ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Advanced Communications Systems	)	ASBCA No. 52592
	)	
Under Contract No. DCA200-94-H-0015	)	

APPEARANCE FOR THE APPELLANT: Cyrus E. Phillips, IV, Esq.
Washington, DC

APPEARANCE FOR THE GOVERNMENT: Jo Ann W. Melesky, Esq.
Deputy Legal Counsel
Defense Information Systems Agency
Scott Air Force Base, IL

OPINION BY ADMINISTRATIVE JUDGE FREEMAN
ON THE PARTIES' MOTIONS

Advanced Communications Systems (ACS) appeals the denial of its claim for government breach of a licensing agreement. In response to a pre-hearing order, allowing submission of "revised [quantum] claims," ACS substituted lost profit damages for the fee-for-service damages in the claim submitted to the contracting officer. The government moves to dismiss on various grounds and, in the alternative, for partial summary judgment on the lost profit damages. ACS has withdrawn the challenged portion of the lost profit damages, but otherwise opposes the government motion and moves for sanctions. We grant the government motion to the extent that we strike the fee-for-service damages from the complaint. The government motion is moot as to the challenged portion of the lost profit damages. The parties' motions are otherwise denied.

STATEMENT OF FACTS (SOF)
FOR PURPOSES OF THE MOTIONS

1. Effective 2 March 1994, ACS and the government entered into the above captioned license agreement whereby ACS gave the government no-cost access to the ACS Electronic Data Interchange Value-Added Network (VAN) for the purposes of conducting electronic commerce with government contractors through Department of Defense (DoD) "Hub" computers. (R4, tab 1 at 7) This licensing agreement (hereinafter VLA 0015) was one of a number of such agreements entered into by the government with VAN providers. As of 13 November 1996, there were 29 such providers with substantially the same VLA 0015 licensing agreement. (Gov't mot., ex. 8 at 1-14)

2. At paragraph 2.1 of Addendum A to the Technical Scope of Work, VLA 0015 stated that: "DoD will require all contractors desiring to electronically conduct business to only do so with a participating, fully tested . . . VAN Provider" (R4, tab 1 at 11, 19-20). The participating, fully tested providers could compete for the contractor business, but VLA 0015 did not guarantee that any VAN provider would get any particular share of that business (R4, tab 1).

3. The term of the ACS VLA 0015 was one year with four successive one-year options thereafter. Either party, however, could terminate the agreement on 30 days notice to the other party. (R4, tab 1 at 7) On 16 January 1998, the ACS VLA 0015 was terminated and replaced on the same day by a revised VLA (R4, tab 1 at 1). The revised VLA is not at issue in this appeal.

4. On 27 March 1999, ACS submitted a certified claim to the contracting officer for government breach of VLA 0015. The alleged breach was that the government "provided electronic data directly to contractors, through other sources [such] as DLA bulletin boards, electronic malls, and other government systems during the term of the License Agreement in violation of [paragraph 2.1 of Addendum A]." (R4, tab 2)

5. The alleged damages in the 27 March 1999 claim were $1,832,565,543.40 "for compensation for . . . services provided" (R4, tab 2). This amount was the amount of the ACS "transaction fees" and other charges that allegedly would have been charged to the government for its 1,416 days use of the ACS VAN in the absence of a no-cost license agreement (gov't mot., ex. 5 at 2). We refer to these damages hereafter as the "fee-for-service" damages.

6. By final decision dated 30 November 1999, the contracting officer denied the 27 March 1999 claim entirely (R4, tab 5). That decision was timely appealed by ACS on 18 January 2000. ACS's complaint alleged the fee-for-service damages as set forth in its claim (compl. ¶¶ 22, 23). The ACS appeal was preceded by the appeals on similar claims of four other VLA-0015 contractors, and was followed by the appeal of CACI International, Inc. (CACI) on 28 September 2000. Counsel for the appellants and government respectively were the same in all of these appeals.

7. The CACI appeal was the first of the VLA 0015 appeals to be heard and decided on both entitlement and quantum. Our decision in CACI, issued on 29 April 2005, held that the government had breached the agreement, but denied the claimed lost profit damages on the ground, among others, that they were "too remote and consequential because they would have been realized, if at all, through collateral enterprises." *CACI International, Inc.*, ASBCA Nos. 53058, 54110, 05-1 BCA ¶ 32,948 at 163,254, *aff'd*, 177 F. App'x 83 (Fed Cir. 2006).

8. On 13 May 2005, the government citing the CACI decision moved to amend its answers in the ACS and other VLA-0015 appeals "to include the affirmative defense of collateral estoppel/issue preclusion with regard to the Board's determination as to the availability of lost profits as a form of damages." By letter dated 6 June 2005, counsel for the appellants entered no objection to the government motion.

9. On 29 June 2005, the parties submitted a joint status report and proposed schedule for further proceedings in the ACS and other VLA-0015 appeals. With respect to the ACS appeal, the report stated: "No later than July 28, 2005, Counsel for Appellant will advise the Board and opposing counsel in writing of the status of the ACS claim . . . to include a date for submission of any expert report." This proposed schedule was adopted by the Board on 6 July 2005.

10. On 8 August 2005, the Board suspended the 29 June 2005 schedule in light of the appeal of the CACI decision to the Federal Circuit. Following a telephone conference with the parties, the Board on 30 September 2005 amended the 8 August 2005 order in relevant part as follows:

> [ACS] shall complete preparation of its revised claims and expert reports no later than 15 March 2006 and, by that date, provide the revised claims and expert reports to the government for audit. The government shall then proceed expeditiously with the audits.

11. In compliance with the Board's 30 September 2005 order, ACS on 8 March 2006 submitted to the contracting officer an expert Economic Damages Report "establishing the quantum due [ACS]." This report did not address the fee-for-service damages in the 27 March 1999 claim. It set forth a calculation of lost profits damages for the period April 1994 to March 1999 based on an estimate of the revenue that would have been earned from contractors using the ACS VAN if the government had not allowed them to use other means of electronic commerce. (Gov't mot., ex. 1)

12. In its letter forwarding the Economic Damages Report to the contracting officer, ACS certified the maximum estimated amount of lost profit in the report, $44,905,267, as a claim under the Contract Disputes Act of 1978 (Gov't mot., ex. 1 at 1). The contracting officer did not issue a decision on the "claim."

13. On 16 March 2006, the government submitted its First Request for Production of Documents to ACS. The government requested, among other items, all documents consulted or reviewed by the person preparing the Economic Damages Report and stated that an audit of the report and claim could not begin until the requested documents were received. (Bd. corr.)

14. On 8 August 2006, the government moved for (i) dismissal of the ACS 27 March 1999 claim because that claim was replaced by the 8 March 2006 claim; (ii) a determination that the 8 March 2006 claim was a new claim that was not considered by the contracting officer; (iii) dismissal of both the 27 March 1999 and 8 March 2006 claims as barred by *laches* and Board Rule 31 for "exceptional lack of diligence in [their] pursuit"; and (iv) summary judgment on "the non availability of lost profits damages for the period April 5, 1994 through April 4, 1996" (gov't mot. at 20).[1]

15. Prior to its 8 August 2006 motion, the government had not moved for a Rule 31 show cause order or otherwise indicated any dissatisfaction or prejudice arising from the pace of the proceedings in the ACS appeal.[2]

16. The ACS opposition to the government motion was received by the Board on 24 August 2006. In that opposition, ACS relinquished "any claim for lost profit for any period prior to April 5th, 1996," but otherwise opposed the motion and moved for sanctions against the government for failing to comply with the Board's order of 30 September 2005. (App. opp'n at 1, 6)

17. In reply to an inquiry by the Board, ACS, on 25 September 2006, confirmed that "in submitting its revised Quantum Claim for lost profits damages [it] withdrew its fee-for-services damages claim of [27 March 1999]." ACS also advised that it would be moving to file an amended complaint limiting its lost profits damages to a period beginning on 5 April 1996.

DECISION

[1] At page 6 of its motion, the government requested "dismissal and/or summary judgment" on the ACS 8 March 2006 claim "as it does not request reliance or restitution damages." The government, however, limited its request for summary judgment in the "Conclusion" of its motion to a partial summary judgment denying "lost profit damages allegedly accruing prior to April 5, 1996." (Gov't mot. at 20) In view of that limitation, we give no further consideration to the broader request on page 6.

[2] Rule 31, entitled "Dismissal or Default for Failure to Prosecute or Defend" states in relevant part: "Whenever a record . . . indicates an intention not to continue the prosecution or defense of an appeal, the Board may, in the case of a default by the appellant, issue an order to show cause why the appeal should not be dismissed . . . . If good cause is not shown, the Board may take appropriate action."

The first item in the government motion is that we dismiss the 27 March 1999 fee-for-service damages claim because that claim was replaced by the 8 March 2006 lost profit damages claim. *See* SOF ¶ 14. It is clear from the ACS response to the Board's inquiry, that its 8 March 2006 "revised Quantum Claim" for lost profit damages withdrew the quantum, but not the entitlement, portion of the 27 March 1999 claim. *See* SOF ¶ 17. Accordingly, we grant the government motion only to the extent that we strike the fee-for-service damages portion of the complaint.

The second item in the government motion is that we determine that the 8 March 2006 "revised Quantum Claim" for lost profits damages is a new claim that was not considered by the contracting officer and is therefore outside our jurisdiction.[3] *See* SOF ¶ 14 and *Paragon Energy Corp. v. United States*, 645 F.2d 966, 967 (Ct. Cl. 1981). We find no merit in this argument. The ACS designation and certification of its 8 March 2006 submission as a "claim," did not establish that it was a new claim for purposes of jurisdiction. The determinative factor is the substance of the submission and not the format.

The fee-for-service damages in the ACS 27 March 1999 breach of contract claim and the lost profit damages in the 8 March 2006 "revised Quantum Claim" are alternative measures of damages for the same alleged breach of contract – namely, the government's conducting specified small purchase electronic commerce by means other than through the participating VANs during the term of VLA 0015. *See* RESTATEMENT (SECOND) OF CONTRACTS §345(a), (d) (1981). As an alternative measure of damages for the same breach, the 8 March 2006 revised quantum claim for lost profit damages was not a new claim for purposes of our jurisdiction. *See Lockheed Martin Librascope Corp.*, ASBCA No. 50508, 00-1 BCA ¶ 30,635 at 151,249-50 (change in interpretation of a price redetermination modification reducing the claimed amount – not a new claim); *Essex Electro Engineers, Inc.*, ASBCA No. 40553, 91-2 BCA ¶ 23,712 at 118,690-91 (sales-based quantum substituted for cost-based quantum – not a new claim); *Transco Contracting Co.*, ASBCA No. 28620, 85-2 BCA ¶ 17,977 at 90,171-72 (prime contractor mark-ups added to subcontractor claim – not a new claim). We also note in the instant appeal that the contracting officer denied appellant's claim on entitlement and never considered quantum.

The government cites *Consolidated Defense Corp.*, ASBCA No. 52315, 03-1 BCA ¶ 32,099 and *Gold Tree Technologies, Inc.*, ASBCA Nos. 54158, 54159, 05-1 BCA ¶ 32,856 in support of its argument that the 8 March 2006 submission was a new claim. Both of those cases, however, involved new operative entitlement facts. In *Consolidated*,

[3] In the current posture of the appeal, the government's motion on this item is in the nature of a motion *in limine* since ACS has not yet amended the complaint.

the appellant attempted to add a bad faith breach claim with extra costs or damages to a convenience termination settlement claim. 03-1 BCA at 158,668-69. In *Gold*, the appellant attempted to add a claim for illegal "pass-through" to claims for failing to mentor and to exercise an option. 05-1 BCA at 162,803.

The third item in the government motion is that both the 27 March 1999 and 8 March 2006 claims be dismissed as barred by *laches* and Board Rule 31 for "exceptional lack of diligence" by ACS in their pursuit. *See* SOF ¶ 14. With respect to the 27 March 1999 claim, the government has failed to show that the 14-month delay between the termination of the ACS VLA 0015 and the submission of the 27 March 1999 breach claim was unreasonable. Nor has it shown any prejudice arising therefrom.[4] *See* SOF ¶¶ 3, 4. The subsequent delay in proceedings in the ACS and other VLA 0015 appeals pending decision of the CACI appeal was not unreasonable given the common issues of fact and law. After the CACI decision was issued, proceedings in the ACS appeal resumed in light of that decision. See SOF ¶¶ 8-11, 13.

With respect to the 8 March 2006 revised quantum claim, it was submitted within the time prescribed by the Board's order of 30 September 2005. *See* SOF ¶¶ 10, 11. It was not a new claim, but an amendment to the existing claim within the scope of the Board's order. No exception to that order was taken by the government when it was issued. Prior to the present motion, the government made no motion for a Rule 31 show cause order, or otherwise indicated any dissatisfaction with the pace of proceedings in the ACS appeal. *See* SOF ¶ 15. It has shown no basis for the invocation of *laches* or a Rule 31 show cause order now.

The fourth item in the government motion is that we grant summary judgment on that part of the ACS lost profit claim incurred prior to 5 April 1996. *See* SOF ¶ 14. Since ACS has relinquished the portion of damages at issue, the motion on that point is moot. *See* SOF ¶ 16.

On the ACS motion to sanction the government, ACS does not specify in what respect the government failed to comply with the Board's order of 30 September 2005. Absent such specificity, there is no basis for determining if the order was violated and no basis for sanctions.

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[4] *Laches* is generally defined as "neglect or delay in bringing suit to remedy an alleged wrong, which taken together with lapse of time and other circumstances, causes prejudice to the adverse party and operates as an equitable bar." *A.C. Aukerman Co. v. R.L. Chaides Construction Co.*, 960 F.2d 1020, 1028-29 (Fed. Cir. 1992) (*en banc*).

For the reasons stated above, the government motion is granted to the extent that we strike the fee-for-service damages in the complaint. The motion is moot as to damages incurred prior to 5 April 1996 in the 8 March 2006 revised quantum claim. The government motion is otherwise denied as is the ACS motion for sanctions.

Dated: 26 October 2006

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

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. 52592, Appeal of Advanced Communications Systems, rendered in conformance with the Board's Charter.

Dated:

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