

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
DynCorp International LLC) ASBCA No. 56078
)
Under Contract No. DAAH23-00-C-0226)

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APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
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MAJ David Abdalla, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD
ON JURISDICTION

The government moves for summary judgment arguing that appellant’s claim for \$26,061,962.00 for alleged mistakes during the submission of proposals is barred by the six year statute of limitations set forth in the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 605(a). Appellant opposes the motion. Since motions raising the six-year limitation in the CDA are jurisdictional we treat this motion as one for dismissal for lack of jurisdiction. *See Gray Personnel, Inc.*, ASBCA No. 54652, 06-2 BCA ¶ 33,378.

In light of our treatment of the motion, we allowed the parties to make additional filings.¹ Each party responded on 6 February 2009 (gov’t supp. mot; app. supp. reply). On 9 March appellant filed and we accepted a “Second Supplemental Reply” to the

¹ We also asked the parties to tell us the date on which the first option was exercised and to tell us what EAC and B/(W) stood for in exhibit 4 to the government’s motion. The parties agree that the first option was exercised on 30 January 2001 and that B/(W) is an abbreviation for “Better/(Worse)” where the parenthetical indicates positive or negative. They disagree however on the meaning of EAC. Appellant says it is an abbreviation for “Estimate at Completion” and the government says it means “Estimated Actual Cost.” Since the abbreviation originated on cost information submitted by DI, we attach the meaning intended by appellant, the originator.

motion (app. 2nd supp. reply) which included as evidence the deposition of DynCorp International LLC (DI) employee John Supina, taken by government counsel in this case and argument that the deposition supported a denial of the government's motion. The government responded on 6 April 2009 (gov't reply) taking the opposite view and appellant filed a further reply on 17 April 2009.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 8 March 2000, the U. S. Army Aviation & Missile Command (AMCOM) issued Request for Proposals No. DAAH23-00-R-0182 (the RFP), a negotiated procurement, for a Life Cycle Contractor Support (LCCS) services contract for the Army's C-12/RC-12 /UC-35 fixed wing aircraft fleet. Required services included total aircraft system maintenance, logistical support, and management process to maintain the worldwide fleet of approximately 172 C-12/RC-12 Army Aircraft, 20 Army UC-35 and 2 Navy UC-35 aircraft. The solicitation included Contract Line Item Number ("CLIN") X001,² Base Operations Support. This CLIN required a firm-fixed monthly unit price including all direct and indirect labor and services. For SubCLIN 0001AA, the base year line item for Army LCCS Base Operations Support, a fixed price monthly rate was included and the length of the term was four months ending on 31 January 2001. For all other option years for this SubCLIN, the term was 12 months. (R4, tab 1 at 1, 130 and 180)

2. The successful contractor was to furnish all documentation, materials, equipment, property, facilities, and vehicles that were not specifically provided as government furnished property (GFP) necessary to perform the contract (*id.* at 180).

3. On 24 April 2000 two offers were received in response to AMCOM's RFP. DI and AVTEL submitted proposals. AVTEL's price was \$604,610,909 while DI, the higher of the two, offered a price of \$635,616,053. The initial Source Selection Evaluation Board (SSEB) was completed on 25 May 2000. Each proposal was evaluated in the areas of LCCS, past performance, management and price. (R4, tab 4)

4. With its initial proposal, DI submitted a CD-ROM containing numerous files that included documents and spreadsheets containing supporting cost information related to its price proposal (R4, tab 2 at 743). Among them were spreadsheets of cost information titled CLIN 0001AA that indicated labor rates and costs associated with individual employees listed by position at each site location (mot., ex. 1).

² CLIN X001 is CLIN 0001 in the base year, CLIN 1001 for Option Year 1, CLIN 2001 for Option Year 2, etc. (R4, tab 1 at 130)

5. On CLIN 0001AA, pages two and three of four, the government has highlighted six labor positions (in pink). The positions, two Site Leads (Heidelberg), Site Lead (Stuttgart), Site Supervisor (Wiesbaden), Site Lead (Wiesbaden) and Senior Aircraft Mechanic (Wiesbaden), had been entered correctly and were included in the initial proposal. Mistakes in these entries were introduced in the final proposal discussed below.

6. Also highlighted in pink by the government on pages two and three of four for CLIN 0001AA of the initial proposal were certain subsistence costs. A mistake was made on those pages in that these costs were not multiplied by the number of employees and thus the subtotals for each work site for subsistence costs were incorrect. By not multiplying the subsistence cost by the number of employees located at each site, DI failed to account for the subsistence costs of a total of 44 positions. The subsistence cost mistakes made as demonstrated for the base year are duplicated in each of the CLINs corresponding to each of the nine option years. (Mot., ex. 1)

7. On 31 May 2000, both offerors were found to be in the competitive range, although each offeror possessed numerous deficiencies and disadvantages in its initial proposals (R4, tab 5).

8. Responses to discussion questions were received from the offerors on 14 June 2000. The government conducted a second competitive range determination and on 22 June 2000 notified AVTEL that they were, based on their initial proposal and discussions, no longer within the competitive range. On 7 July 2000 a final proposal revision (FPR) was received from DI with a total price of \$624,970,350. DI's final evaluated price of \$624,970,350 represented a 1.7% decrease from its initial evaluated offer of \$635,616,053. (R4, tab 7)

9. DI's final proposal included a CD-ROM which contained numerous files and spreadsheets that provided the backup cost material for DI's paper FPR (R4, tab 6 at 1231). Among them was an Excel spreadsheet that contains the individual labor costs and subsistence costs for each site by employee position (motion, ex. 2; R4, tab 6 at 1232).

10. These spreadsheets mirror the spreadsheets included in DI's Request for Equitable Judgment (REA) and clearly illustrate DI's mistakes (R4, tab 8). In the REA the mistakes are demonstrated for CLIN 0001AA by boxes drawn around the entries that are in error (R4, tab 8 at 1257-58; mot., ex. 2). The column labeled "rate" indicates six positions that have a labor rate that equals \$0.00. Those six positions are: two Site Lead positions at Heidelberg, one Site Lead position at Stuttgart, and one Site Lead position, one Site supervisor position, and one Senior Aircraft mechanic position at Wiesbaden (*id.*).

11. The mistakes made regarding the labor rates for each of the labor positions were not made in the initial proposal and are indicated in pink on pages two and three of four on CLIN 00001AA. (Mot., exs. 1, 2)

12. The mistakes made in regard to the subsistence costs in the FPR mirror the mistakes made in the initial proposal (R4, tab 8 at 1257-58; mot., exs. 1, 2). The mistakes in calculating the subsistence costs were made by providing subsistence costs for one employee, even when the number of employees at a site with the same job title was greater than one (mot., exs. 1, 2).

13. The mistakes in the FPR for both labor rates and subsistence costs as demonstrated above for the base year (CLIN 0001AA) were made for each of the nine option years and their corresponding CLINs (R4, tab 8).

14. Errors were also made in the calculation of the fringe rate and the program management pool which arose directly out of the errors in labor and subsistence costs included in the FPR (compl. at 9; R4, tab 8 at 1253).

15. On 4 August 2000, the Army awarded Contract No. DAAH23-00-C-0226 to DI at the total estimated price of \$624,970,350 for a Base Year (date of award through 31 January 2001) plus nine option years, to run from 1 February 2001 through 31 January 2010. However, only the base year amount, \$20,710,932, was funded and ran through 31 January 2001. The award included firm fixed price CLIN 0001AA for a four month period ending on 31 January 2001. (R4, tab 1)

16. The contract included an "Option to Extend the Contract" clause which provided the government with the option to extend the term of the contract by written notice to the contractor at any time prior to the expiration of the current period of performance. The clause further provided that the government was not obligated to exercise any options. The performance period for Option 1 was 1 February 2001 through 31 January 2002. (R4, tab 1 at 143) The government exercised Option 1 on 30 January 2001 (app. supp. reply, ex. 1).

17. In late May 2005, DI submitted an Advance Request for Equitable Adjustment to the government incurred as a result of certain pricing errors described therein (R4, tab 11 at 1660). On 23 September 2005, AMCOM responded stating that based on its review of the original package and subsequent submittals, no final decision could be made as to the validity of the requested amounts. AMCOM attached a list of questions/concerns and sought DI's response to same. The government response further stated:

In accordance with FAR Part 33.204, the Government's policy is to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer's level. Reasonable efforts should be made to resolve controversies prior to the submission of a claim. In this particular situation, the government has expended extensive hours in evaluating referenced REA package, researching the contract and subsequent modifications, and acquiring technical information from FWPMO to assist in formulating a response. At this point, based on all information made available, we are unable to determine that the Government owes DynCorp any additional compensation. However, if further rationale and supporting documentation is provided to satisfactorily substantiate these issues, the Government will further review and will always remain ready to attempt resolution in a fair and equitable manner.

(Id. at 1634-37)

18. By letter of 3 October 2005, then-counsel for DI submitted a letter to the government setting forth its understanding of FAR provisions governing correction of mistakes (Rule 4 supplement dated 14 September 2007). DI proposes a finding that thereafter, DI and AMCOM engaged in numerous discussions regarding both the legal and factual aspects of the matter, but provides no documentary support for that finding.

19. On 10 August 2006, DI submitted to AMCOM a Request for Equitable Adjustment (REA) – Proposal Pricing Mistake, Contract Number DAAH23-00-C-0226, which contained its REA for the entire contract period (R4, tab 8 at 1247, 1248).

20. The REA consisted of spreadsheets indicating errors in formulae; it also included corrected copies with earlier identified errors corrected (R4, tab 8).

21. On 31 October 2006, the contracting officer submitted her review of the REA to DI (R4, tab 11).

22. On 25 January 2007, DI certified its REA and requested a contracting officer's decision on the now certified claim, valued at \$26,061,962 (R4, tab 9).

23. The amount claimed covers the entire contract period through the final option year (R4, tab 9 at 1609).

24. The claim is based on three possible legal theories: mutual mistake, unilateral mistake and unconscionability. The claim seeks recovery of the intended “price of complete performance of the contract terms.” (R4, tab 9 at 1603-04)

25. On 31 May 2007, the contracting officer issued her final decision denying DI’s claim. The decision explained that the mistakes made by DI in their FPR were not discovered by the government and the government was not required to verify the costs for this firm fixed price CLIN. (R4, tab 10 at 1628-29)

26. DI states in its REA that these mistakes are “obvious pricing errors” (R4, tab 8 at 1251).

27. During discovery the government propounded discovery and appellant responded as indicated:

2. Produce all documents in the possession of DI relating to when DI became aware of the alleged mistakes.

RESPONSE: Please see attached e-mail correspondence and PowerPoint presentation from January 9, 2001 (Attachment # 5).

11. When did DI first become aware that the mistakes alleged in the complaint had taken place?

RESPONSE: DI first became aware that there were mistakes in the FPR several months after the award of the contract. At the time, the full magnitude and variety of the pricing errors were not known, however. In the spirit of customer relations and because the estimation of the scope of the mistakes was far less than ultimately realized, it was determined that the impact would be absorbed by DI.

12. Who discovered the alleged mistakes in the final proposal?

RESPONSE: It is unknown who specifically discovered the mistakes in the FPR. The individual or individuals who discovered the mistakes may no longer be in DI’s employ.

13. Please describe the circumstances in which the alleged mistakes were discovered.

RESPONSE: After contract award (in early 2001), DI discovered that costs to perform the contract had overrun costs as stated in our FPR. An analysis was developed, under which the program revenue and margin was recognized by DI's finance department. When this analysis was compared to the FPR, it was discovered that the costs reflected in the analysis did not match those in the FPR. A detailed comparison of the two revealed that there were mistakes in the FPR.

(Mot., attach. 3) John Supina (Supina) signed appellant's response on 12 December 2007.

28. The 9 January 2001 email and Power Point presentation demonstrate the estimate at completion (EAC) costs versus the actual costs up to December 2000 and the B/(W) (better or worse) variance between them (mot., ex. 4).

29. On 4 March 2009, the government deposed Supina. Supina has been with DI over 29 years (tr. 13) and, as vice president for contracts he was involved in the review of the RFP (tr. 19, 21). In his deposition Supina was asked how the PowerPoint presentation notifies DI of the errors in the FPR as referred to in response 2 to the government's discovery, and he testified that it was embarrassing but it did not, stating as follows:

[T]his PowerPoint presentation is basically a routine presentation. It would be given to demonstrate the financial performance [of] a program and actually when you review this, this shows that the program through the first four months of the contract anyway, through December 2000, was actually a profitable program.

The revenue on the program and that's what this column is just the revenue, how much money the company has actually earned, was less than what we originally estimated because EAC is estimate at completion and so for the first year of the program there would be an estimate put together on what we think we might get in the program. The revenue is down. Okay, we had estimated at least through December of this period that revenue would be \$20.3 million and it was actually \$15.1 million.

Then the operating profit you can see here what the actual percentages were versus what we were, the EAC was, and this is what the program was reporting at the time. So their reporting was much better than we had anticipated.

This particular document unfortunately after reviewing now and when I was when inside counsel...sent these to me last week and I started reviewing it again. I couldn't figure out why this PowerPoint presentation was submitted in response to the question because it really doesn't answer it and that's – because nowhere in here does it even get into the CLINs. This just provides the financial performance which I really wish the program looked today like it did at that time.

(Tr. 53-55) Supina does not recall who found the errors but recalled that he first learned of the alleged errors when it was brought to his attention in the first or second quarter of 2001 at a meeting and he does not recall the actual date of the meeting (tr. 57-58).

CONTENTIONS OF THE PARTIES

The government contends that under the CDA statute of limitations which applies to contracts awarded after 1 October 1995, claims must be submitted within six years of accrual. The government concludes that the subject claim accrued no later than the date of contract formation 4 August 2000 which was more than six years prior to filing a certified claim with the contracting officer on 25 January 2007. Alternatively, the government says that DI had actual knowledge of the alleged liability at the latest by 9 January 2001, the date of the email with attached PowerPoint, which was six years and 16 days prior to filing their claim.

Appellant first argues that DI's claim could not have accrued until the conclusion of the base year of the contract on 31 January 2001 which was less than six years before it filed its certified claim with the CO on 25 January 2007. Second it argues that no matter how we rule on the base year, the continuing claim doctrine applies to the portion of the claim arising from the option years and the claim is timely for those nine years. (App. supp. reply at 2)

In later filed responses, the parties further refined their arguments. Appellant argues that the Supina deposition supports its position that the significance of the January 9 email and attached PowerPoint is not that it reveals a pricing mistake, but that it reveals the inadequacy of preliminary data to allow detection of a problem (app. 2nd supp. reply at 5). The government argues that Supina is merely trying to distance DI

from the damaging admission in the previous response to interrogatories provided two years earlier (gov't reply at 1).

DISCUSSION

Section 6(a) of the CDA, 41 U.S.C. § 605(a), provides in pertinent 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.

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, unless the contracting parties agreed to a shorter time period. This 6-year time period does not apply to contracts awarded prior to October 1, 1995. 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, unless the contracting parties agreed to a shorter time period. The 6-year period shall not apply to contracts awarded prior to October 1, 1995, or to a Government claim based on a contractor claim involving fraud.

Recently, the Court of Appeals for the Federal Circuit stated in *Arctic Slope Native Association, LTD. v. Secretary of Health and Human Services*, No. 2008-1532, 2009 U.S. App. LEXIS 21361, at *17-18 (Fed. Cir. September 29, 2009):

The six-year presentment period is part of the requirement in section 605(a) that all claims by a contractor against the

government be submitted to the contracting officer for a decision. This court has held that the presentment of claims to a contracting officer under section 605(a) is a prerequisite to suit in the Court of Federal Claims or review by a board of contract appeals. *England v. Swanson Group*, 353 F.3d 1375, 1379 (Fed. Cir. 2004); *Sharman Co. v. United States*, 2 F.3d 1564, 1568 (Fed. Cir. 1993). Statutory time restrictions on the submission of administrative claims are a part of the requirement that a party must satisfy to properly exhaust administrative remedies. *See Woodford v. Ngo*, 548 U.S. 81, 90, 126 S. Ct. 2378, 165 L. Ed. 2d 368 (2006) (“Proper exhaustion demands compliance with an agency’s deadlines and other critical procedural rules.”). Therefore, subject to any applicable tolling of the statutory time period, the timely submission of a claim to a contracting officer is a necessary predicate to the exercise of jurisdiction by a court or a board of contract appeals over a contract dispute governed by the CDA.

In order to determine if the claim was timely submitted we must determine when it accrued. FAR 33.201, Definitions, provides in part:

“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.

DI submitted its certified claim on 25 January 2007. If the claim accrued prior to 25 January 2001, the claim is barred. As FAR 33.201 provides, accrual of a claim means the date when all events that fix liability and permit assertion of the claim were known or should have been known. Furthermore, some injury must have occurred. In order to determine when liability is fixed, we must initially examine the legal basis of the particular claim. *RGW Communications, Inc. d/b/a Watson Cable Co.*, ASBCA Nos. 54495, 54557, 05-2 BCA ¶ 32,972.

Here, the claim alleges alternatively unilateral mistake in bid, mutual mistake, or unconscionability.³ In each instance, the claim is to recover the intended price of complete performance of the contract. For negotiated procurements, FAR 15.508 requires that mistakes disclosed after award be processed substantially in accordance with the procedures prescribed for sealed bid procurements, FAR 14.407-4. FAR 14.407-4 states that to make a determination to reform a contract to increase the price such that, as corrected, it does not exceed the next lowest offer under the original solicitation, “it must be clear that the mistake was — (1) mutual, or (2) if unilaterally made by the contractor, so apparent as to have charged the contracting officer with notice of the probability of the mistake” (FAR 14.407-4(b)(2) and (c)).

With respect to the base year, the critical questions are when DI knew or should have known of the mistakes made in its FPR with respect to CLIN 0001AA and when “some injury” occurred. Clearly no injury had occurred on 4 August 2000, the date of contract formation. Injury could not have occurred before on or about 1 October 2000 when DI began performance of CLIN 0001AA.

As to when DI knew or should have known of the mistakes, the government contends that the claim accrued no later than 9 January 2001, based upon the email and PowerPoint presentation and the answers to interrogatories. We do not believe the PowerPoint presentation is proof of actual knowledge, especially in light of Mr. Supina’s deposition testimony concerning what that document represents. We know from the DI discovery responses that appellant at least became aware of the facts underlying the claim that there were mistakes “several months after the award” or in “early 2001” (SOF ¶ 27, *see also* SOF ¶ 29 (first or second quarter of 2001)). We know that by 9 January 2001, appellant’s PowerPoint presentation demonstrated at least some knowledge of a variance between EAC and actual costs up to December 2000. In relying on the PowerPoint presentation and the discovery responses, the government is only pointing to evidence that costs incurred were not matching up with costs in the FPR, not evidence that appellant knew or even should have known of the mistakes or of potential liability of the government for reforming the contract to compensate for the mistakes. *See Emerson Construction Co.*, ASBCA No. 55165, 06-2 BCA ¶ 33,382 (In arguing that appellant knew or should have known of a breach due to an under run in orders issued, the government only points to evidence that there was an under run, not required evidence that appellant knew or should have known that the government estimates were inadequately or negligently prepared).

³ The doctrine of unconscionability requires no separate analysis for present purposes because unilateral mistake is a descendent from the doctrine of unconscionability. 7 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 28.41 at 258 (rev. ed. 2002).

With respect to the base year of the contract, which ended on 31 January 2001, we are not persuaded that we should dismiss the appeal without further development of the record about when appellant knew or should have known of the alleged mistakes in the backup sheets for the FPR. *Emerson, supra* at 165,501.

With respect to the option years, we believe the claim is subject to the continuing claim doctrine which we have determined to have application to government contract cases. Under that doctrine, a “claim must be inherently susceptible to being broken down into a series of independent and distinct events or wrongs, each having its own associated damages.” Only the base year was initially awarded. Each subsequent year was to be separately awarded at the government’s option. Thus, if the government chose not to award additional option years, there would be no claim for those years. Therefore, the portions of the claim attributable to each option year are distinct events with its own associated damages. *Gray Personnel* at 165,476-77, citing *Brown Park Estates-Fairfield Development Co. v. United States*, 127 F.3d 1449-1456 (Fed. Cir. 1997). Option Year 1 was awarded on 30 January 2001 and the certified claim was submitted on 25 January 2007, less than 6 years later. Thus the claims for Option Year 1 and those options thereafter exercised are properly before us.

The motion to dismiss is denied with respect to the claim for mistakes in the base year computations without prejudice to renewal at a later time, upon a fuller record. The motion is denied with respect to option years one through nine.

Dated: 20 October 2009

RICHARD SHACKLEFORD
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board

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. 56078, Appeal of DynCorp International LLC, rendered in conformance with the Board's Charter.

Dated:

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