

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of--)
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Qatar International Trading Co.) ASBCA No. 55518
)
Under Contract No. F38604-05-M-R425)

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Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES
UNDER BOARD RULE 11

This appeal arises from the contracting officer's (CO) 29 April 2006 final decision that denied Qatar International Trading Co.'s (QIT) \$319,901.29 claim for payment of its invoices dated 21 August 2005 and 13 October 2005, except for \$1,006.27 under the August invoice. The Board has jurisdiction of the appeal under the Contract Disputes Act of 1978, 41 U.S.C. § 607. The parties elected to have the Board decide the appeal on the record pursuant to Board Rule 11. The record includes the Rule 4 documents and supplemental documents of both parties, including stipulations at tab 2 of respondent's supplemental Rule 4 file, the parties' Rule 11 briefs and reply briefs and the parties' 9 February 2009 ADR position papers, at their joint request.¹ We decide entitlement only (Bd. corr. ltr. dtd. 2 Sept. 2008).

FINDINGS OF FACT

1. On 14 October 2004 the U.S. Air Force 447th Air Expeditionary Group/Contracting (AEG/ECONS), Camp Sather, Baghdad International Airport, Iraq, generated a "Request for Purchase" for "Thuraya Satellite Phone contract renewal" from February through December 2005 of an unidentified "cur[r]ent contract end 31Jan05" for five phone numbers: 8821666664714, -4731, -4733, -4735 and -4736 (R4, tab 1).

¹ The Board grants appellant's request to strike the 10 June 2009 e-mail attached to respondent's reply brief as being untimely.

2. The appeal record does not identify the current contract to be renewed and does not include the “RFQ” solicitation issued by AEG/ECONS to QIT, QIT’s quote to AEG/ECONS and the record of negotiations between the parties for such Thuraya satellite phone contract.

3. Effective 1 February 2005 AEG/ECS awarded Contract No. F38604-05-M-R425 (the contract) to QIT, Baghdad, Iraq, to provide “Thuraya Phone Service” from 1 February 2005 through 30 September 2005, including material, labor, equipment and administration, for five government-owned Thuraya satellite cell phones numbered (88216) 6666-4714, -4731, -4733, -4735 (phone 4735) and -4736. The contract was awarded under FAR subpart 13.2 for commercial items outside the U.S. on Standard Form 1449 (SF 1449) within the micro-purchase threshold of \$25,000. Delivery was f.o.b. destination. (R4, tab 2 at 1-3; stip. ¶¶ 3, 4; app. supp. R4, tab 2 ¶ 5, tab 18 at 294; gov’t ADR paper at 8; app. ADR paper ¶ 1)

4. QIT’s headquarters is in Doha, Qatar. QIT acquired satellite phone services from Qatar’s telephone company, Qatar Telecom (“QTEL”), which in turn obtained satellite services from Thuraya Satellite Telecommunications Co., a United Arab Emirates, satellite-based mobile telephone services provider (stip. ¶ 1). Subcontracts or agreements between QIT and QTEL and between QTEL and Thuraya are not in the appeal record.

5. SF 1449, Block 26, “TOTAL AWARD AMOUNT...” stated “NTE \$25,000.00.” The contract schedule designated in SF 1449, Block 20, stated:

<u>ITEM NO.</u>	<u>SUPPLIES/SERVICES</u>	<u>QUANTITY</u>	<u>UNIT</u>	<u>UNIT PRICE</u>	<u>AMOUNT</u>
0001	Monthly Thuraya Phone Service (Estimated)	8	MO	\$2,825 (EST)	\$22,600.00 (EST)
0002	Monthly Agent Fee (Fixed)	8	MO	\$300 (Fixed)	\$2,400.00 (Fixed)

Beneath items 0001 and 0002, the stated contract amount and funded amount both were “NTE \$25,000.00.” (R4, tab 2 at 1-2; stip. ¶ 4) The items were to be delivered for government acceptance at Camp Sather (R4, tab 2 at 3, 11). QIT knew prior to contract formation that “NTE” meant “not-to-exceed.” QIT had no mechanisms in place to ensure that QTEL and Thuraya would not exceed such NTE amount (app. supp. R4, tab 18 at 1-2).

6. The contract included the following pertinent FAR clauses (R4, tab 2 at 4-9):

52.212-4 CONTRACT TERMS AND CONDITIONS—
COMMERCIAL ITEMS (FEB 2002)

....

(i) Payment. Payment shall be made for items accepted by the Government that have been delivered to the delivery destinations set forth in this contract....

(j) Risk of loss. Unless the contract specifically provides otherwise, risk of loss or damage to the supplies provided under this contract shall remain with the Contractor until, and shall pass to the Government upon:

(1) Delivery of the supplies to a carrier, if transportation is f.o.b. origin; or

(2) Delivery of the supplies to the Government at the destination specified in the contract, if transportation is f.o.b. destination.

....

(l) Termination for the Government's convenience. The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate, to the satisfaction of the Government using its standard record keeping system, have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the Contractor's records. The Contractor shall

not be paid for any work performed or costs incurred that reasonably could have been avoided.

....

(o) Warranty. The Contractor warrants and implies that the items delivered hereunder are merchantable and fit for use for the particular purpose described in this contract.

(p) Limitation of liability. Except as otherwise provided by an express or implied warranty, the Contractor will not be liable to the Government for consequential damages resulting from any defect or deficiencies in accepted items.

....

52.213-3 NOTICE TO SUPPLIER (APR 1984)

This is a firm order ONLY if your price does not exceed the maximum line item or total price in the Schedule. Submit invoices to the [CO]. If you cannot perform in exact accordance with this order, Withhold Performance, and notify the [CO] immediately, giving your quotation.

....

52.232-11 EXTRAS (APR 1984)

Except as otherwise provided in this contract, no payment for extras shall be made unless such extras and the price therefore [sic] have been authorized in writing by the [CO].

....

252.233-7001 CHOICE OF LAW (OVERSEAS) (JUNE 1997)

This contract shall be construed and interpreted in accordance with the substantive laws of the United States of America....

7. To perform satellite phone services, at the time services commenced QIT had provided AEG/ECONS with "SIM" (Subscriber Identity Module) cards to be inserted in

each of the five satellite cell phones (stip. ¶ 6; app. supp. R4, tab 1 at 43-44). A SIM card stores cellular telephone subscribers' user identity, location and phone number, network authorization data, personal security keys, contact lists and text messages. Its security features include authentication and encryption to protect data and prevent eavesdropping. (Stip. ¶ 6) When QIT ordered the Thuraya satellite SIM cards from QTEL, QIT did not disclose to QTEL that QIT was providing the SIM cards to U.S. Air Force personnel, their unit or mission (stip. ¶ 7). The record does not reveal the "user identity" and "location" for any of the SIM cards used in the five satellite cell phones.

8. The "cloning" of a cellular telephone occurs when the account number of a telephone user is stolen and reprogrammed into another cellular telephone. Each cellular phone has two unique numbers: the electronic serial number (ESN) programmed into the phone's microchip, which cannot be altered, and the mobile identification number (MIN), a 10-digit phone number assigned to the customer by the carrier, which can be changed. The ESN/MIN pair can be cloned without the knowledge of the subscriber by electronic scanning devices (digital data interpreters) that intercept and record the ESN/MIN pair, which can be downloaded to a computer that reprograms the microchip of another cellular phone to create a clone of the phone from which the ESN/MIN pair was stolen. In cellular cloning cases, actual loss is generally the amount of fraudulent billing for each cloned ESN/MIN pair. (R4, tab 39 at iv, 5, 11)

9. The Thuraya satellite cell phones under the contract were assigned to the Expeditionary Detachment (EDet) 2408 at Baghdad, which kept the phones in a common area near the Information Manager's desk. Such phones could be taken and used by individuals at any time without anyone's knowledge. (Stip. ¶¶ 8, 14) Phone 4735 was assigned to Behnam "Billy" Rasho, an EDet 2408 contract linguist (app. supp. R4, tab 1 at 21; supp. R4, tab 4).

10. On 18 July 2005 Mr. Dwain Brown, QIT's Operational Manager, notified the CO, TSGT Eric Williams, that July cell phone usage totaled more than \$100,000, without identifying the contract or cell phone number generating such usage (R4, tabs 7, 16). It was then evident to QIT that Thuraya had some real-time traffic monitoring capabilities (app. supp. R4, tab 18 at 4).

11. On 20 July 2005 Mr. Brown informed CO Williams that phone number 4735 generated the July calls. EDet/OSI told CO Williams that no one had used any of their Thurayas since April 2005. He did not direct QIT to terminate services or unilaterally terminate the contract. (Stip. ¶¶ 13-14)

12. Three hundred ninety-eight (398) calls were made on phone 4735 from 30 June through 14 July 2005; 52 calls were made on 14 July 2005 before continuous transmissions began at 21:49:15 hours; and "one or both of the USAF's Arabic

interpreters, or other persons authorized by the USAF” made three calls to # 96392903185 in Syria, two on the “Visit GSM” network and the third, at 20:28:51 hours, on the “Visit Thuraya” network Thereafter, calls to Iraq on phone 4735 ceased. (R4, tab 13 at 9; stip. ¶¶ 52-53)

13. On 31 July 2005 QIT paid QTEL’s 1 August 2005 invoice to QIT for July calls (app. supp. R4, tab 5 at 1, 3).

14. On 1 August 2005 QIT notified the CO that the 4735 phone usage had increased by \$80,000 since the July conversations (R4, tab 10).

15. Bilateral Modification No. P00001, signed by the parties on 1 August 2005, stated (R4, tab 11):

The purpose of this modification is to cancel Thuraya cell phone service for (88216)6666-4714, (88216)6666-4731, (88216)6666-4733, (88216)6666-4735, (88216)6666-4736 effective immediately. Canceling said service terminates the Government’s liability to pay for any future cell phone charges to these accounts. It does not de-obligate any of the Not To Exceed funds, totaling \$25,000, as obligated by the purchase order. These funds remain viable until which time that QIT invoices for the months of 1 February 2005 thru 1 August 2005. If Thuraya cell phone bills for 1 February 2005 thru 1 Aug 2005 eclipse [sic] the funds already obligated on this purchase order, and are determined to be valid and proper...then payment shall be remitted under FAR 52.233-1. At which time that QIT receives payments for said months, another modification to this contract shall finalize the termination.

16. On 4 August 2005 QIT notified QTEL to cancel Thuraya numbers 4714, 4731, 4733, 4735 and 4736; services ended on 7 August 2005 (app. supp. R4, tab 4).

17. On 15 August 2005 respondent received QIT’s invoices for CLIN 0001 phone services in the amounts of \$390.15 for February 2005, \$196.27 for March 2005, \$145.48 for April 2005, \$1,146.47 for May 2005 and \$1,767.98 for June 2005. None of those invoices included phone usages by number of calls and minutes. (R4, tabs 3-6, 9)

18. On 20 August 2005 QIT collected from “OSI Det 9” five Thuraya cell phones and their corresponding SIM cards “leased” under the contract (stip. ¶ 19; R4, tab 14).

19. QIT's 21 August 2005 invoice to the government for July 2005 totaled \$222,347.34 for phone 4735, and appended a QTEL bill to QIT which listed each call by number, date, start time, called number, duration, call location and amount. The appended list showed that prior to 14 July 2005 the called numbers were 11 to 13 digits. Beginning on 14 July 2005 the same few destination numbers called were of 9 digits and were transmitted in a serial (sequential) manner for virtually 24 hours a day and overlapped for extended periods. (R4, tab 13)

20. QIT's 13 October 2005 invoice to the government totaled \$97,553.95 for Thuraya phone service from 31 July 2005 at 05:06:07 to 7 August 2005 at 20:34:25, and appended a QTEL invoice to QIT. Charges showed continuous phone 4735 usage and frequent simultaneous calls placed to one of 17 different destination phone numbers. (R4, tab 21 at 1-2)

21. EDet 2408's OSI investigated and questioned the validity of the calls invoiced for July 2005 on phone 4735. CO Williams denied payment on that invoice until their validity was resolved. (R4, tabs 15-16, 19) CO Williams and QIT's supplier Thuraya investigated those phone calls (R4, tabs 8, 13, 20-22, 23). QTEL's list of 2,372 calls on phone 4735 from 14 July through 7 August 2005 included 1,977 calls to adult entertainment sites at Wallis and Fortuna Islands, 385 to Sao Tome, 7 to Madagascar and 3 to Lebanon (R4, tabs 13, 21; app. supp. R4, tab 7; stip. ¶ 36). QTEL concluded that the SIM card for phone 4735 had been cloned and used by "fraudsters" (stip. ¶ 26). The government consensus was that "[t]his is clearly a fraud issue" and it was "most likely the Thuraya satellite phone number was somehow 'captured' ...and subsequently cloned" (stip. ¶¶ 39, 41, 44).

22. The CO reviewed QIT's 21 August 2005 and 13 October 2005 invoices and determined that of the \$319,901.29 billed for calls from phone 4735, the government was liable only for \$1,006.27 (R4, tabs 23, 24).

23. On 30 November 2005 QIT paid QTEL's 1 September 2005 invoice to QIT for August calls (app. supp. R4, tab 6 at 1, 2).

24. QIT's 30 November 2005 letter submitted a certified claim for \$319,901.29 (R4, tab 29). The CO's 29 April 2006 final decision denied that claim except for the \$1,006.27 determined to be government usage on the contract from phone 4735 (R4, tab 30). On 24 July 2006 QIT timely appealed from that decision (Bd. corr. file).

25. The 8 July 2006 report of Special Agent Robert C. Lomurro on "Fraudulent Use of Detachment Cellular Telephone Assigned to Expeditionary Detachment 2408, Baghdad, Iraq," stated, *inter alia*, that EDet 2408 had no instructions to detachment personnel for the proper use of the phones; there was no accountability of who, when, or

how long the phones were being used; the phones were left in the open and not maintained in a secure place; and it was possible for anyone on the EDet team to use these phones in his/her tent without anyone's knowledge (app. supp. R4, tab 1 at 1, 18, 32-34; stip. ¶¶ 8, 14, 45-48).

26. In April 2009 ex parte witness statements, Mr. Rasho denied that he had used the Thuraya cell phone as a computer modem and Mr. Tony Attie, another EDet 2408 linguist, stated that he did not know how to use a modem (supp. R4, tabs 3, 4).

27. QIT's 1 May 2009 answer to respondent's interrogatory 2 stated:

At the time of contract award, it was QIT's understanding that the "NTE" was inserted by the USAF for contract administration purposes, and that the value of the contract would be increased if the satellite phone services exceeded this amount.... In the absence of some action by the USAF to increase the funding or [to] initiate a change to the contract (e.g., a unilateral, bilateral or "constructive" change under the "Changes" clause, the "Option to Extend Services" clause, the "Extras" clause, the "Termination for Convenience" clause... etc.), the value of the contract was not to exceed the amount stated.

(App. supp. R4, tab 18 at 1) The appeal record contains no evidence that QIT communicated such understanding to respondent before 1 May 2009.

28. The stipulated facts contain lengthy assertions of how phone 4735 incurred such a huge volume of charges from 14 July to 7 August 2005. We find that such assertions contain speculation and unconvincing evidence of persons who did not personally observe anyone who used a computer modem and phone 4735 on 14 July 2005 or know how that phone began continuous transmissions at 21:49:15 hours on 14 July 2005. The parties agree that phone 4735 most probably was cloned, but the proof of whether a person employed or retained by the government or a third party "fraudster" performed or enabled such cloning is inconclusive. (Stip. ¶¶ 21, 24, 26, 31-34, 36, 39, 41, 44-48, 51, 53)

DECISION

I.

Appellant argues that: (1) Respondent had the duty to monitor phone callers, destinations called and durations, and to limit EDet's usage of satellite phones to the

contract's estimated price and failed to discharge such duty (app. br. at 30). (2) QIT had no duty to provide respondent advance notice of phone usage and charges, and had no right to terminate service if phone usage exceeded the contract's estimate (*id.* at 29-30). (3) Respondent's actions and failures to act constituted a constructive change to the contract (or a breach of contract) that occurred before its termination for the convenience of the government; such termination converted the fixed price contract to a cost reimbursement contract; QIT acted promptly and reasonably to terminate Thuraya's satellite services on 7 August 2005; and QIT is entitled to recover its allowable costs of performance and constructive change or breach costs incurred before the convenience termination pursuant to FAR 52.214-4(l) and *Astro Dynamics, Inc.*, ASBCA No. 41825, 91-2 BCA ¶ 23,807 (*id.* at 33-35), as well as cell phone service charges incurred after the 1 August 2005 contract termination at 4:07 p.m., through 7 August 2005 as "Costs continuing after termination" pursuant to FAR 31.205-42, Termination costs, ¶ (b).

Respondent argues that: (i) since respondent returned the satellite phones and SIM cards to QIT, there was no "loss" under the FAR 52.212-4(j) Risk of loss clause, which "did not contemplate damages caused by a third-party tortfeasor...a fraudster, abusing the services provided in conjunction with the use of the 'supplies,' i.e. the phones" (gov't br. at 8); (ii) the FAR 52.212-4(p) Limitation of liability clause addresses contractor liability, and there is no clause that provides for government liability to QIT for consequential damages due to a defect or deficiency in accepted items (*id.* at 9); (iii) QIT failed to perform the FAR 52.213-3 NOTICE TO SUPPLIER clause requirements to withhold performance (or to suspend service), to notify the CO immediately if it could not perform in exact accordance with the contract and to coordinate with QTEL and Thuraya to monitor satellite phone services and numbers so as to keep within the contract's \$25,000 NTE amount, which is respondent's limit of liability, and to mitigate its damages (*id.* at 6, 9-12, 18-20) and (iv) QIT has not proffered any evidence that government personnel caused excessive phone 4735 charges, cloned that phone's SIM card, or any authorized person made a phone call during which that phone or its SIM card was cloned (*id.* at 14-16).

II.

QIT provided the five SIM cards used in five government cell phones from February to August 2005 (findings 1, 7, 15). QTEL concluded that on 14 July 2005 phone 4735 had been cloned and used by "fraudsters" and the government consensus was that "[t]his is clearly a fraud issue" and it is "most likely the Thuraya satellite phone number was somehow 'captured' ...and subsequently cloned" (finding 21). Thus, the parties agree that phone 4735 most probably was cloned (finding 28).

The parties disagree about which of them bore the risk of the charges to phone 4735 for calls placed after 2149 hours on 14 July 2005 by a fraudster who intercepted the

ESN/MIN pair of phone 4735, cloned that pair to another cell phone and incurred charges thereby to QIT's account with QTEL.

The FAR 52.212-4(j) Risk of loss clause does not resolve this issue, because that clause, so far as the case precedents indicate, applies to physical supplies, not to services. Moreover, the parties cited no case precedents interpreting the FAR 52.212-4(j) Risk of loss clause, and our research on the issue of risk allocation disclosed no decision based on facts remotely analogous to those in this appeal. We conclude that the outcome of this appeal turns on whom the services were stolen from.

In our view, the services were stolen from appellant (which includes its suppliers). An unidentified "fraudster" was able to use the electronic information necessary to steal those services from appellant by capturing the electronic transmissions from the government phone. While appellant asserts that the government should have taken certain actions to prevent the theft and to limit cell phone usage to the contract's estimated price, we cannot find any contractual duty for the government to have done so. Appellant seeks a contractual remedy from this Board, and specifically denies that it is seeking recovery for a negligent action that might sound in tort. (*See, e.g., Qatar International Trading Co.*, ASBCA No. 55518, 08-2 BCA ¶ 33,948 (decision on motion to dismiss); app. reply br. at 9-11)

QIT argues that it had no duty to notify respondent of phone usage and charges and no right to terminate phone service if usage charges exceeded the contract estimate. QIT's propositions are true but are irrelevant to the issues of from whom the services were stolen and how to stop the fraudulent charges to phone 4735. On 1 August 2005 the parties agreed to cancel the contract, which was akin to a contract termination. But the fraudulent charges to number 4735 via the cloned cell phone continued to 7 August 2005, when QIT directed its supplier QTEL to cancel phone 4735 (and others) (finding 16). Therefore, contract cancellation did not stop the fraudulent charges. QIT, not the government, had privity of contract and the necessary information to direct QTEL to cancel cell phone 4735 and hence to stop the fraudulent charges, *i.e.*, the services stolen from appellant.

CONCLUSION

We deny the appeal.

Dated: 8 June 2010

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
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. 55518, Appeal of Qatar International Trading Co., rendered in conformance with the Board's Charter.

Dated:

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