

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Rex Systems, Inc.) ASBCA No. 54436
)
Under Contract No. 00000-0-00-0000)

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OPINION BY ADMINISTRATIVE JUDGE FREEMAN

Rex Systems, Inc. (RSI) has appealed the deemed denial of its claim for government breach of three alleged implied-in-fact contracts and for a Fifth Amendment taking. In our decision of 21 July 2005, we found the allegation of a Fifth Amendment taking withdrawn, and we dismissed the claim as to one of the alleged implied-in-fact contracts for lack of jurisdiction. *See Rex Systems, Inc.*, ASBCA No. 54436, 05-2 BCA ¶ 33,028. Hearing on the merits of the claim of breach as to the two remaining implied-in-fact contracts has been held, and the government in its post-hearing brief raises for the first time a jurisdictional objection to that claim. RSI has replied to the objection in its post-hearing reply brief. We sustain the objection and dismiss the remainder of the appeal.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE
JURISDICTIONAL OBJECTION

1. The RT-859A/APX-72 is the receiver transmitter component (transponder) of an identification friend or foe (IFF) system. It is installed on ships, aircraft and other platforms where it provides automatic radar identification, position and other data of the platform to all interrogators within the operational range of the system. (App. supp. R4, tab 216 at 24) From 1985 through 1996, RSI received \$1,179,643 or 51 percent of the dollar amount of awards of U.S. government contracts for RT-859A/APX-72 end items and components (gov't supp. R4, tab 4 at 4, 8; tr. 2/92-94).

2. In June 1997, the government determined that it had lost configuration control over the RT-859A/APX-72 (app. supp. R4, tab 134 at 1). The “configuration” of an item is its functional and physical characteristics as set forth in the technical documentation and manufactured item. Configuration control is the systematic control of changes to the item after establishment of its configuration baseline. (App. supp. R4, tab 231)

3. As a first step in re-establishing configuration control, the government decided to perform a physical configuration audit (PCA) of the equipment. Since it did not have a complete set of drawings with all current changes to perform the PCA, the government requested and RSI lent the government its set of drawings. (App. supp. R4, tabs 102, 105). The PCA was conducted in September 1997. It revealed “differences in the drawings, schematics, parts lists and the actual hardware . . . [and] unapproved vendor parts in the supply system that do not perform” (app. supp. R4, tab 134 at 1). The government returned the drawings to RSI when the PCA was completed (tr. 1/82).

4. On 25 November 1997, the government asked RSI for a “budgetary cost estimate” for acquisition of “a complete Technical Data Package [for the RT-859A/APX-72] with U.S. Government rights for use of data for competitive requirements” (app. supp. R4, tab 106). On 22 January 1998, RSI provided two cost proposals. Neither was accepted by the government. (App. supp. R4, tabs 107, 134 at 2; tr. 1/85-91)

5. On 10 June 1998, the Naval Inventory Control Point (NAVICP) Philadelphia issued a Source Solicitation Announcement (SSA) requesting potential manufacturing sources of the RT-859A/APX-72 to participate in a source qualification process. The SSA expressly stated that it was: “not a commitment by the Government to pursue or award a contract for this effort.” (Joint Stipulation (JS), ¶¶ 1, 3; R4, tab 1) RSI participated in the SSA qualification process. It was the only participant to successfully complete all tests for the end item and all components “across the board.” (JS, ¶ 5-13; R4, tab 9; app. supp. R4, tabs 125, 169, 171 at 2)

6. On 16 December 1998, NAVICP Philadelphia met with RSI “to discuss RSI’s qualification and future drawing submission to facilitate NAVICP’s provisioning effort” (app. supp. R4, tab 170). Provisioning consisted of identifying every piece part within an end item down to the lowest component and documenting the level of maintenance of that part (tr. 1/189). RSI’s notes of this meeting state: “The Gov. wants level 2 drawings so they can enter RSI as the current source for the system” (app. supp. R4, tab 129). RSI’s level 2 drawings included the parts lists that were necessary for provisioning and configuration control of the equipment (tr. 1/158, 191, 201-07, 244).

7. In a telephone conference on 14 January 1999, the NAVICP Philadelphia contracting officer and RSI agreed that RSI would provide its level 2 drawings within 30 days of receipt of a government letter stating that it was a qualified source for the RT-859A/APX-72. RSI's notes of this meeting state: "the Navy needs our drawings for provisioning." The contracting officer issued RSI's qualification letter on the same day. (JS, ¶ 16-19; app. supp. R4, tab 130; R4, tab 11)

8. RSI made an initial delivery of its level 2 drawings to the government on 2 March 1999 with a transmittal letter stating that: "these drawings are provided to allow the government to establish configuration control." The transmittal letter also included a Technical Data Rights provision granting the government "Limited Rights" in the drawings as specified in the Department of Defense FAR Supplement (DFARS) 252.227-7013 clause (app. supp. R4, tab 112). The specified Limited Rights allowed the government to use the drawings for any purpose "within the Government," except manufacture, and prohibited disclosure "outside the Government" with exceptions not here relevant.

9. The government, without objection to the use provisions in the transmittal letter, accepted and used the RSI level 2 drawings to update the government's provisioning databases for the RT-859A/APX-72 at NAVICP Philadelphia and at the Naval Air Warfare Center, Aircraft Division (NAWCAD), St. Indigos, Maryland (tr. 1/213-14, 216-17, 219-22, 243, 255-56). Government employees at NAWCAD consulted the drawings "once or twice" in connection with an equipment repair problem (tr. 2/90-91). A third party (BAE) support contract employee at NAWCAD also looked at the drawings once to determine if they would be useful in performing the repair work at NAWCAD or for rewriting the Organizational and Intermediate (O&I) Technical Manual for the RT-859A/APX-72. He found the drawings "not helpful at all." (Tr. 3/57-59, 62)

10. On 24 July 2003, RSI submitted a certified claim to the NAVICP Philadelphia contracting officer who had participated in the 14 January 1999 telephone conference (see SOF ¶ 7). The claim alleged a Fifth Amendment taking and breach of three implied-in-fact contracts. The alleged implied-in-fact contracts were: (i) a contract that if RSI successfully completed the qualification requirements under the SSA, the government would award all future RT-859A/APX-72 contracts only to sources so qualifying; (ii) a contract that if RSI provided its level 2 drawings to the government, the government would use those drawings "solely to re-establish configuration control over the system by establishing the parts and assemblies used by RSI . . . as the Government's provisioning database"; and (iii) a contract to "restrict [the government's] use of [RSI's level 2] drawings to the uses authorized for 'Limited Rights' technical data under DFAR[S] 252.227-7013." (R4, tab 13 at 1, 6)

11. The damages for breach of the alleged implied in fact contract restricting future RT-859A/APX-72 procurements to sources passing the SSA qualification tests were stated in the claim letter as \$1,114,995 for the “incurred costs associated with the qualification effort” (R4, tab 13 at 8). We dismissed this part of the claim for lack of jurisdiction in our decision of 21 July 2005. *Rex Systems, Inc., supra* at 163,695.

12. The damages for breach of the two alleged implied-in-fact contracts restricting the use of RSI’s level 2 drawings were stated in the claim letter as follows:

Damages to make RSI “whole” for the lost value of its trade secrets consist of the following:

a) Reasonable damages or license fees to compensate RSI for the Government’s past and future unauthorized use of RSI’s proprietary and confidential trade secret information. RSI submits that at a minimum such reasonable damages or license fees for such unauthorized use of its trade secret information is 15% of the value of all transactions entered into, performed by or made possible by the Government unauthorized use of RSI’s trade secret information.

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b) In addition, RSI is entitled to be compensated for any unjust enrichment earned by the Government by virtue of its breach of contract and misappropriation of RSI’s trade secret information.

RSI reserves the right to determine the extent of such damages with greater specificity on the basis of discovery as to the transactions entered into by the Government involving the unauthorized use of RSI’s proprietary information and the Government’s breach of contract. Because the extent of the Government’s breach of contract is not known by RSI, and because RSI does not possess complete information as to the nature and extent of the Government’s unauthorized use of its proprietary data, RSI is unable to precisely define the additional damages it is owed due to the Government’s actions.

(R4, tab 13 at 8-9)

13. As of 26 November 2003, the NAVICP Philadelphia contracting officer had neither decided RSI's claims nor notified RSI of when a decision would be issued. On that date, RSI appealed the deemed denial of its claims.

14. From 1999 through 2005 (the last year for which evidence is in the record), RSI received \$743,027 or 83 percent of the dollar amount of the U.S. government awards of RT-859A/APX-72 procurement contracts during that period (gov't supp. R4, tab 4 at 4, 8; tr. 2/92-94)

DECISION

The Board has heard on the merits RSI's claim for breach of the two alleged implied-in-fact contracts restricting government use of RSI's level 2 drawings. In its main post-hearing brief on this claim, the government raised for the first time a jurisdictional objection that the damages for the alleged breach were not stated in a sum certain in the 24 July 2003 certified claim to the contracting officer (gov't br. at 15-16). A "sum certain" is a requirement for a monetary claim to the contracting officer under the Contract Disputes Act of 1978 (CDA), 41 U.S.C §§ 601-11, and the implementing Federal Acquisition Regulation (FAR).¹ *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995). If a monetary claim submitted to the contracting officer is not stated in a sum certain, an appeal from the decision or lack of decision on the claim is not within the jurisdiction of this Board. *Sandoval Plumbing Repair, Inc.*, ASBCA No. 54640, 05-2 BCA ¶ 33,072 at 163,933.

That part of RSI's claim to the contracting officer for alleged unauthorized use of its level 2 drawings is stated in the claim letter to be "at a minimum . . . 15% of the value of all transactions" made possible by such use, plus "any unjust enrichment earned by the Government" as a result of such use (SOF ¶ 12). There is a complete absence in the claim of any quantification of the "unjust enrichment" to which RSI claims it is entitled, and the phrase "at a minimum" modifying the claimed 15 percent license fee is indistinguishable from the modifying phrases "no less than," "not less than" and "in excess of," which we have previously found to disqualify a stated amount as a sum certain. *See Sandoval Plumbing Repair, Inc.*, *supra* at 163,933; *Atlantic Industries, Inc.*, ASBCA No. 34832, 88-1 BCA ¶ 20,244 at 102,472; and *Godwin Equipment, Inc.*, ASBCA No. 53462, 02-1 BCA ¶ 31,674 at 156,530. RSI argues in its reply brief that it claimed entitlement to "a specific percentage" of the government's transactions (app.

¹ At the time the implied-in-fact contracts were entered into and at the time the claim was submitted to the contracting officer, the FAR defined "claim" in relevant part as: "a written demand or written assertion by one of the contracting parties seeking as a matter of right, the payment of money in a sum certain" 48 CFR 33.201 (1998), 48 CFR 2.101 (2002).

reply br. at 4). Fifteen percent “at a minimum,” is not a specific percentage. It is 15 percent or more.

Todd Pacific Shipyards Corp., ASBCA No. 55126, 06-2 BCA ¶ 33,421, and *Lockheed Martin Aircraft Center*, ASBCA No. 55164, 07-2 BCA ¶ 33,742, cited by RSI deal with pleadings before the Board, and not with the jurisdictional requirement for a sum certain in a monetary claim submitted to the contracting officer. Moreover, both *Todd* and *Lockheed* illustrate the point that asserting an unqualified sum certain in the claim to the contracting officer, does not preclude a contractor from increasing that amount on appeal if the increase is reasonably based upon further information developed in litigation before the Board. *Todd Pacific Shipyards Corp.*, *supra* at 165,687; *Lockheed Martin Aircraft Center*, *supra* at 165,933.

The appeal as to that part of the claim that is for breach of implied-in-fact contracts restricting government use of RSI’s level 2 drawings is dismissed for lack of jurisdiction.

Dated: 6 November 2007

MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

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. 54436, Appeal of Rex Systems, Inc., rendered in conformance with the Board's Charter.

Dated:

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