* finding 6] was submitted, I received a follow-up letter from appellant's outside counsel dated 30 January 2004 [*see* finding 7]. This was the last communication my office received from appellant prior to the filing of this appeal in February 2004.
>
> 7. Between the time appellant submitted its 23 October 2003 [termination settlement] package and the 30 January 2004 letter, I received no calls, messages, or correspondence from appellant . . . .

(Declaration of William E. Campbell, Jr., SR4, tab 80)

10. Appellant has opposed the motion with the declaration of its president, who states in part:

> 3. . . . I submitted the [termination settlement] proposal to the contracting officer on July 23, 2003 via SF 1436. The proposal was transmitted by a cover letter with the required certification signed by me. . . . However, I neglected to execute the SF 1436.
>
> 4. Upon further review my counsel realized that the SF 1436 was unsigned, and I executed the document and the proposal was retransmitted to the contracting officer on October 23, 2003.
>
> 5. At no time has the contracting officer ever contacted me concerning our termination settlement proposal, his expectations for a settlement proposal, or to determine what amount is owed [appellant] because of the termination . . . .

(Appellant's Opposition to Respondent's Motion for Summary Judgment (app. opp'n), ex. 1)

## DECISION

In moving for summary judgment, respondent contends that there are no genuine issues of material fact regarding its defense that appellant's termination for convenience settlement proposal was untimely under FAR 52.249-2(e) and (j). (Government's Motion for Summary Judgment (resp't mot.) at 5-12) Respondent urges that, regardless of whether appellant submitted its termination settlement proposal on 23 July 2003, or 23 October 2003, it was time-barred because appellant's previous counsel received our decision on 8 June 2002, and hence appellant had until one year later, or 9 June 2003, within which to submit its proposal. (Government's Response to Appellant's Opposition to Respondent's Motion for Summary Judgment (resp't reply) at 8-9)

In opposing the motion, appellant stresses that summary judgment must be denied because the record contains "dueling affidavits stating differing dates as to when [appellant] submitted its termination settlement proposal." (App. opp'n at 3) Appellant argues that the "effective date of termination" under FAR 49.001 was not 8 June 2002, when appellant's previous counsel received our decision, but 29 September 2002, which appellant computes as the date following expiration of the period for seeking review by the court of appeals. (App. opp'n at 3-7)

At the outset, we must satisfy ourselves that we have jurisdiction to entertain the appeal. We conclude that we do. "While the refusal to consider a termination settlement proposal in and of itself would not suffice to confer jurisdiction," *Harris Corp.*, ASBCA No. 37940, 89-3 BCA ¶ 22,145 at 111,460, the record presents the additional jurisdictional fact that appellant certified its proposal as a claim. That is, appellant's "October 2003 package" (*see* finding 9) was submitted to the contracting officer and contained the 23 July 2003 letter that both requested a final decision on the termination settlement proposal and contained a certification in accordance with FAR 33.207 (findings 5, 6). From the contracting officer's failure to respond to the package (finding 7), to respond to appellant's 30 January 2004 letter (findings 7, 8), and to communicate at all with appellant (finding 8), it is evident that the parties were at an impasse. *See James M. Ellett Constr. Co v. United States*, 93 F.3d 1537, 1543-44 (Fed. Cir. 1996); *Central Environmental, Inc.*, ASBCA No. 51086, 98-2 BCA ¶ 29,912 at 148,080 (holding that a request for a final decision and the contracting officer's refusal to meet to negotiate constituted impasse). Given the foregoing considerations, we have jurisdiction. *Harris Corp.*, *supra*, 89-3 BCA at 111,460; *cf.*, *England v. The Swanson Group, Inc.*, 353 F.3d 1375, 1379 (Fed. Cir. 2004) (holding that we lacked jurisdiction where contractor "submitted neither a claim nor a termination settlement proposal that could have ripened into a claim").

With respect to the merits of the motion, we evaluate the parties' contentions against the familiar formulation that "[s]ummary judgment is properly granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). "Our task is not to resolve factual disputes, but to ascertain whether material disputes of fact – triable issues – are present." *John C. Grimberg Co.*, ASBCA No. 51693, 99-2 BCA ¶ 30,572 at 150,969. A material fact is one that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

After considering the motion papers, pleadings and other documents in the record, we conclude that respondent's motion must be granted and the appeal denied for three principal reasons.

*First*, the effective date of termination was the date that appellant's counsel received our decision. FAR 52.249-2(e), which is part of the TERMINATION FOR CONVENIENCE clause in appellant's contract (finding 2), keys the deadline for submission of termination settlement proposals to "the effective date of termination." FAR 49.001, DEFINITIONS, illuminates that term. It provides:

> "Effective date of termination" means the date on which the notice of termination requires the contractor to stop performance under the contract. If the termination notice is

> received by the contractor subsequent to the date fixed for termination, then the effective date of termination means the date the notice is received.

In this case, the date on which appellant was required to stop performance was 14 August 1998 (finding 3). That date, however, was specified in the notice of default termination, which cannot start the clock running for submission of a convenience termination settlement proposal. So far as the present record shows, the first notice that appellant received of the convenience termination was our decision, which was delivered to appellant's previous counsel on 8 June 2002 (finding 3). This date was subsequent to the original 14 August 1998 "date fixed for termination." *See Voices R Us, Inc.*, ASBCA No. 51565, 99-1 BCA ¶ 30,213 at 149,477 (noting that, "[p]ursuant to FAR 49.001, the effective date of the termination was either the date specified in the notice of termination, or the date the notice was received by [the contractor], whichever was later").

We reject appellant's argument that "the effective date of the termination for convenience was September 29, 2002," the date upon which the appeal period is said to have expired. (App. opp'n at 2) While appellant's argument relies upon *Melkonyan v. Sullivan*, 501 U.S. 89 (1991) and *Melka Marine, Inc. v. United States*, 29 Fed. Appx. 594 (Fed. Cir. 2002), we find these cases decided under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 2412, and other statutes, inapposite. EAJA's statutory scheme expressly provides that fee applications must be made "within thirty days of final judgment in [an] action" in any court having jurisdiction. 28 U.S.C. § 2412(d)(1)(A), (B). Similarly, *Houser v. United States*, 12 Cl. Ct. 454 (1987), upon which appellant also relies, involved a fee application under the Uniform Relocation Act, 42 U.S.C. § 4654(c), which contemplates a fee award "as part of [a] judgment" in a proceeding brought under the Tucker Act, 28 U.S.C. § 1491.

We see no reason to engraft the requirements of these statutory schemes onto the straightforward procedure for submission of termination for convenience settlement proposals. There is no textual support for doing so in either of the two cited statutes, in the FAR, or in the TERMINATION FOR CONVENIENCE clause itself. Moreover, it would be odd to import a tolling provision from EAJA or the Uniform Relocation Act when the court of appeals has already recognized that the time limits for submission of termination settlement proposals are "[a]part from the requirements of the CDA." *England v. The Swanson Group, supra*, 353 F.3d at 1377.

The function served by termination settlement proposals also militates against employing a tolling provision. Fee shifting statutes constitute waivers of sovereign immunity that must be strictly construed. *E.g., Levernier Constr., Inc. v. United States*, 947 F.2d 497, 502 (Fed. Cir. 1991). By contrast, a termination settlement proposal is simply "the first step in the usual and ordinary process following a termination for

convenience," *Mayfair Constr. Co.*, ASBCA No. 30800, 87-1 BCA ¶ 19,542 at 98,744. It "serves as a device for initiating an ongoing negotiation process." *Harris Corp*., ASBCA No. 37940, 89-3 BCA ¶ 22,145 at 111,462; *see also Rex Systems, Inc. v. Cohen*, 224 F.3d 1367, 1371 (Fed. Cir. 2000) (noting that termination settlement proposals "are by their very nature merely negotiating tools"); *Gardner Machinery Corp. v. United States*, 14 Cl. Ct. 286, 293 (1988) (observing that "a settlement proposal is contemplated under the [FAR] as a request for opening negotiations"). Because FAR 52.249-2 "anticipates negotiation," *Rex Systems*, *supra*, 224 F.3d at 1371, there is no expectation that such a proposal will necessarily precede or follow litigation.

*Second*, appellant had one year from the effective date of termination within which to submit its termination settlement proposal or seek an extension. The TERMINATION FOR CONVENIENCE clause in appellant's contract (*see* finding 2) provided that "[t]he Contractor shall submit the [termination settlement] proposal promptly, but no later than 1 year from the effective date of termination, unless extended in writing by the Contracting Officer upon written request of the Contractor within this 1-year period." FAR 52.249-2(e). The clause also provides that, "if the Contractor failed to submit the termination settlement proposal . . . within the time provided in paragraph (e) . . . and failed to request a time extension, there is no right of appeal." FAR 52.249(j).

*Third*, there are no genuine issues of material fact. We reject appellant's argument that the present motion requires us to choose among "dueling affidavits stating differing dates as to when [appellant] submitted its termination settlement proposal" (app. opp'n at 3). To the contrary, we need not resolve whether the proposal was actually "submitted . . . to the contracting officer on July 23, 2003," as appellant's president states (finding 10), or "not earlier than 23 October 2003," as the contracting officer states (finding 9). The material facts are that appellant neither submitted its proposal by 9 June 2003, nor requested an extension by that date (finding 4). Those facts are undisputed (*id.*).

## CONCLUSION

Respondent's motion for summary judgment is granted. The appeal is denied.

Dated: 10 November 2005

ALEXANDER YOUNGER
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. 54514, Appeal of Ryste & Ricas, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals