ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Woodside Summit Group, Inc.	)	ASBCA No. 54554
	)	
Under Contract No. NAS4-96009	)	

APPEARANCES FOR THE APPELLANT: John J. Fausti, Esq.
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Washington, DC

APPEARANCE FOR THE GOVERNMENT: David A. Samuels, Esq.
Chief Counsel
NASA, Dryden Flight Research Center

OPINION BY ADMINISTRATIVE JUDGE FREEMAN
ON MOTION TO DISMISS

Woodside Summit Group, Inc. (WSGI) appeals the denial of a claim for costs which it failed to invoice when it was the prime contractor under a cost-reimbursement contract. The government moves to dismiss for lack of standing, lack of jurisdiction and untimeliness. We deny the motion on all grounds.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. The contract was awarded to WSGI on 10 October 1996 for facilities and information systems services at a NASA research center (R4, tab 1 at 1, 5-13, 22). WSGI subcontracted part of the work to Sparta, Inc. (compl. & answer ¶¶ 4). Performance of the contract with exercised options ultimately extended to 31 July 2002 (R4, tab 92 at 2).

2. On 7 August 1998, WSGI, Sparta and the government signed a novation agreement (Modification No. P00029) with an effective date of 12 August 1998. This agreement replaced WSGI as prime contractor with Sparta. The agreement stated in relevant part:

> 1. The parties agree that Woodside Summit Group hereby relinquishes all rights, obligations and liabilities as contractor for NASA contract NAS4-96009. These same

rights, obligations and liabilities are hereby assumed in their entirety by Sparta Inc. . . . .

. . . .

6. . . . .The retention by Sparta of Woodside Summit Group for selected functions as a subcontractor denotes recognition by Sparta of Woodside's technical capabilities and past performance in those functional areas.

7. This modification is not a termination for default action, nor is this action taken in lieu of a Government decision to pursue a default termination.

(R4, tab 36 at 1-3)

3. On the same day that the parties signed the novation agreement, the contracting officer wrote a letter to WSGI expressing appreciation for its cooperation in restructuring the contract. He also praised WSGI's past performance as prime contractor in "several areas," and stated that he anticipated acting favorably on a Sparta request to retain WSGI as a subcontractor. (App. opp'n, ex. 5)

4. WSGI's president states by affidavit that the primary purpose of the novation was "to re-establish Woodside and Sparta in contract performance roles that would result in more comprehensive technical support to NASA." He further states that WSGI's claim rights as the former prime contractor were "not an issue discussed during the negotiations for the contract restructuring." (App. opp'n, ex. 1 at 3-4) An affidavit of WSGI's contract manager is to the same effect (app. opp'n, Richards aff. at 2-3).

5. The responding affidavit of the contracting officer who negotiated the novation for the government does not directly contradict the statement that WSGI's claim rights as the former prime contractor were "not an issue discussed during the negotiations." On this specific point, he only states that his intent and understanding was that any such claims were barred by the words used in Modification No. P00029. (Gov't reply, ex. 1 at 4-5)

6. On or about 19 August and 6 October 1998, WSGI submitted respectively its Vouchers Nos. 35 and 37 for costs incurred as prime contractor from 28 June through 11 August 1998, the last day before the effective date of the novation (R4, tab 101 at 6). There is no evidence that the government refused to accept or otherwise challenged WSGI's right to submit these vouchers when they were submitted. The record on the motion does not show the subsequent history of these invoices.

7. On or about 4 June 2002, WSGI orally told the contracting officer that it had failed to bill $268,820 in costs incurred when it was the prime contractor. The contracting officer told WSGI to submit any claim to Sparta, the current prime contractor. (Compl. & Answer ¶¶ 14, 15) On or about 19 July 2002, WSGI invoiced Sparta by Voucher SP 048 for the previously unbilled costs. Sparta sent the WSGI voucher to the government, but did not itself invoice those costs to the government. Voucher SP 048 was not certified as a claim under the Contract Disputes Act of 1978 (CDA). (Compl. & Answer ¶¶ 17; R4, tab 98)

8. The contracting officer requested an audit of Voucher SP 048 by the Defense Contract Audit Agency (DCAA) (R4, tab 99). The DCAA audit report dated 6 January 2003 verified the invoiced costs to WSGI's books and records when it was the prime contractor and took no exception to the amount of the voucher. The audit report specifically found that $201,425 of the total invoiced amount was underbilled on WSGI's Voucher No. 17 dated 14 October 1997 for costs incurred from 31 August through 27 September 1997. (R4, tab 101 at 2-3, 6)

9. By letter to Sparta dated 27 February 2003, the contracting officer stated that the government would defer paying any further invoices under the contract pending receipt of audits of the total incurred costs of the prime and subcontractors on the contract (compl., ex. 3). By letter dated 28 March 2003, counsel for WSGI requested "prompt and full payment on [Voucher SP 048], without waiting for the close-out audit . . ." (R4, tab 102). On 22 September 2003, the government advised WSGI that the incurred cost audits had not been completed, and that payment on any outstanding WSGI vouchers might be further deferred because of a potential government claim against WSGI on another contract (R4, tab 103 at 1-2).

10. On 10 November 2003, WSGI submitted to the contracting officer a certified claim under the CDA for the $268,820 in unbilled costs incurred when it was the prime contractor (R4, tab 104). By final decision dated 9 January 2004, the contracting officer denied the claim for lack of jurisdiction (R4, tab 105). This appeal followed. On 23 April 2004, Sparta submitted a certified claim to the contracting officer in the amount of $268,820 "for costs incurred by [WSGI] under the contract prior to August 1998 while it was itself the prime contractor" (gov't reply, ex. 8). There is no appeal on this Sparta claim presently before the Board.

DECISION

In its motion to dismiss, the government first argues that, pursuant to the novation agreement, WSGI as a subcontractor lacks standing to prosecute its claim, and the Board lacks jurisdiction to hear the appeal (gov't mot. at 1). WSGI answers that the claimed costs were incurred when it was the prime contractor, and that it did not relinquish its

"former prime contractor claim rights" in signing the novation agreement (app. opp'n at 9-12). We agree with WSGI. WSGI's novation agreement had an effective date of 12 August 1998. Nothing in that agreement suggested an intended earlier effective date. The agreement included no express relinquishment by WSGI of claims relating to its pre-novation performance as prime contractor. *See* finding 2. Moreover, the government's acceptance of WSGI's Vouchers Nos. 35 and 37 in 1998 indicates a contemporaneous interpretation that the novation agreement did not have retroactive effect. *See* finding 6 and *Max Drill v. United States*, 427 F.2d 1233, 1240 (Ct. Cl. 1970).[1] In the absence of an express relinquishment, WSGI has standing to prosecute, and we have jurisdiction to decide, claims relating to its pre-novation performance as prime contractor. *See Ginsberg v. Austin*, 968 F.2d 1198, 1201-02 (Fed. Cir. 1992).[2]

The government also argues that the appeal should be dismissed as barred either by the six-year statute of limitations in FAR 33.206(a) or by *laches*. The statute of limitations and *laches* are affirmative defenses that do not go to the jurisdiction of the Board. *Do-Well Machine Shop v. United States*, 870 F.2d 637, 639-40 (Fed. Cir. 1989). The government's motion to dismiss on those grounds is in substance a motion for summary judgment. We grant such motions only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987).

The government contends that the timeliness of the claim for purposes of applying the statute of limitations or *laches* is to be measured from the submission of the Sparta claim on 23 April 2004 (gov't mot. at 7-8). We have held above, however, that WSGI had standing as the pre-novation prime contractor to submit its 10 November 2003 claim directly to the government. Therefore, the timeliness of the claim for purposes of limitations and *laches* is to be determined from the date of that submission.

FAR 33.206(a) (1996) requires submission of a contractor claim to the contracting officer within 6 years after "accrual" of the claim. FAR 33.201 (1996) states that:

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[1] "The interpretation of a contract by the parties to it before the contract becomes the subject of controversy is deemed by the courts to be of great, if not controlling weight." 427 F.2d at 1240.

[2] In *Ginsberg*, the Court reversed a board dismissal for lack of standing of an appeal on a claim by a lessor/assignor for pre-assignment back-rent. The Court held: "Under general principles of both property and contract law, Ginsberg cannot be held to have transferred his back rent claim, unless he expressly so stated. He did not do so. Ginsberg thus retained his claim for accrued but unpaid rent, and is therefore possessed of the requisite standing to pursue the merits of that claim." 968 F.2d at 1201-02.

"'Accrual of a claim' occurs on the date when all events, which fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known." FAR 33.201 (1996) also states that a claim exceeding $100,000 is not a CDA claim until certified as required by the Act,[3] and that an invoice, voucher or other routine request for payment is not a claim until it is disputed or not acted upon in a reasonable time.

The record on the motion is insufficient for us to determine the date or dates when government liability for all of the claimed unbilled costs was fixed and assertion of a claim for those costs would have been permitted. Those dates are genuine issues of material fact without which we cannot determine whether WSGI's 10 November 2003 claim or any portion thereof was untimely as alleged by the government.

The motion to dismiss is denied on all grounds.

Dated: 26 October 2005

MONROE E. FREEMAN, JR.
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

[3] WSGI's Voucher No. SP 048 for $268,820 submitted on 19 July 2002 was not certified. *See* finding 7. Under the FAR 33.201 definition it was not a claim and did not stop the running of the statute of limitations in FAR 33.206(a).

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. 54554, Appeal of Woodside Summit Group, Inc., rendered in conformance with the Board's Charter.

Dated:

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