ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
McDonnell Douglas Services, Inc.	)	ASBCA No. 56568
	)	
Under Contract No. F09603-97-C-0268	)	

APPEARANCES FOR THE APPELLANT: Kent R. Morrison, Esq.
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APPEARANCES FOR THE GOVERNMENT: Richard L. Hanson, Esq.
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OPINION BY ADMINISTRATIVE JUDGE SCOTT
ON APPELLANT'S MOTIONS FOR SUMMARY JUDGMENT OR TO DISMISS

McDonnell Douglas Services, Inc. appealed under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, on behalf of subcontractor Alsalam Aircraft Company Ltd. (Alsalam), headquartered in Riyadh, Saudi Arabia, from two contracting officers' (COs') decisions issued in June 2008 that asserted a $2,024,877 claim against McDonnell Douglas Services, Inc. for alleged defective pricing under its captioned 1997 Foreign Military Sales (FMS) contract with the United States Air Force for aircraft maintenance, performed by Alsalam. At some point after contract award, The Boeing Company acquired McDonnell Douglas Services, Inc. Like the parties, we generally refer to the prime contractor as "MDS." (App. mot. at 2 n.1; gov't opp'n at 2)

Appellant has moved for summary judgment in its favor or, alternatively, for dismissal of the government's claim with prejudice, on the ground that the claim accrued more than six years before the COs' decisions and thus is time-barred under the CDA, 41 U.S.C. § 605(a). The government opposes the motions.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

The following facts are undisputed or uncontrovertible for purposes of the motions.

Background

The parties have agreed, with immaterial minor variances, to the following background statement:

> Under the [FMS] Program, the Royal Saudi Air Force ("RSAF") has purchased, maintained, and upgraded various aircraft for its fleet, including a number of F-15 aircraft now manufactured by The Boeing Company. Alsalam supports prime contractors in these efforts by providing maintenance, modification and upgrade services for the aircrafts' aviation systems. Alsalam provides these services, among others, under various FMS technical support program ("TSP") contracts entered into by the Air Force and prime contractors such as MDS for the benefit of the RSAF. Alsalam has provided such services under, for example, the Peace Sun IV ("PS IV" or "TSP IV"), Peace Sun IX ("PS IX" or "TSP IX"), and C-130 aircraft programs.

(Gov't opp'n at 2; *see also* app. mot. at 2)

Contract, Subcontract, Audits

Contract No. F09603-97-C-0268 is a letter contract effective 1 May 1997 between the Air Force and McDonnell Douglas Services, Inc. Although it is not clear in the record when The Boeing Company acquired McDonnell Douglas Services, Inc., a government price negotiation memorandum, dated 9 October 1997, concerning contract definitization, refers to "The Boeing Company McDonnell Douglas Services, Inc." (R4, tab 7 at 1 of 578). The contract was definitized, effective 21 October 1997, by Modification No. PZ0001. The parties refer to the definitized contract, sometimes denominated as Contract No. F09603-97-C-0268-PZ0001, which involves F-15 aircraft, as the "TSP IV prime contract." Alsalam provided "augmented personnel" as a subcontractor to MDS under Purchase Order (PO) No. Z70502 (sometimes Z70502T), to which the parties refer as the "TSP IV subcontract." (R4, tabs 1, 2, 4 at 1 of 34; app. supp. R4, tab A2 at 1 (Subject of Audit); *see* app. mot. at 3; gov't opp'n at 3)

At the time it was definitized, the TSP IV prime contract incorporated by reference the Federal Acquisition Regulation (FAR) 52.215-22, PRICE REDUCTION FOR

DEFECTIVE COST OR PRICING DATA (OCT 1995), and 52.215-24, SUBCONTRACTOR COST OR PRICING DATA (OCT 1995), clauses (R4, tab 2 at 1, 59 of 380).

Alsalam had submitted its initial proposal, resulting in the TSP IV subcontract, to MDS on or about 8 October 1996. Prior to award, Alsalam had submitted numerous documents to the Defense Contract Audit Agency (DCAA) containing or transmitting cost and pricing data. DCAA reviewed the documents and data and issued pre-award audit reports on 16 December 1996 and 16 April 1997. (App. mot. at 3; gov't opp'n at 3; *see also* R4, tab 13 at 32 of 48) On 30 April 1997 Alsalam certified its cost or pricing data as accurate, complete, and current as of 25 April 1997 (R4, tab 3; app. mot. at 3; gov't opp'n at 3).

Alsalam began performance on the TSP IV subcontract on 1 May 1997, under MDS letter Contract No. N6B-P014-0043, definitized as PO No. Z70502, on 20 May 1997. On 16 October 1997, in connection with the TSP prime contract, MDS certified its cost or pricing data as accurate, complete, and current as of 2 October 1997. (R4, tab 8 at 17 of 19; app. mot. at 3-4; gov't opp'n at 3)

On or around 10 February 1998, within months of the TSP IV prime contract price agreement, DCAA's European Branch Office (DCAA EBO) initiated a post-award audit of Alsalam's TSP IV subcontract pricing. Its preliminary Audit Report, No. 2191-98S42000315, prepared for the Resident Auditor at MDS/Boeing, was dated 31 July 1998. It referred to the prime contractor as "The Boeing Company, McDonnell Douglas Service [sic], Inc. (MDS)." (App. supp. R4, tabs A1, A2 at cover ltr., 1; *see* app. mot. at 4; gov't opp'n at 3) All subsequent iterations of the Alsalam audit, referred to below, were numbered the same or essentially the same.

DCAA EBO stated in the 31 July 1998 report that:

> As part of our continuing program of evaluating subcontractor compliance with 10 U.S.C. 2306a [the Truth in Negotiations Act (TINA)] and implementing regulations, we audited subcontractor cost or pricing data related to the pricing of [PO] Z70502 awarded to [Alsalam] under prime contract no. F09603-97-C-0268-PZ0001. The purpose of the audit was to test whether the price, including profit, negotiated in that pricing action was increased by a significant amount because the subcontractor furnished cost or pricing data that was not accurate, complete, and current as required by the cited statute.

(App. supp. R4, tab A2 at 1) The auditors opined that Alsalam had failed to comply with TINA on the alleged grounds that the cost or pricing data it had submitted were

defective in that they were not accurate, complete, and current as of the date of the agreement on price and that Alsalam had overstated its site and TSP overhead costs (app. supp. R4, tab A2 at 2, 5, 7). DCAA EBO recommended a $3,123,407 downward price adjustment in the prime contract, calculated as follows:

> - [Alsalam] did not disclose that its 1998 direct labor cost estimates for the [PS IX] and C-130 programs should be included in its proposed site overhead allocation base. As a result, the proposal was overstated by $2,597,317.
> - [Alsalam] failed to exclude unallocable amortization costs from its TSP overhead pool. As a result, the proposal was overstated by $74,929.
> - The remaining recommended price adjustment results from applying G&A [general and administrative] expense and profit rates to the overstated amounts proposed for overhead costs.

(App. supp. R4, tab A2 at 1) The allegedly unallocable amortization costs were identified as pre-operating costs (app. supp. R4, tab A2 at 7).

On 21 August 1998 DCAA EBO provided Alsalam with a copy of its preliminary audit results, with reference to, and including portions of, the 31 July 1998 report that recommended a downward price adjustment of $3,123,407 and gave the stated bases therefor (app. supp. R4, tab A3; app. mot. at 4; gov't opp'n at 4).

On 3 May 2000 DCAA EBO provided Alsalam with a copy of a revised, undated, audit report, recommending a lower price adjustment of $2,901,059 (R4, tab 13 at 4 of 48; app. supp. R4, tab A4 at cover ltr., 1; *see* app. mot. at 4; gov't opp'n at 4). The revised adjustment included the same $74,929 as in the 31 July 1998 report, on the same ground that Alsalam erroneously included unallocable amortization of pre-operating costs in its proposed TSP overhead pool (app. supp. R4, tab A4 at 2, 7). The $2,407,086 portion of the recommended adjustment was calculated based upon the previously stated ground that Alsalam did not include direct labor cost estimates for the PS IX and C-130 programs in its allocation base for site overhead, and upon the additional alleged ground that it erroneously included Riyadh labor costs in the allocation base for site overhead when Riyadh labor bore no benefit from site overhead. The adjustment again included G&A and profit. (App. supp. R4, tab A4, *e.g.*, at 1-4, 6, 7, 9, 10)

In a 2 September 2000 response, which the parties describe as "extensive," Alsalam disputed DCAA's conclusions (app. mot. at 5; gov't opp'n at 4; *see also* R4, tab 13 at 4 of 48).[1]

On 22 March 2001 DCAA EBO issued a final subcontractor post-award audit report, identified as prepared for DCAA's Boeing St. Louis Resident Office, and naming the prime contractor as "The Boeing Company, MDS" (R4, tab 13 at 1, 31 of 48; app. mot. at 5; gov't opp'n at 4). The report stated that the audit had disclosed that the cost or pricing data submitted by Alsalam were not accurate, complete, and current as of the date of agreement on subcontract price. The auditors now recommended a downward price adjustment of $1,667,515, composed of $1,381,028 pertaining to site overhead and $45,623 pertaining to TSP overhead, plus G&A and profit. (R4, tab 13 at 2, 5 of 48) The auditors had reduced their prior recommended adjustment, after reviewing Alsalam's 2 September 2000 response, by excluding alleged defective pricing impact associated with an unexercised option year (R4, tab 13 at 4 of 48).

The 22 March 2001 audit report identified significant issues as:

> 1. Alsalam did not disclose the fact that direct labor cost estimates for the F-15 Peace Sun IX and C-130 programs should have been included in its proposed Site Overhead allocation base. Additionally, Alsalam erroneously applied Site Overhead to Riyadh labor costs, which bear no benefit from Site Overhead. As a result, negotiated Site Overhead costs were overstated by $1,381,028.
>
> 2. Alsalam failed to exclude unallocable amortization costs from its TSP Overhead pool. As a result, the proposal was overstated by $45,623.

(R4, tab 13 at 2-3 of 48) Again, the unallocable amortization costs pertained to pre-operating costs (R4, tab 13 at 6 of 48).

[1] Alsalam referred to a 17 March 2000 draft audit report said to allege defective pricing and to seek a $2,736,576 adjustment (R4, tab 13 at 34 of 48). We have not located a report marked with that date and claiming an adjustment in the stated amount, but a chronology of record refers to that date and to a draft audit presented to Alsalam (R4, tab 14 at 22 of 22). Regardless, the parties each describe Alsalam's 2 September 2000 response as pertaining to the adjustments conveyed to it in May 2000 and any differences are immaterial.

The 22 March 2001 audit report noted that the auditors had coordinated with DCAA's Boeing St. Louis Resident Office, Air Force procurement personnel, and the CO:

> We coordinated factual matters relating to our recommendations with the prime contract audit office and the cognizant procurement representatives at Robins Air Force Base. Audit results were coordinated between Ms. Donna Peltomaki, Technical Specialist, of this office and Mr. Dennis Humphries, DCAA Auditor at the Boeing St. Louis Resident Office, and Ms. Hazel Ann Gleaton, Warner Robins [CO]. We furnished these individuals with copies of our draft report exhibit and explanatory notes describing the recommended price adjustment in order to ensure that a mutual understanding of the facts and issues was reached.

(R4, tab 13 at 4 of 48)

Over 14 months after the 22 March 2001 report, by letter dated 14 May 2002 to George Harms, Contracts and Pricing, The Boeing Company – Aircraft and Missile Systems, DCAA's Resident Auditor at its Boeing St. Louis Resident Office stated:

> We received DCAA Audit Report No. 2191-1998S42000315, dated March 22, 2001, added the applicable negotiated McDonnell Douglas Services overhead and profit, and are forwarding our preliminary findings. The attached pages from our draft audit report detail the costs along with our recommended price adjustment. This is being provided for your comments before we issue our final audit report to determine if there is any difference in the interpretation of the facts as stated.

(App. supp. R4, tab A7; *see also* app. opp'n at 1-2) DCAA's recommended price adjustment, including application of the added negotiated MDS overhead and profit rates, was $2,024,877 (app. supp. R4, tab A7 at 2, 4). DCAA reiterated the 22 March 2001 report's basis for the adjustment:

- Alsalam did not disclose the fact that direct labor cost estimates for the F-15 Peace Sun IX and C-130 programs should have been included in its proposed Site Overhead allocation base.

- Alsalam erroneously applied Site Overhead to Riyadh labor costs, which had no benefit from Site Overhead.

- Alsalam failed to exclude unallocable amortization costs from its TSP Overhead pool.

(App. supp. R4, tab A7 at 2-3)

On 17 June 2002 DCAA's Boeing St. Louis Resident Office issued Audit Report No. 3421-2002H42097001, prepared for the procuring CO at Warner Robins Air Logistics Center (R4, tab 14 at 1 of 22, *et seq*.). The report stated that: "The purpose of this examination was to incorporate the results of DCAA Assist Audit Report No. 2191-1998S42000315, dated March 22, 2001, and to add The Boeing Company, McDonnell Douglas Services, Inc. (MDS) associated burden and profit" (R4, tab 14 at 2 of 22). DCAA recommended a price adjustment of $2,024,877, the same amount recommended in its draft audit report conveyed on 14 May 2002, based upon the same three factors (R4, tab 14 at 2-3 of 22).

Almost six years later, on 3 June 2008, CO William G. Calhoun, Jr. issued a final decision, to the attention of Mr. Harms (R4, tab 9 at 1 of 5). The CO cited DCAA's Audit Report No. 3421-2002H42097001, the incorporated subcontractor Audit Report No. 2191-1998S42000315, and the same three bases for price adjustment asserted therein. He decided that MDS and Alsalam had failed to submit accurate, complete and current cost and pricing data as required by TINA and implementing contract provisions, thereby increasing the contract price by $2,024,877. He reduced the contract price by that amount and asserted that the Air Force was entitled to a refund in that amount, plus interest. (R4, tab 9)

On 17 June 2008 CO John L. Havrilla issued a final decision, now directed to the attention of Mr. Torbjorn Sjogren, said to confirm the 3 June 2008 decision. The CO stated that the Air Force had originally been informed that Mr. Harms represented MDS in the matter, but had been advised, after the 3 June decision, that Mr. Sjogren was its representative. The CO again demanded $2,024,877, plus interest, from MDS. (R4, tab 10 at 1, 3 of 7)

On 2 September 2008 MDS appealed to the Board from both COs' decisions. The Board docketed the appeals as the captioned ASBCA No. 56568.

DISCUSSION

The Parties' Contentions

Appellant contends that the undisputed material facts demonstrate that the government's claim is time-barred under the CDA's six-year statute of limitations and that appellant is entitled to summary judgment, or to dismissal of the government's claim with prejudice. Appellant asserts that the government had actual knowledge of all events establishing the elements of appellant's alleged defective pricing liability, and that therefore the government's claim had accrued, well more than eight years before the COs' final decisions issued.

The government responds that statutes of limitation potentially barring the government's rights must be strictly construed in its favor. It states that The Boeing Company had acquired McDonnell Douglas Services, Inc. by the time of the 17 June 2002 audit and therefore "had become the subject of" that DCAA Boeing Resident Office's prime contractor audit for defective pricing (gov't opp'n at 4). It alleges that a genuine issue of material fact remains concerning when the CO knew or should have known of all events that fixed the liability of the prime contractor for the actions of its subcontractor and that permitted the government to assert a "properly established" claim against the prime, with which it was in privity of contract (*id.* at 8). The government contends that it did not know the sum certain amount of damages for which MDS was allegedly liable prior to the 17 June 2002 final prime contractor audit report, to which MDS was entitled to respond. Ultimately, the government asserts that the date when the CO received that final prime contractor audit report (unclear but, by implication, on or about 17 June 2002) was the earliest possible claim accrual date that started the CDA's statute of limitations running (gov't opp'n at 8-9).

Appellant replies that: the CDA's statute of limitations and the FAR do not distinguish between the contractor and the government in terms of claim accrual; the $2,024,877 claim against the prime contractor was calculated at the latest by 14 May 2002, more than six years prior to the COs' decisions; in any event, calculation of a fixed sum certain is not a prerequisite to the accrual of a CDA claim; the government's underlying theory of liability was set long before 17 June 2002; and no input from MDS was necessary to calculate the claim, because, as the government acknowledged, in arriving at the $2,024,877 claim amount, it merely took the results of the 22 March 2001 audit report and added the previously negotiated MDS overhead and profit.

CDA's Statute of Limitations and Claim Accrual

The CDA requires that:

> 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. The preceding sentence does not apply to a claim by the government against a contractor that is based on a claim by the contractor involving fraud.

41 U.S.C. § 605(a). The "contractor" is a party to a government contract other than the government. 41 U.S.C. § 601(4). Both as of the 1997 contract at issue and now, FAR 33.206, Initiation of a claim, has provided:

> (b) The [CO] 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.

The CDA does not define "accrual" of a claim, but as of the 1997 contract at issue, FAR 33.201, Definitions, stated:

> Accrual of a claim occurs on the date when all events, which 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.

The current FAR 33.201 definition of "accrual of a claim" is virtually the same. *See Gray Personnel, Inc.*, ASBCA No. 54652, 06-2 BCA ¶ 33,378 at 165,475 (addressing regulatory history).

We do not accept the government's suggestion to the effect that we should interpret the CDA's six-year limitations period more liberally when a government claim is involved than when a contractor's claim is involved. Limitations principles generally apply to the government in the same way that they apply to private parties. *Franconia Associates v. United States*, 536 U.S. 129, 148 (2002) (referring to claim limitations period under the Tucker Act, 28 U.S.C. § 2501, which provides: "Every

claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.") The CDA and its implementing regulations do not distinguish between government claims and contractor claims with respect to the requirement that claims be asserted within six years after accrual, with the exception, inapplicable here, for government claims based upon a contractor claim involving fraud.

In evaluating when the claimed liability was fixed, we first examine the legal basis of the claim. *Gray Personnel*, 06-2 BCA ¶ 33,378 at 165,475. In a defective pricing claim the government is required to prove that: (1) the information in dispute is "cost or pricing data" under TINA; (2) the cost or pricing data was not meaningfully disclosed; and (3) the government relied to its detriment upon the inaccurate, noncurrent or incomplete data presented by the contractor. "[O]nce nondisclosure is established a rebuttable presumption arises that a contract price increase was a natural and probable consequence of that nondisclosure." *McDonnell Douglas Helicopter Systems*, ASBCA No. 50447 *et al.*, 00-2 BCA ¶ 31,082 at 153,465.

In 1996, twelve years before the 2008 COs' decisions at issue, Alsalam submitted its cost or pricing data in connection with the definitization of its subcontract price. On 30 April 1997 it certified its cost or pricing data as accurate, complete, and current. On 16 October 1997, in connection with the definitization of the prime contract, MDS certified its cost or pricing data as accurate, complete, and current. However, Alsalam allegedly failed, in 1996 or 1997, to submit the cost or pricing data at issue, said to have affected the definitized prime contract's price.

DCAA EBO's 31 July 1998 audit report, which was prepared for the Resident Auditor at MDS/Boeing and reflected that MDS had been acquired by The Boeing Company by that time, alleged two defective pricing failures: (1) that Alsalam did not disclose that 1998 labor cost estimates for the PS IX and C-130 programs should be included in its proposed site overhead allocation base and (2) that Alsalam did not exclude unallocable amortization costs (pre-operating costs) from its TSP overhead pool, both resulting in an overstated proposal price. These are two of the three stated bases for the government's defective pricing claim against MDS, asserted nearly ten years later in the COs' June 2008 decisions. Over eight years before those decisions, in its revised 3 May 2000 audit report, DCAA EBO added the third and last basis for the government's claim – that Alsalam had erroneously included Riyadh labor in its site overhead allocation base. Over seven years before the decisions, DCAA EBO's 22 March 2001 audit report, which reiterated the same three bases for the government's defective pricing claim, stated that DCAA had conferred with the CO about the matter. Finally, no later than 14 May 2002, over six years before the COs' decisions, DCAA's Resident Office communicated its defective pricing assessments to the prime contractor. DCAA's recommended contract price adjustment was $2,024,877, which was derived from the 22 March 2001 audit report's calculation, plus

the negotiated MDS overhead and profit rates. The COs claimed the same $2,024,877 amount in June 2008.

"Once a party is on notice that it has a potential claim, the statute of limitations can start to run." *Gray Personnel*, 06-2 BCA ¶ 33,378 at 165,476. When monetary damages are alleged, some extra costs must have been incurred before liability can be fixed and a claim accrued, but there is no requirement that a sum certain be established. *Id*.; *see also Parsons-UXB joint Venture*, ASBCA No. 56481 (slip. op. at 4) (Nov. 5, 2009); *Robinson Quality Constructors*, ASBCA No. 55784, 09-1 BCA ¶ 34,048 at 168,396, *recon. denied*, 09-2 BCA ¶ 34,171, *appeal docketed*, No. 10-1034 (Fed. Cir. Oct. 23, 2009).

Here, we do not need to determine a precise date on which the government was on notice of, was aware of, or should have been aware of, its potential defective pricing claim against the prime contractor, because the undisputed and uncontrovertible facts demonstrate that the government had established the basis for its defective pricing claim against the prime contractor well before, and definitely no later than, 14 May 2002, more than six years before the COs' June 2008 decisions issued. Furthermore, in connection with its motion, appellant has not disputed the government's contention that the alleged defective pricing increased the contract price. This occurred as of contract definitization, with the logical consequence that the government incurred increased costs when contract performance began and, again, definitely no later than 14 May 2002.

Accordingly, the government's defective pricing claim is time-barred under 41 U.S.C. § 605(a).

Consequences of Time-Barred Government Claim

As established, the government's defective pricing claim accrued more than six years prior to the COs' decisions asserting it and the claim is therefore time-barred under 41 U.S.C. § 605(a). It is not viable and cannot be considered. *See Arctic Slope Native Ass'n v. Sec'y of Health and Human Services*, 583 F.3d 785 (Fed. Cir. 2009); *Gray Personnel*, 06-2 BCA ¶ 33,378; *see also John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008) (addressing Tucker Act's six year claim limitations period). Because the government's defective pricing claim upon which the COs' decisions were based is time-barred and not cognizable under the CDA, the COs' decisions asserting the claim were not valid. If there is no valid CDA claim, any purported CO's decision on the matter is a nullity and we do not have jurisdiction to entertain an appeal from the purported decision. *See Paragon Energy Corp. v. United States*, 645 F.2d 966, 971 (Ct. Cl. 1981); *Birkart Globistics AG*, ASBCA No. 53458 *et al.*, 06-1 BCA ¶ 33,138 at 164,227; *Chandler Manufacturing and Supply*, ASBCA Nos. 27030, 27031, 82-2 BCA ¶ 15,997 at 79,312.

DECISION

We dismiss the appeal without prejudice for lack of jurisdiction under the CDA because the government's defective pricing claim is time-barred.

Dated: 2 December 2009

CHERYL L. SCOTT
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. 56568, Appeal of McDonnell Douglas Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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