ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Emerson Construction Company, Inc.	)	ASBCA No. 55165
	)	
Under Contract No. DAKF48-97-D-0020	)	

APPEARANCE FOR THE APPELLANT: Paul H. Sanderford, Esq.
Pratt & Sanderford, P.C.
Temple, TX

APPEARANCES FOR THE GOVERNMENT: COL Samuel J. Rob, JA
Chief Trial Attorney
CPT Sean M. Connolly, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TUNKS
ON GOVERNMENT'S MOTION FOR PARTIAL DISMISSAL

The government moves for partial dismissal alleging that appellant's claim for an under run in the amount ordered as it relates to the base year of a requirements contract was not submitted within the six-year limitation in § 6 of the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-13. The government states that its motion to dismiss is in substance a motion for summary judgment. Since the time when the government filed its motion, the Board has held that motions raising the six-year limitation in the CDA are jurisdictional. *Gray Personnel, Inc.*, ASBCA No. 54652, slip op. August 9, 2006. Accordingly, we treat the motion as one for partial dismissal for lack of subject matter jurisdiction.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. On 21 July 1997, the government awarded the subject requirements contract to appellant for miscellaneous roads, grounds, site repairs and improvements at Fort Hood, Texas (R4, tab 5). The contract consisted of a base year from 1 August 1997 through 31 July 1998 and two option years. The contract included estimated quantities of unit-priced items. At award, the total estimated amount of the contract was $59,129,853. (R4, tab 5 at 3-26, R4, tab 6 at 1)

2. Among other clauses, the contract incorporated FAR 52.211-18 VARIATION IN ESTIMATED QUANTITY (APR 1984) (the VEQ clause), FAR 52.216-18 ORDERING (OCT 1995) (the Ordering clause), and FAR 52.216-21 REQUIREMENTS (OCT 1995)

ALTERNATE I (APR 1984) (the Requirements clause). The VEQ clause provides in relevant part:

> If the quantity of a unit-priced item in this contract is an estimated quantity and the actual quantity of the unit-priced item varies more than 15 percent above or below the estimated quantity, an equitable adjustment in the contract price shall be made upon demand of either party.

The Ordering clause provides that delivery orders for the base year may be issued through 31 July 1998. (R4, tab 5, § 00700-1, -5)

3. Effective 1 August 1997, the government increased the estimated amount from $59,129,853 to $60,029,850 ($20,009,950 for the base year and each option year) (R4, tab 7, Modification No. P00001).

4. The government exercised the first option year on 15 July 1998, extending the contract from 1 August 1998 through 31 July 1999 (R4, tab 9, Modification No. P00005).

5. On 18 September 1998, the government increased the estimated amount of the base year and the first option year to $40,663,900 (or $20,331,950 per year) (R4, tab 10, Modification No. P00006).

6. The government did not exercise the second option year (R4, tab 12 at 1).

7. The government issued approximately 110 delivery orders under the contract, Nos. 0001-0070 during the base year and Nos. 0071-0143 during the option year, with some breaks in sequence. The last delivery order issued during the base year, according to the government, was delivery order No. 0070 dated 22 July 1998. This delivery order called for concrete construction, required completion not later than 93 work days after commencement at the site, and was priced at $234,328.08. Ultimately, the period of performance was extended to 12 September 1999, the price was increased to $271,792.85, and the government deobligated some of the funds because of "overestimation of quantities." The delivery order does not indicate that it would be the final or last delivery order issued during the base year. (Supp. R4, tab 80 at 1 of 4, Modification No. 007002 at 2 of 4, Modification No. 03 at 1-2 of 3; *see generally* supp. R4, tabs 24-133)

8. Of the amount estimated for the base year and the first option year, the government allegedly ordered only 33 percent, "resulting in an under run from the 85% threshold of approximately 61%" (R4, tab 12 at 2 of 6).

9. On 30 July 2004, appellant submitted a certified claim seeking $1,628,287.04 under the VEQ clause[1]. In the alternative, appellant sought breach of contract damages alleging that the government failed to exercise due care in the preparation of the estimates. Appellant alleged that the size of the under run established a *prima facie* case of lack of due care. (R4, tab 12)

10. Appellant sent its claim to the contracting officer by certified mail on 30 July 2004 (gov't mot., ex. A). The contracting officer received the claim on 3 August 2004 (gov't mot., ex. B).

11. On 8 September 2005, the contracting officer issued a final decision denying appellant's claim on the merits without raising the issue of timeliness (R4, tab 23).

DECISION

The government moves for partial dismissal arguing that appellant's claim for an under run in the quantity ordered during the base year of the contract is time-barred under § 605(a) of the CDA. The parties agree that appellant sent its claim to the contracting officer by certified mail on 30 July 2004 and that the contracting officer received the claim on 3 August 2004, three days after the expiration of the six-year limitation in the statute if one assumes the claim accrued on 31 July 1998 (the last day ordering was permitted in the base year). The government argues that "the important date with regard to submission of a claim is the date of receipt" (gov't reply at 3). Appellant argues in its response to the motion that its claim is not barred because (1) the contracting officer accepted the claim and issued a final decision on the merits without questioning its timeliness; and (2) the claim was placed into the custody of the United States Postal Service prior to the expiration of the six-year period.

Section 605(a) provides in relevant part:

> All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. Each claim by a contractor against the government relating to a contract and each claim by the government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim.

[1] The claim is for the base year and the first option year. This motion is directed only to the base year.

FAR 33.206, Initiation of a claim, provides that:

> (a) Contractor claims shall be submitted, in writing, to the contracting officer for a decision within 6 years after accrual of a claim . . . . The contracting officer shall document the contract file with evidence of the date of receipt of any submission from the contractor deemed to be a claim by the contracting officer.
>
> (b) The contracting officer shall issue a written decision on any Government claim initiated against a contractor within 6 years after accrual of the claim . . . .

In *Dawco Construction, Inc. v. United States*, 930 F.2d 872, 880 (Fed. Cir. 1991), *overruled in part on other grounds, Reflectone, Inc. v. United States*, 60 F.3d 1572 (Fed. Cir. 1995) (*en banc*), the Court construed "submitted" as used in the first sentence of § 605(a). The contractor had sent its claim to the Navy's contracts manager rather than the contracting officer. The government contended that the contractor had not "submitted" the claim because the contractor had not addressed it to the contracting officer. The Court rejected this interpretation of "submitted":

> The Act simply requires the contractor's claim to be "submitted" to the contracting officer. Neither the Act, nor its implementing regulations, instructs the contractor how this must be accomplished. . . . Congress deliberately left the language concerning submission to the contracting officer "broad . . . to permit appropriate Government officers to receive written claims and forward them to the [contracting officer]." [Citation omitted]
>
> In context, the Act's requirement that a claim must be "submitted" does not govern how the letter asserting the claim is to be addressed, or to whom it must first be given. It simply identifies the person to whom the dispute is to be "submitted" for a final decision. Webster's Dictionary defines "submit" as:
>
> > 1. To surrender or yield (oneself) to the will or authority of another . . . . 3. To commit (something) to the consideration or judgment of another.

> [Citation omitted] Clearly, the purpose of the Act's "submit" language is not related to the minutia of addressing or delivering claim letters, as the government argues, but is merely a requirement that once a claim is made, the parties must "commit" the claim to the contracting officer and "yield" to his authority to make a final decision.
>
> Contrary to the government's assertion, our reading of the "submission" requirement will not adversely affect the speed and efficiency of the claims process. A contractor has numerous incentives to identify the contracting officer and to forward its claim to the contracting officer in the most efficient manner possible. For example, the 60-day period in which the contracting officer must make a final decision begins only after the claim's *receipt* by the contracting officer. . . . An even more compelling incentive is that interest, if any, on any adjustment accrues from the date the "contracting officer *receives* the claim."

In short, the Court, in its analysis, distinguished between submission and receipt of a claim. There is no reason to think that the term "submitted" as used in the third sentence of § 605(a) should be construed differently than "submitted" as used in the first sentence. When appellant mailed the claim, it committed it to the contracting officer for decision, and yielded to his authority, meeting the requirements of the Act. The government relies upon the requirement in FAR 33.206(a) that the contracting officer note the date of receipt. As the Court said in *Dawco*, there are various consequences such as the time within which to issue a final decision that flow from the date of receipt. FAR 33.206(a) does not, however, state that "submitted" and "receipt" are synonymous. On the other hand, FAR 33.206(b) uses "issued" synonymously with "submitted," and does not refer to "receipt." We conclude that appellant submitted the claim on 30 July 2004, when it mailed it to the contracting officer.

In its motion for partial dismissal, the government gave appellant the "benefit of the doubt" and used 31 July 1998, the last date of the base year, as the date of accrual (gov't reply at 4). In its reply to appellant's response to the motion, the government changed its position and asserted that the claim actually accrued on 15 July 1998, the date on which the government exercised the option for the first year, or on 22 July 1998, the date on which the government issued the last delivery order during the base year. The government argues that appellant should have known by these dates "that the delivery orders for the base year were going to result 'in an under run from the 85% threshold of approximately 61%' or that 'the Government failed to exercise due care in its preparation of contractual estimates,' as it alleged in its claim . . . ." (gov't reply at 4, 5).

FAR 33.201, Definitions, provides that

> "Accrual of a claim" means the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred.

In determining when a claim accrues as defined above, we start by examining the legal basis of the particular claim. *Gray Personnel, Inc., supra*, slip op. at 13. The VEQ clause applies when "the actual quantity of the unit-priced item varies more than 15 percent above or below the estimated quantity . . . ." Here, the government was entitled to issue delivery orders for the base year through 31 July 1998. Accordingly, liability under the VEQ clause for a variation below the estimated quantity was not fixed, at the earliest, until the time period for issuing delivery orders expired on 31 July 1998. *Cf. Konitz Contracting, Inc.*, ASBCA No. 53433, 02-1 BCA ¶ 31,845 at 157,364 (contractor's VEQ claim not barred by release where contractor "could not know whether the actual quantities of line items 55 through 108 would vary by more than 15% from their estimated quantities until the DOs in the option year were completely performed").

The government's argument that appellant's claim under the VEQ clause accrued prior to 30 July 1998 because it should have known that the government would not order sufficient quantities of the estimated quantities is incorrect. In *Franconia Associates v. United States*, 536 U.S. 129, 146 (2002), the Court rejected an analogous argument that an aggrieved party was required to sue for breach of contract when the government repudiated a contract instead of waiting for the time performance was due. The Court concluded that the government's argument "would surely proliferate litigation." Here too it "would surely proliferate litigation" if contractors were required to guess whether or not the government would ultimately fail to issue a sufficient number of delivery orders to meet the 85% threshold.

Appellant's alternative claim that the government failed to exercise due care in its preparation of the contractual estimates is another matter. According to the Federal Circuit:

> [T]o the extent that a government estimate is inadequately or negligently prepared, its inclusion without correction in a solicitation or contract constitutes a misrepresentation that, whether deliberate or unintentional, amounts to a breach of contract.

Rumsfeld v. Applied Companies, 325 F.3d 1328, 1335 (Fed. Cir. 2003). In *Franconia*, 536 U.S. at 141, the Court held that a cause of action for breach of contract accrues at the time of the breach. Here, arguably the breach of contract occurred no later than the date of award of the contract (21 July 1997). The government is correct, therefore, that the critical question with respect to this claim is whether the contractor knew, or should have known, of the alleged breach prior to 30 July 1998. In arguing that it did, the government points only to the fact that there was an accumulating under run. That does not establish, however, that appellant knew, or should have known, that the government estimates were "inadequately or negligently prepared." On the other hand, appellant also points only to the fact that there was an under run for its "*prima facie*" claim. While appellant ultimately has the burden of establishing that the Board has subject matter jurisdiction, we are not persuaded that we should dismiss the appeal as it relates to this theory of recovery without further development of the record about appellant's knowledge of the facts relating to whether the estimates were "inadequately or negligently prepared."

The government's motion for partial dismissal is denied without prejudice to its renewal as to the negligent estimate theory of recovery upon fuller development of the record.

Dated: 17 August 2006

ELIZABETH A. TUNKS
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. 55165, Appeal of Emerson Construction Company, Inc., rendered in conformance with the Board's Charter.

Dated:

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