ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
AshBritt, Inc.	)	ASBCA No. 56826
	)	
Under Contract No. W912P8-05-D-0025	)	

APPEARANCES FOR THE APPELLANT:
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OPINION BY ADMINISTRATIVE JUDGE SCOTT
ON APPELLANT'S MOTIONS TO DISMISS GOVERNMENT'S CLAIM

Appellant AshBritt, Inc. has filed several appeals under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, pertaining to its contract with the United States Army Corps of Engineers (Corps) for the removal, reduction and disposal of debris generated by Hurricane Katrina in Mississippi. The captioned appeal, which is consolidated with ASBCA Nos. 56145, 56250 and 56314, is AshBritt's appeal from the contracting officer's (CO's) final decision asserting an overpayment claim against the contractor, as set forth in the Corps' complaint. On 23 June 2009, appellant moved to dismiss the claim on the grounds that the Corps waived it because it is untimely, or that the claim is not one for which relief can be granted. On 22 July 2009, the Corps filed its opposition to the motions and, on 4 August 2009, appellant filed its reply.

Appellant does not contend that the Corps failed to file its claim within the CDA's 6-year limitation period, 41 U.S.C. § 605(a), and it has not moved to dismiss the claim for lack of jurisdiction. We thus find its waiver motion to be in the nature of an assertion of an affirmative defense. Moreover, in support of its motion to dismiss for failure to state a claim upon which relief can be granted, appellant has relied upon matters outside the pleadings. Accordingly, as set forth below, we have treated that motion as one for summary judgment. For the reasons stated, we deny both motions.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

Contract, Work and Payment

The parties agree that the devastation caused by Hurricane Katrina, beginning on 29 August 2005, required one of the largest debris removal operations in United States history (ASBCA Nos. 56145, 56250 (56145/56250) R4, tab B at 1; app. mot. at 2). On 15 September 2005, the Corps awarded AshBritt the subject indefinite delivery contract, which incorporated the contractor's proposal. The contract's maximum base period amount was $500 million; it contained an option for an additional $500 million. The contract generally provided that AshBritt would be paid under contract line item numbers (CLINs) for work performed. The parties negotiated CLIN 0001 (1001 for the option quantity), "DEBRIS REMOVAL FFP," at $17 per cubic yard (cy) of material removed. Orders were placed under the contract until the initial maximum amount had essentially been reached. On 18 March 2006, the Corps exercised its option. Orders were placed during the option period until the contract work was substantially complete on or about the first anniversary date of Hurricane Katrina. (56145/56250, R4, tab 2 at Bates 2, 3, 197; compl. ¶¶ 2-3)

The contract included the Federal Acquisition Regulation (FAR) 52.243-1, CHANGES--FIXED-PRICE (AUG 1987)-ALTERNATE I (APR 1984) clause, which provides in part:

> (a) The [CO] may at any time, by written order…make changes within the general scope of this contract in any one or more of the following:
>
> (1) Description of services to be performed.
>
> ....
>
> (b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the [CO] shall make an equitable adjustment in contract price, the delivery schedule, or both, and shall modify the contract.
>
> (c) The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if the [CO] decides that the facts justify it, the [CO] may receive and act upon a proposal submitted before final payment of the contract.

....

(e) Failure to agree to any adjustment shall be a dispute under the Disputes clause.

(56145/56250, R4, tab 2 at Bates 88) The contract contained the FAR 52.233-1 DISPUTES (JUL 2002) clause, which provides that the contract is subject to the CDA (56145/56250, R4, tab 2 at Bates 85).

By a series of contract modifications or amendments, the parties added CLIN 0005 (1005 for the option quantity) for "Leaners, Hangers, Stump Removals, and Back Filling Stump Holes," for the counties or cities where work was being performed. The parties negotiated and agreed upon prices for the various CLINs 0005/1005 as memorialized in the government's price negotiation memorandum (PNM). Under subCLINs, the Corps paid "per tree" or by the "each." For example, CLIN 0005AB, "Leaners and Stump Extraction," was priced based upon the size of the leaner, and payment was upon a per tree basis. CLIN 0005AC, "Stump Cavity Backfill," was priced on an "each" basis. (*E.g.*, 56145/56250, R4, tab 2.a at Bates 44; compl. ¶ 4) For each leaner (also referred to as "hazard tree"), the PNM stated that "[t]he Mobile estimate used as the GE [government estimate] was for cutting and leaving the stump in ground. The Ashbritt [sic] proposal is inclusive of stump extraction and is accepted as proposed" (app. mot., ex. 1 at Bates 4; compl. ¶ 5).

The Corps alleges that, as the work was performed, it recorded it on tree and stump (T&S) tickets (*see, e.g.*, app. mot., ex. 3 at 14-16) under CLINs 0005/1005, or subCLINs as appropriate, and paid AshBritt "per tree" or by the "each," and that it also paid AshBritt the per cy rate for debris removal under CLINs 0001/1001 for all material removed (compl. ¶ 6).

It is apparent from the parties' submissions and the appeal records that recording AshBritt's work under the emergency conditions, invoicing therefor, and reviewing the invoices for payment was complex and involved a voluminous amount of documentation and extensive efforts.

On 21 August 2007, the Board docketed AshBritt's appeal from the CO's deemed denial of its 24 May 2007 claim for allegedly unpaid T&S work, including backfilling voids, as ASBCA No. 56145. On 2 November 2007, the CO issued his decision that AshBritt was entitled to payment for certain work, subject to alleged government overpayments, no longer at issue due to settlement. He denied AshBritt's claim pertaining to backfill work after stump removal. On 13 November 2007, AshBritt appealed to the Board, which docketed the appeal as ASBCA No. 56250. On 27 December 2007, AshBritt filed its complaint in 56145/56250.

Corps' Counterclaim at Issue

On 14 April 2009, the Corps filed an "Amended Counterclaim in the Nature of a Setoff" in 56145/56250 and ASBCA No. 56314, which covers AshBritt's claim for alleged wrongful withholdings and failures to pay invoices. The Corps averred that, within the last month of discovery, it had learned that AshBritt deemed that certain work that did not require stump removal was to be paid only at the contract rate for debris removal. However, the Corps had paid both that rate and a per tree rate. The Corps alleged that the per tree payments were erroneous. It sought return of the overpayments, in an amount to be calculated during the quantum portion of the appeals. On 20 April 2009, appellant objected that there was no pending counterclaim for the Corps to amend because its prior counterclaims had been dismissed following the parties' settlement. Appellant also alleged that the Board lacked jurisdiction over the current counterclaim because it had not been the subject of a CO's decision.

The Corps undertook promptly to secure the CO's decision, which he issued on 11 May 2009 (ASBCA No. 56826, Bd. corr. file). Among other things, the CO sought to recover the payments alleged to have been erroneously made when certain "leaner" trees were flush cut with the ground and no stump extraction was performed. The CO determined that the government was entitled to a price adjustment of $29,762,643.12, to be applied as a credit or offset against appellant's claim in 56145/56250, should the Board find that it had any merit. On 12 May 2009, AshBritt appealed to the Board, which docketed the appeal as ASBCA No. 56826, consolidated it with 56145/56250 and 56314, and directed the Corps to file a complaint.

In its 1 June 2009 complaint, the Corps asserted a claim, no longer described as an amended counterclaim, as follows:

> 8. The denial of AshBritt's claim [in 56145/56250 for backfilling voids and unpaid T&S work] was based in part on the determination that stump extraction was not required or performed for every leaner tree, or that not all stump hole backfills were filled in accordance with the requirements of the Leaner/Hanger modifications. Many leaner, or hazard, trees were "flush cut" and no stump extractions were performed. Where leaners were flush cut, there would be no holes to backfill.
>
> 9. AshBritt's theory for recovery under [56145/56250] rests on the assertion that every leaner should have an associated backfill, that AshBritt was not paid for a backfill for every leaner, and that the Respondent

> should pay AshBritt the value of a "Stump Hole Backfill" in all instances where payment for a backfill did not correspond with a leaner.
>
> 10. During contract performance, AshBritt considered that any work performed under CLIN 0005 which did not require the extraction of the tree's stump because of a flush cut, should only be paid for at the yardage rate contained in CLIN 0001/1001. Notwithstanding this position AshBritt billed, was paid, and accepted payment for the work performed under CLIN 0005 at the "per tree" rate in addition to the "per cubic yard" rate under CLIN 0001/1001.
>
> 11. If AshBritt proves under [56145/56250] that every leaner should have stump extraction and associated backfill, then the Government constructively changed the contract by allowing AshBritt to flush cut leaners and not requiring a stump extraction. Accordingly, the Respondent is entitled to an equitable adjustment for any decrease in cost as a result of not having to extract the stump because AshBritt flush cut the leaner tree.

(Compl. at 2-3) The Corps alleged that the exact amount due the government would be determined at the hearing but it projected the amount at $29,762,643.12, as claimed in the CO's decision.

DISCUSSION

The Parties' Contentions

Appellant contends that the Corps has waived its claim because it is untimely and appellant has been prejudiced by the delay. Appellant also alleges that the claim is not one upon which relief can be granted because it rests upon the contractor's successful litigation of its own claims and because there is no evidence to support the Corps' claim. Appellant cites to five exhibits attached to its initial brief.

The Corps counters, among other things, that it learned of the facts pertinent to its claim in March 2009 during the course of discovery on appellant's claims in 56145/56250, and that appellant is not justified in characterizing the Corps' claim as untimely when appellant's own claim, filed on 27 December 2007, rests upon T&S tickets that were created as early as January 2006. The Corps alleges that appellant is not prejudiced in that both parties will rely upon the same T&S tickets in support of

their claims. The Corps also contends that appellant's motion to dismiss for failure to state a claim is tantamount to a motion for summary judgment, that material facts are in dispute, and that judgment on the merits is not warranted prior to a full evidentiary hearing. The Corps cites to five exhibits attached to its opposition brief.

Motion to Dismiss Government Claim as Untimely

The Changes clause, upon which the Corps principally relies[1], contains no deadline by which the government must file a claim. Even in the case of a contractor's claim, which, under the clause, is to be asserted within 30 days from the contractor's receipt of a change order, the CO has discretion to act upon a change proposal received before final contract payment. Appellant refers to several cases that cite the seminal case of *Roberts v. United States*, 357 F.2d 938 (Ct. Cl. 1966), for the proposition that the CO cannot delay unreasonably in bringing a claim under the Changes clause. In *Roberts*, after a trial, the court held that the government had waived its counterclaim for savings to the contractor from contract changes because the Changes clause required the CO to act within a reasonable time, to allow the contractor to appeal while the facts were still readily available and before it was prejudiced by final settlement with subcontractors, suppliers and other creditors, and the CO had not done so. The government had known of the savings before contract completion and long before its claim. *Roberts*, 357 F.2d at 946-47. However, not only are appellant's cases distinguishable, but they were all decided after a trial, hearing, or evidentiary submission on the merits. Some found in favor of the government, and none support the pre-hearing dismissal appellant seeks. Indeed, there is as yet no evidence that appellant has been prejudiced as it alleges.

Accordingly, we deny appellant's motion to dismiss the government's claim as untimely.

Motion for Summary Judgment

A motion to dismiss for failure to state a claim upon which relief can be granted, which would be a dismissal on the merits, is treated as one for summary judgment when the movant, as here, relies upon matters outside the pleadings. Summary judgment is not appropriate if there are genuine issues of material fact. The movant must show that there is an absence of evidence to support the non-movant's case, and we draw all reasonable inferences against the movant.

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[1] The Corps also contends that if, as appellant alleges, a "leaner" requires both tree removal and stump extraction, then appellant was not complying with the contract when it flush cut the leaners and the government would be due an adjustment under the contract's FAR 52.246-4, INSPECTION OF SERVICES—FIXED-PRICE (AUG 1996) clause (56145/56250, R4, tab 2 at Bates 25).

Dick Pacific/GHEMM, JV, ASBCA No. 55829, 08-2 BCA ¶ 33,937 at 167,941-42 (collecting cases).

It is apparent from the record and the parties' briefs that material facts are in dispute that preclude summary judgment in appellant's favor on the Corps' counterclaim. For example, the Corps disputes appellant's following allegations: the Corps misrecorded or failed to record the number of stumps that were backfilled (app. mot. at 3); December and January 2005 T&S modifications and other contractual documents and correspondence clearly establish a "leaner/stump/backfill relationship" and AshBritt relied upon that relationship (*id*. at 5); a "leaner" requires both tree removal and stump extraction (*id*. at 6); an author of an AshBritt e-mail had no authority to speak on its behalf or to bind it contractually (*id*. at 12); and compliance with Federal Emergency Management Agency rules or guidelines is irrelevant to appellant's and the government's claims (app. reply at 5).

Accordingly, we deny appellant's motion for summary judgment.

DECISION

We deny appellant's motions to dismiss the government's claim as untimely and for summary judgment.

Dated: 28 September 2009

CHERYL L. SCOTT
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMPLER
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. 56826, Appeal of AshBritt, Inc., rendered in conformance with the Board's Charter.

Dated:

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