ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Todd Pacific Shipyards Corporation	)	ASBCA Nos. 55126, 56910
	)	
Under Contract No. N00024-01-C-4115	)	

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OPINION BY ADMINISTRATIVE JUDGE SCOTT
ON GOVERNMENT'S MOTIONS TO DISMISS FOR LACK OF JURISDICTION

BACKGROUND

ASBCA No. 55126 covers Todd Pacific Shipyards Corporation's (Todd's) appeal under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, from the contracting officer's (CO's) denial of its 28 March 2005 certified claim for $5,990,000 under its subject contract with the United States Navy for advance planning and potential repair and alteration of Auxiliary Oiler Explosive (AOE) class ships. Todd seeks costs pertaining to its Dry Dock No. 3, or "Emerald Sea," dry dock. In *Todd Pacific Shipyards Corp*., ASBCA No. 55126, 06-2 BCA ¶ 33,421 (*Todd I*), we denied the Navy's motion to dismiss portions of ASBCA No. 55126 for lack of jurisdiction on the alleged ground that Todd's complaint had resulted in a revised claim that failed to state a sum certain. In *Todd Pacific Shipyards Corp*., ASBCA No. 55126, 08-2 BCA ¶ 33,891 (*Todd II*), we granted the Navy's motion in ASBCA No. 55126 for summary judgment in part and we otherwise denied it.

In a 19 February 2009 supplemental response to the Navy's discovery request for the process by which Todd had calculated its claim, Todd increased the amount of its

claim to $10,952,000, based upon a method revised from that in its 28 March 2005 claim. On 23 March 2009 the Navy moved to dismiss the revised claim for lack of jurisdiction on the ground that it was a new claim that Todd had not submitted to the CO for decision. The Navy contended that Todd had not met its burden to prove that the increased claim amount was based upon information unavailable to it as of its 28 March 2005 claim and that the revised claim did not depend upon new underlying operative facts. Todd opposed the motion.

On 4 June 2009 Todd submitted a "protective" certified claim to the CO in the amount of $10,952,000. The Board docketed its appeal from the CO's deemed denial of the claim as ASBCA No. 56910, consolidated it with ASBCA No. 55126, and tabled its decision on the Navy's motion to dismiss the revised claim in No. 55126, subject to later consideration should calculation of any CDA interest due Todd become relevant.

On 26 October 2009 the Navy moved to dismiss Todd's "new" 4 June 2009 claim for lack of jurisdiction on the ground that it is time-barred by the CDA's six-year statute of limitations, 41 U.S.C. § 605(a). Todd opposed the motion. On 2 December 2009 the Board requested supplemental briefing on the application, if any, of *Arctic Slope Native Ass'n v. Sec'y of Health and Human Services*, 583 F.3d 785 (Fed. Cir. 2009), and the doctrine of equitable tolling. The Board also noted that Todd had not addressed the Navy's characterization of its claim as a "new" claim and directed Todd to advise whether it now conceded that its augmented claim in ASBCA No. 55126 was a new claim and/or that its 4 June 2009 claim was such a new claim.

In its 22 December 2009 memorandum regarding the doctrine of equitable tolling, Todd stated: "The Board's Order also required Todd to advise whether it now concedes that its $10,952,000 claim is a "new" claim under the [CDA]. Todd does concede that it is a new claim." (Mem. at 1 n.1)

In view of Todd's concession that its $10,952,000 claim is a new claim under the CDA and of the Navy's motion to dismiss ASBCA No. 56910, we have resumed our consideration of the Navy's 23 March 2009 motion to dismiss the revised claim under ASBCA No. 55126.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS[1]

The Contract and Emerald Sea Dry Dock Cost Accounting/Reimbursement Issues

In performing predecessor government contracts involving AOEs, under its standard accounting procedures, Todd allocated dry dock costs as indirect costs based upon dry dock usage, with a factor for vessel weight and, in the case of the Navy's AOEs, a special "multiplier." For at least 12 years prior to its 28 March 2005 claim, this had been Todd's consistent practice in allocating its general Emerald Sea costs to individual contracts, both government and commercial. Todd's treatment of its dry dock costs as indirect costs was reflected in its certified incurred cost submissions to the government. (*Todd II* at 167,735-36)

At the time the new contract was under discussion, it was clear to both parties that the Emerald Sea dry dock would need substantial work to be usable for the contract. Todd's expenditures to upgrade, alter, repair and maintain the Emerald Sea to service the AOE vessels under the contract were not the type of routine costs incurred in the past. They were extraordinary. (*Todd II* at 167,736)

Todd alleges that, beginning in about March 2001, it engaged in discussions with one Navy employee in particular, which involved, among other matters, Todd's anticipated expenditures to maintain the Emerald Sea dry dock to have it available under the contract, and a change to the methodology for reimbursing the costs of repairing and maintaining the Emerald Sea. The CO denies knowledge of the alleged discussions beginning in March 2001. (*Id*. at 167,737-38)

On 14 June 2001 the Naval Sea Systems Command (NAVSEA) awarded the subject cost-reimbursement type contract to Todd. It included base services to be performed in government fiscal years (FYs) 2001 and 2002 and 24 options, extending through FY 2007. (*Id*. at 167,739, 167,741) Four of the options in the contract at award, pertaining to the USS SACRAMENTO, USS RAINIER, USS BRIDGE and USS CAMDEN, were for ship repair and alteration work that included dry docking. If the government exercised the options, it was to deliver the vessels to Todd's plant on or about 21 January 2004, 6 October 2004, 6 April 2005 and 5 October 2005, respectively. (*Todd II* at 167,741)

The contract incorporated by reference the Federal Acquisition Regulation (FAR) 52.216-7, ALLOWABLE COST AND PAYMENT (MAR 2000) clause, which provides in part that the "Government shall make payments to the Contractor when requested as work

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[1] Many of the following facts are derived from the Board's decision in *Todd II*, which contains the citations to the record.

progresses...in amounts determined to be allowable by the [CO] in accordance with Subpart 31.2 of the [FAR]" (*Todd II* at 167,739).

During the periods covered by Todd's claims in these appeals, contractor's fiscal years (CFYs) 2002-2005, the contractor's fiscal years ended on or about 31 March (*see, e.g.,* R4, tab 53 at GOV469, -474, tab 65 at GOV569, tab 85 at GOV4513, -4480).

On 21 March 2002, Todd submitted a Proposal to Eliminate Dry Dock Multiplier Discussion Outline to the Navy. According to the CO, this was the first time he had received any indication from Todd that it wished to discuss a different methodology of allocating Emerald Sea dry dock costs, and Todd raised the "dry dock multiplier" issue in connection with all of its dry docks, not just the Emerald Sea. (*Id*. at 167,743)

After March 2002, through Todd's 28 March 2005 claim, Todd engaged in discussions or communications with the government about its wish for an accounting change in its treatment of its Emerald Sea dry dock costs. The CO was the government's lead spokesperson in discussing Todd's various submittals relating to a possible new Emerald Sea dry dock cost allocation methodology. (*Todd II* at 167,749)

In or about June 2003 the parties bilaterally added dry docking to an option contract line item number (CLIN) covering the USS CAMDEN that originally had not included dry dock work. The option was exercised and definitized and Todd performed the dry docking from 2 through 18 August 2003, during CFY 2004— the only dry docking it performed under the contract. (*Todd II* at 167,741)

On 29 August 2003 the government transferred the USS RAINIER to the Military Sealift Command (MSC) (*id*. at 167,742; app. opp'n, ex. 1 at 1). The Navy provisionally exercised a dry dock option CLIN covering the USS SACRAMENTO but, on 19 December 2003, it notified Todd that it had decided to cancel that planned dry docking. Bilateral modifications effective in February and March 2004 reflected the change. (*Todd II* at 167,741-42) In 2004 the Navy transferred the USS BRIDGE to MSC and decommissioned the USS SACRAMENTO. On 1 October 2005 the government decommissioned the USS CAMDEN. With the transfer and decommissioning of the four AOEs, the government no longer needed any of the work specified in its unexercised options and it did not exercise any more. (*Id.* at 167,742) Todd was "very surprised" and "shocked" at the decommissioning of the AOEs and cancellation of their scheduled availabilities (*id*. at 167,743).

Initially, the fact that the Navy had not formalized a new cost reimbursement method was a "nuisance" to Todd and caused it cash flow difficulties that were not critical. The problem became much greater when the Navy began canceling ship availabilities and, under the old reimbursement procedures, there was no readily apparent

process for Todd to be reimbursed for its repair and maintenance of the Emerald Sea. Prior to the decommissioning of the AOEs and cancellation of availabilities, there was no suggestion that the actions were coming in a time frame that arguably might leave Todd without a mechanism to obtain Navy reimbursement of its prior expenditures for the Emerald Sea. (*Todd II* at 167,744)

Todd's Claims

On 5 March 2004 Todd submitted an $8.9 million "Drydock # 3 Settlement Proposal" to the CO seeking reimbursement for unrealized usage costs and unrecovered maintenance and operating costs of the Emerald Sea dry dock. Todd stated that, upon concluding contract negotiations in June, 2001, it had undertaken a five-year repair and maintenance project, estimated to cost $16 million, to ensure that the Emerald Sea would remain certified and ready to support all scheduled and potential emergent dry dockings covered by the subject contract. Todd alleged that it was clearly understood that the Navy would pay for the dry dock costs through direct charges or as unrecovered costs included in overhead. Todd alleged that it would not have committed to the project without $8.9 million in dry dock-related financial support it expected from the Navy but that, after signing the contract, the Navy decided to transfer and/or decommission the AOEs. Todd alleged that it had been discussing the need to change the Emerald Sea dry dock cost recovery methodology with the Navy for three years. (*Id*. at 167,744)

On 10 May 2004, after the Defense Contract Audit Agency (DCAA) had reviewed Todd's proposal, the CO requested more information and a certified proposal. On 18 June 2004, Todd submitted a "Drydock No. 3 Settlement Proposal (Revised)" in the amount of $9,318,462, said to be the Navy's share of Todd's allocable, reasonable, reimbursable costs under the contract for the Emerald Sea dry dock from CFY 2002 through CFY 2006. Todd stated that its rationale was the same as in its earlier proposal, with added recovery theories, including that the costs were reimbursable under the Allowable Cost and Payment clause. Todd certified its submission as a CDA claim. (*Id*. at 167,745; R4, tab 43 at GOV315-16, -319) In its 18 June 2004 claim, Todd set forth alleged unrecovered Emerald Sea dry dock costs as of that date, using claimed actual costs for CFYs 2002-2004 and projected costs for CFYs 2005 and 2006 (R4, tab 43 at GOV326).

The CO did not issue a decision on Todd's 18 June 2004 claim, which the parties attempted to settle over a period of several months (*Todd II* at 167,745-48). By letter to the CO dated 28 March 2005, referring to its 18 June 2004 claim and to numerous meetings with the Navy and DCAA, Todd submitted its "Drydock # 3 Settlement Proposal (Revision 2)" in the amount of $5,990,000, covering CFYs 2002-2005, which it certified as a CDA claim and described as a means of resolving its 18 June 2004 claim (R4, tab 60 at GOV512, 520). The claimed $5,990,000 included $4,502,000 in

NAVSEA certification-related costs; $620,000 for a revised, two-rate, AOE dry dock allocation methodology; $267,000 to correct billing errors in 2002 and 2004; and $600,000 in unabsorbed dry dock costs during the planned USS SACRAMENTO availability period that did not eventuate. (*Todd II* at 167,748) Todd referred to its 18 June 2004 claim for its various grounds for entitlement. It alleged, among other things, that its claimed costs were recoverable under the contract as direct costs. (*Id.* at 167,749, 167,752; *see* R4, tab 60 at GOV515-517)

By final decision dated 31 May 2005, the CO denied Todd's 28 March 2005 claim (*Todd II* at 167,749). He also addressed Todd's 18 June 2004 claim and delineated how it lacked merit in the government's view (R4, tab 66 at GOV574-75). Todd's appeal from the CO's decision, designated as ASBCA No. 55126, ensued.

On 19 June 2008, in *Todd II*, we granted the Navy's motion for summary judgment in part on various of Todd's proffered theories of entitlement, but we denied summary judgment on its direct cost claim under the contract, stating:

> For summary judgment purposes, the Navy has accepted that: appellant's expenditures to upgrade, alter, repair and maintain the Emerald Sea dry dock in order to service AOE vessels were extraordinary due to the age and deteriorating condition of the dry dock and were necessary solely to prepare it for AOE availabilities, not to perform commercial work. We have an expert opinion before us that, under these circumstances, an accounting change was appropriate and that the Emerald Sea dry dock certification costs were properly chargeable to the subject contract as direct costs. We have no conflicting expert opinion.
>
> Moreover, for summary judgment purposes, the Navy has also accepted that, in anticipation of the subject contract, appellant discussed with it the need for substantial repairs to the Emerald Sea dry dock and their high cost, and that, beginning in about March 2001, which was prior to contract award, appellant engaged in discussions with the Navy regarding a change to the methodology for reimbursing the costs of repairing and maintaining the Emerald Sea. We have not located in the record, or been directed to, the parties' forward pricing rate agreements or direct documentation concerning whether the contract years in question were closed when appellant sought to change its accounting methodology.

> Thus, the record to date is insufficient for us to determine whether the accounting change appellant sought was warranted, prospective, allowable, and unreasonably denied, as it asserts, or was unjustified and impermissibly inconsistent and retroactive, as the Navy contends….
>
> Due to the need for more development of the material facts, the Navy is not entitled to summary judgment on appellant's direct cost claim under the base contract.

Todd II at 167,753-54 (citations omitted).[2]

In Todd's 19 February 2009 supplemental response to the Navy's discovery request concerning the process by which it had prepared its claim calculations, a Summary of Damages page included the following alleged incurred costs during 2002-2005 on the Emerald Sea: "Multiplier Pool Costs," capital improvements and applied general and administrative expense (G&A); less depreciation on capital improvements and G&A applied to depreciation; less revenue recovered on Navy and commercial dockings (largely negative figures); plus 9.5% profit on net unrecovered costs, resulting in the total claimed amount of $10,952,000 (R4, tab 84 at GOV3877).

On 23 March 2009 the Navy moved to dismiss the revised claim on the ground that it was a new claim and on 4 June 2009 Todd submitted its "protective" certified claim to the CO in the amount of $10,952,000. Todd characterized its increased claim as "an alternate, revised calculation" (R4, tab 85 at GOV4461) and stated that, as it had previously notified the Navy, it was dropping all but the first part of its 28 March 2005 claim, the NAVSEA certification-related costs of $4,502,000, which remained as an alternative to the $10,952,000 claim (R4, tab 85 at GOV4461 n.1). Thus, Todd abandoned the portions of its claim that sought $620,000 for a revised, two-rate, AOE dry dock allocation methodology, $267,000 to correct billing errors, and $600,000 in unabsorbed dry dock costs during the planned USS SACRAMENTO availability period.

Todd's 4 June 2009 claim alleged that, for FYs 2002-2005, it had spent $15,348,000 to upgrade, alter, repair and maintain the Emerald Sea and that, to mitigate the costs the Navy was required to reimburse, it had performed non-contract work in the dry dock. Todd stated that, during FYs 2002-2005, it had received revenues from Navy dockings that reimbursed dry dock costs of $504,000, and from commercial dockings that resulted in profit of $4,841,000, leaving net unrecovered costs for maintenance, repair

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[2] We also denied the Navy's motion for summary judgment on Todd's "two-rate" and "billing errors" claims (*id*. at 167,758-59).

and upgrade of the Emerald Sea of $10,002,000, plus 9.5% profit, for a total claim of $10,952,000[3]. (R4, tab 85 at GOV4464-65)

Todd reiterated rationales for recovery presented in its prior claims and noted that the direct cost reimbursement it claimed was an accounting change from the previous reimbursement methodology under which it had recovered dry dock repair and improvement costs as indirect costs through formulae based upon ship size, weight, etc., determined at the time of ship dockings. It urged that the accounting change was warranted, prospective and allowable under the contract's Allowable Cost and Payment clause and related regulations, not impermissibly inconsistent and retroactive, and that "[u]nder this cost reimbursement type of contract, the Navy must reimburse" the claimed costs. (R4, tab 85 at GOV4466) In addition to cost calculations and information submitted with its 19 February 2009 discovery response, Todd appended reports by its proffered experts, Patrick A. McGeehin and Darrell J. Oyer, on the accounting issues (R4, tab 85 at GOV4468, 4470-518; *see also* R4, tab 84). Mr. Oyer's report includes his understanding that indirect cost rates have not been finalized since 2001 (R4, tab 85 at GOV4503). The government has not alleged or provided evidence that any of the contractor's fiscal years in question have been closed.

MOTION TO DISMISS IN ASBCA NO. 55126

Appellant has now abandoned the portions of its 28 March 2005 claim that sought $620,000 for a revised, two-rate, AOE dry dock allocation methodology, $267,000 to correct billing errors, and $600,000 in unabsorbed dry dock costs during the planned USS SACRAMENTO availability period. Appellant also has conceded that its later increase in its claim to $10,952,000 was a "new" claim under the CDA. Appellant persists in the portion of its 28 March 2005 claim that sought $4,502,000 in Emerald Sea dry dock certification-related costs and advances it as an alternative to its $10,952,000 claim in ASBCA No. 56910.

DECISION ON MOTION TO DISMISS IN ASBCA NO. 55126

We dismiss with prejudice the portions of ASBCA No. 55126 that pertain to appellant's abandoned claims, above, of $620,000, $267,000 and $600,000. We dismiss the portion of ASBCA No. 55126 that pertains to appellant's $10,952,000 new claim without prejudice for lack of jurisdiction because, at the time appellant revised its claim in that appeal, it had not submitted the resulting new claim to the CO for decision as required by the CDA, 41 U.S.C. § 605(a). The portion of ASBCA No. 55126 concerning

[3] Todd's stated figures actually result in net unrecovered costs of $10,003,000, plus 9.5% profit, for a total claim of $10,953,285, but the discrepancy is immaterial.

appellant's claim for $4,502,000 in Emerald Sea dry dock certification-related costs remains before us.

MOTION TO DISMISS ASBCA NO. 56910

DISCUSSION ON CLAIM ACCRUAL

The Parties' Contentions

The government contends that appellant's 4 June 2009 claim accrued in March 2001 when it began to seek an accounting change regarding its dry dock costs, more than six years before it submitted the claim to the CO, and thus is time-barred under the CDA.

Appellant counters that its claim is for breach of its contract, which the parties entered into on 14 June 2001, and that the claim could not have accrued prior thereto. Appellant notes that a breach of contract claim accrues on the date when all events have occurred that permit a contractor to claim breach, including actual injury. Appellant contends that, in contrast to a claim for extra costs due to a contract change, for example, such as that at issue in *Gray Personnel, Inc.*, ASBCA No. 54652, 06-2 BCA ¶ 33,378, appellant is seeking costs due under its base contract, which required the Navy to reimburse its Emerald Sea dry dock costs, but did not specify the reimbursement method. Thus, according to appellant, the determinative factor for claim accrual purposes is the point at which appellant sustained an injury after the government's contract breach.

Appellant alleges that although, historically, it had been reimbursed for its dry dock costs through indirect markups on work performed during the docking of Navy vessels, it had understood, based upon discussions before and after contract execution, that the Navy would reimburse it in a different manner under the subject contract, divorced from AOE dockings, which were not scheduled to occur until two to four years after contract execution. Ultimately, after contract award, the parties had several discussions about reimbursement methodologies but they did not agree upon one.

Appellant urges that the Navy's failure to agree to a new reimbursement method could not be deemed to be a breach of its contract as long as it could still recover its Emerald Sea costs through the "provisional method" of indirect markups on vessel dockings (ASBCA No. 56910, opp'n at 2). Appellant alleges that its claim accrued, at the earliest, on 29 August 2003, when the Navy first began to transfer or decommission the AOEs that were expected to be serviced under the contract. Appellant identifies this as the first point at which there was a combination of the Navy's failure to agree upon a new accounting methodology and a cancellation of a planned dry docking, such that appellant would not be able to recover its costs under its historical accounting method.

Appellant further contends that, arguably, it could not have asserted breach until 31 May 2005, when the four AOEs had been transferred or decommissioned and it clearly was not going to be able to recover its costs because the CO had denied its 28 March 2005 compromise claim, after appellant thought that settlement had been reached. Appellant asserts that its protective 4 June 2009 claim was timely filed within the CDA's six year limitations period under either the 29 August 2003 or the 31 May 2005 claim accrual dates.

Accrual of Appellant's Claim

The CDA requires in pertinent part that "[e]ach claim by a contractor against the government relating to a contract...shall be submitted within 6 years after the accrual of the claim." 41 U.S.C. § 605(a). Subject to any tolling of this period, a contractor's timely submission of a claim to the CO is "a necessary predicate" to the Board's exercise of jurisdiction under the CDA. *Arctic Slope*, 583 F.3d at 793. FAR 33.201 defines "accrual" as follows:

> "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.

In evaluating when the claimed liability was fixed, we first examine the legal basis of the claim. *Gray Personnel, Inc.*, 06-2 BCA ¶ 33,378 at 165,475. Appellant claims breach of contract, specifically breach of the Allowable Cost and Payment clause, which provides that the "Government shall make payments to the Contractor when requested as work progresses."

Generally, a cause of action for breach of contract accrues at the time of the breach. *Franconia Associates v. United States*, 536 U.S. 129, 141-42 (2002); *Gray Personnel,* 06-2 BCA ¶ 33,378 at 165,476. Contrary to the government's contention that appellant's claim accrued in March 2001, prior to contract award in June 2001, a breach of contract cannot occur before the contract is formed. *RGW Communications, Inc. d/b/a Watson Cable Co.*, ASBCA Nos. 54495, 54557, 05-2 BCA ¶ 32,972 at 163,332. There is no breach of the Allowable Cost and Payment clause until the contractor requests payment and the government fails to pay. *See Parsons-UXB Joint Venture,* ASBCA No. 56481, 09-2 BCA ¶ 34,305 at 169,459 (concerning rejected invoices for tax assessment reimbursements).

On the record before us, we do not know when appellant first requested payment in accordance with the Allowable Cost and Payment clause and the government failed to pay. If the first request was through appellant's 5 March 2004 proposal to the CO seeking reimbursement for its Emerald Sea dry dock costs, then its claim is clearly not time-barred.

DECISION ON MOTION TO DISMISS ASBCA NO. 56910

Accordingly, we deny the government's motion to dismiss, without prejudice, subject to further development of the facts at the upcoming hearing commencing 8 March 2010. In view of our disposition of the government's motion, we do not reach any question of equitable tolling.

Dated: 1 February 2010

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 Nos. 55126, 56910, Appeals of Todd Pacific Shipyards Corporation, rendered in conformance with the Board's Charter.

Dated:

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