ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeals of -- | ) | |
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| Boeing Satellite Systems, Inc. | ) | ASBCA Nos. 56072, 56073 |
| | ) | |
| Under Contract No. NAS5-98069 | ) | |

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OPINION BY ADMINISTRATIVE JUDGE DELMAN

The National Aeronautics and Space Administration (NASA or government) moves to dismiss, in part, the complaint filed by Boeing Satellite Systems, Inc. (BSS or appellant) in these appeals. NASA contends that the Board does not have jurisdiction over certain allegations in appellant's complaint seeking delay damages from NASA under the above contract. BSS opposes the motion and contends that we do have jurisdiction over these averments. For reasons stated below, we conclude that we do have jurisdiction and we deny the government's motion.

STATEMENT OF FACTS FOR PURPOSES OF MOTION

1. In January 1998, NASA awarded appellant[1] a firm fixed price contract to build and deliver in orbit two geostationary operational environmental satellite ("GOES") spacecraft, designated as GOES N and GOES O, with options for two additional spacecraft. In brief, the contract obligated appellant to "provide the personnel, facilities, services and materials necessary to design, integrate, test, launch, support launch, and support on-orbit operations" for the spacecraft developed under the contract (R4, tab 453, C.1, Scope of Work at 0007908). The subject dispute involves the delivery of the GOES N satellite.

2. Given that appellant was responsible for providing launch and launch support services, appellant, through its launch service provider, Boeing Launch Services, Inc., (BLS), obtained a launch license from the Department of Commerce, Federal Aviation Administration (FAA) in order to be able to provide the required launch services and to conduct the launch (compl. ¶ 28; R4, tab 453, H.12, Special Contract Requirements at 0007933). Insofar as pertinent, FAA regulation 14 C.F.R. § 415.75 (2002) provided as follows:

> Prior to conducting a licensed launch from a federal launch range, a launch licensee or applicant shall enter into an agreement with a federal launch range providing for access to and use of U.S. Government property and services required to support a licensed launch from the facility and for public safety related operations and support. The agreement shall be in effect for the conduct of any licensed launch. A launch licensee shall comply with any requirements of the agreement that may affect public safety and safety of property during the conduct of a licensed launch, including flight safety procedures and requirements.

3. The Boeing Company executed an agreement on behalf of BLS with the Department of the Air Force (Air Force), the custodian of the federal launch range at Cape Canaveral Air Station, FL. This agreement was entitled "Commercial Space Operations Support Agreement" (CSOSA). NASA was not a party signatory to the CSOSA. Article I, ¶ B of the CSOSA states in pertinent part: "Unless specifically stated

[1] The contract was awarded to Hughes Space and Communications Co. (Hughes). The Boeing Company acquired Hughes in October 2000 and this contract was assigned to BSS. Hughes had contracted with McDonnell Douglas Corporation (MDC) to provide launch services. The Boeing Company acquired MDC, which was renamed Boeing Launch Services, Inc. For purposes of convenience we shall refer to the contractor as appellant or BSS.

to the contrary herein, no agencies of the Government other than the Air Force and its subordinate elements are committed in any way by this Agreement" (R4, tab 173 at 0002874).

4. In general, the CSOSA governed the rights and duties of BLS and the Air Force with respect to the provision of facilities, launch property and launch support services. Insofar as pertinent here, the Air Force range safety office was charged with the responsibility to establish, direct and enforce the required range safety program as defined by the procedures contained in the manual "Eastern and Western Range (EWR) 127-1, Range Safety Requirements" (R4 supp., vol. 37, tab 56), and to approve all hazardous and safety critical items prior to use in accordance with EWR 127-1 (R4, tab 172, CSOSA, Annex A at 8).

5. The NASA contract also imposed the EWR 127-1 range system safety program requirements upon appellant. Insofar as pertinent, the Statement of Work (SOW), Attach. A, provided as follows:

> **3.7.2 System Safety Program**
>
> For the GOES N-Q spacecraft with contractor-provided launch vehicle/services, *NASA will audit the system safety program* for those spacecraft and launch vehicles; *and the spacecraft contractor shall interface directly with the Eastern Test Range (ETR) system safety personnel. However, the spacecraft contractor shall not be relieved from the requirement to have a system safety program fully compliant with EWR 127-1*.
>
> . . . .
>
> **3.8.2.3.3 NASA Insight into Launch Site Services**
>
> In support of each launch, the spacecraft contractor shall provide NASA insight into the following areas:
>
> 1. The supplies and services required to modify, validate, operate, maintain, and refurbish the launch site facilities, hardware, and GSE.
> 2. *The required approvals/waivers and any tailoring of launch range safety requirements that may be proposed in order to meet the intent of EWR 127-1 (March 31, 1995).*
> 3. *All ground and flight constraints.*

4. Launch site operations schedules and daily updates, as required, for the time period from LV on stand through launch, including NASA participation in vehicle walk-down inspections.
5. All identified tests, checkouts, and closeout data to assure successful integration of the spacecraft to the launch vehicle, and launch.
6. Problem/discrepancy reports, anomalies, failure analyses, and post-test data including all problem resolutions, closure actions, and deviations/waivers.

(R4, tab 2 at 0000106, 0000109) (Emphasis added)

6. NASA's contract right of "insight" is further described in the contract, Section H.13 as follows:

> H.13 GOVERNMENT INSIGHT AND APPROVAL OF LAUNCH SERVICES
>
> NASA must be provided an adequate level of insight into and/or approval of certain Contractor tasks and milestones related to the acquisition of launch services. The Government's monitoring of launch services has two elements, approval and insight. Government approval is defined as providing authority to proceed and/or formal acceptance of requirements, plans, designs, analyses, tests, or success criteria in specified areas. . . .
>
> *Government insight is defined as gaining understanding necessary to knowledgeably concur with the Contractor's action through watchful observation, inspection, or review of program events, documents, meetings, tests, audits, hardware, etc., without approval/disapproval authority.* Where government insight is required, the Contractor shall notify the Contracting Officer, the Government Resident Office or the appropriate Government operations organization at the site of meetings, *reviews or tests, related to launch services, in sufficient time to permit meaningful Government participation*.
>
> Should approval or *insight identify noncompliance with the terms and conditions of the contract,* a difference in interpretation of test results, requirements or contract terms,

> or disagreement with the contractor technical directions, *the Government will take appropriate action within the terms of the contract to ensure compliance or direction to the Contractor.*
>
> The Government requires insight or approval into all areas associated with the GOES mission launch services including all processes, software, hardware, integration and test, launch operations, and manufacturing. The Statement of Work and CDRL's [sic] specify approval and insight items.
>
> The Contractor shall ensure that Government insight is provided for in all subcontracts with Launch Services suppliers and contractors. Such subcontract provisions shall ensure that the Government shall have access to all facilities, data, hardware, software and personnel necessary to exercise insight rights defined above.

(R4, tab 453 at 0007933-34) (Emphasis added) Appellant was also obligated to furnish "Launch Vehicle Countdown Procedures and Deviations" for NASA approval in accordance with EWR 127-1 (R4, tab 8 at 0000691).

7. Pursuant to EWR 127-1, Appendix 4B4, the Air Force was tasked to test appellant's flight termination system (FTS) batteries prior to launch (R4, tab 170 at 0002839-2844). On 16 June 2005, Mr. David Huff of the Air Force range safety office sent an e-mail to Mr. Paul D. Smith (employer not identified on the face of the e-mail) reporting a battery nonconformance as follows:

> At this time, all Delta batteries should be considered unacceptable for FTS use.
>
> During the destructive physical analysis (DPA) of the two 2004 batteries that had been subject to a re-qual because of unacceptable 2004 lot acceptance test (LAT) results, a.k.a. the Plan A batteries, a large number of tab breakages was discovered. . . . A broken tab/wire can result in the loss of that plate's contribution to cell capacity and hence battery capacity.
>
> . . . .
>
> At this time, the root cause of the broken tabs cannot be isolated to the 'possible failure modes' associated with the

> 2004 LAT failures. *Until identification and isolation of root cause can be determined, all Delta FTS 1 amp-hour batteries are affected by this issue. This includes the "Plan B" (1999/extended life) batteries that are manifested for GOES-N and IIR-14.* Resolution of this issue is a range safety constraint to the launch of any Delta vehicle configuration.
>
> . . . .
>
> *. . . The government battery technical review team that includes Aerospace, NASA and Range Safety, stand ready to work with Boeing and the battery manufacturer (BST) to work the issue.*

(R4, tab 175) (Emphasis added) Mr. Huff copied ("cc") a number of interested persons on the e-mail, including NASA representative Mr. Thomas Casale.

8. Appellant contends that the decision to withdraw the prior approval of appellant's "Plan B" batteries because of defects discovered in the "Plan A" batteries was a misapplication of EWR 127-1, § 4.4.7 (R4 supp. vol. 38, tab 59 at NP01-0003007). According to appellant, the rejection of appellant's FTS batteries caused a delay to the GOES-N launch set for 23 June 2005, which impacted its costs.

9. The foregoing e-mail also indicated that NASA was part of the "government battery technical review team" that was tasked to "work the issue." It thus appears that NASA played some role in FTS battery decision-making, albeit the extent of such a role is not clear on the record.

10. On or about 23 October 2006, BSS submitted a certified claim to the NASA contracting officer (CO), seeking damages in the amount of $50,193,700 for the delayed performance of the subject contract, including launch delays incident to the rejection of the FTS batteries (R4, tab 419). The CO issued a decision on 23 March 2007 denying the claim in its entirety, and also demanded payment from BSS for late delivery, in the nature of liquidated damages, in the amount of $12,000,000. Insofar as pertinent here, the CO stated that NASA was not responsible for Air Force actions under the CSOSA and alternatively, that the Air Force's actions regarding the FTS batteries were timely and reasonable. (R4, tab 431)

11. Appellant filed a timely appeal with this Board on 19 June 2007. Appellant's claim was docketed as ASBCA No. 56072. The NASA claim for liquidated damages was docketed as ASBCA No. 56073. The appeals were consolidated.

## CONTENTIONS OF THE PARTIES

Appellant's complaint before the Board includes averments of delay for which NASA is claimed to be responsible, including a launch delay incident to the rejection of the FTS batteries, ¶¶ 46-86. In brief, appellant alleges that the FTS battery decision was wrongful under EWR 127-1 and NASA was an active participant in FTS battery decision-making or otherwise ratified the same, or alternatively that EWR 127-1 was a requirement under the NASA contract and Air Force acted as NASA's agent or representative to enforce EWR 127-1. NASA moves to dismiss these allegations, contending that the decision to reject appellant's FTS batteries was made solely by the Air Force pursuant to EWR 127-1 under the CSOSA to which NASA was not a party and for which decision NASA was not responsible, and therefore the Board has no jurisdiction over this element of appellant's delay claim.

## DECISION

Insofar as pertinent here, appellant's claim seeks delay damages from NASA under this contract for launch delay attributable to the rejection of its FTS batteries under the range safety requirements as defined by EWR 127-1. It appears that both the CSOSA and the NASA contract imposed upon appellant the obligation to follow these range safety requirements. The NASA contract directed appellant to interface directly with range system safety personnel. The NASA contract also granted NASA the right to audit appellant's system safety program under EWR 127-1, and NASA's right of insight provided a basis to take appropriate action for noncompliance with the terms and conditions of the contract. The record also provides evidence of some level of participation by NASA on FTS battery issues as they relate to EWR 127-1. Appellant filed a certified claim with the CO related to this subject matter; the CO denied the claim and the CO's decision was timely appealed to this Board.

We have jurisdiction to decide appeals from the decisions of NASA COs related to contract claims under NASA contracts under the Contract Disputes Act (CDA), 41 U.S.C. § 607(d). Insofar as pertinent, the subject appeals are from a decision of a NASA CO related to a contract performance claim filed by a NASA contractor against NASA under a NASA contract regarding the rejection of FTS batteries under EWR 127-1 on which matters NASA had some element of involvement under the contract. We believe we have jurisdiction to hear and decide such appeals under the Act.

Whether NASA is in fact responsible to pay delay damages to appellant as a breach of contract or otherwise due to the rejection of the FTS batteries is a question of mixed law and fact that goes to the merits of appellant's claim. We are not prepared to address the merits of this claim at this early stage of the proceedings; the record needs further evidentiary development for this purpose. However for reasons stated we believe we have jurisdiction to hear this evidence and to decide this claim under the Act.

We have duly considered the arguments and the supporting case law in the government's motion. We find the case law distinguishable and the arguments in support of dismissal unpersuasive.

## CONCLUSION

The government's motion to dismiss appellant's complaint, in part, is denied.[2]

Dated: 5 August 2008

JACK DELMAN
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

[2] We understand that appellant has also filed a claim against the Air Force under the CSOSA regarding the rejection of the FTS batteries. That action has no bearing on appellant's claim against NASA under the NASA contract and on our decision herein.

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 56072, 56073, Appeals of Boeing Satellite Systems, Inc., rendered in conformance with the Board's Charter.

Dated:

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