ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Cardinal Maintenance Service, Inc.	)	ASBCA No. 56885
	)	
Under Contract No. N62474-97-D-2478	)	

APPEARANCE FOR THE APPELLANT: Kevin M. Cox, Esq.
Camardo Law Firm, P.C.
Auburn, NY

APPEARANCES FOR THE GOVERNMENT: Barry J. Plunkett, III, Esq.
Acting Navy Chief Trial Attorney
Audrey Van Dyke, Esq.
Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DELMAN
ON THE GOVERNMENT'S MOTION TO DISMISS IN PART
FOR LACK OF JURISDICTION

The Department of the Navy moves to dismiss this appeal in part, contending that a portion of the claim of Cardinal Maintenance Service, Inc. (appellant or CMS) is time barred for failure to file the claim within six years of the date of claim accrual as required by the Contract Disputes Act (CDA), 41 U.S.C. § 605(a). Appellant opposes the motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 10 September 1999, the Department of the Navy, Engineering Field Activity West, Naval Facilities Engineering Command, Lemoore, CA (government) awarded Contract No. N62474-97-D-2478 to CMS for grounds maintenance at the Lemoore Naval Air Station for a base year, plus four one-year option periods. The base year covered October 1999 to 30 September 2000. (R4, tab 1 at 2)

2. No deductions for unsatisfactory work were taken by the government during the base year of the contract. By Modification No. P00011, dated 25 August 2000, the contract was extended for the first option year covering 1 October 2000 to 30 September 2001. (R4, tab 2 at 420)

3. By Modification No. P00019, effective 16 April 2001, the contract was modified to add gopher control services (R4, tab 2 at 393). On 29 June 2001, the government issued unilateral Modification No. P00023, which deducted $3,695.92 from

appellant's invoices for unsatisfactory weed control and gopher control services during the period February 2001 through April 2001 (*id.* at 378).

4. By Modification No. P00030, dated 25 September 2001, the government exercised the second option year of the contract for 1 October 2001 through 30 September 2002 (R4, tab 2 at 346). By unilateral Modification No. P00038, dated 15 April 2002, the government took additional deductions from appellant's invoices in the amount of $23,084.99 for unsatisfactory work performed in June 2001 through March 2002 with respect to weed control, gopher control, irrigation services, mowing services and replacement of vegetation services (*id.* at 323, 324). Additional deductions of $11,041.35 were taken from appellant's invoices for unsatisfactory work performed in April 2002-June 2002 under unilateral Modification No. P00044 dated 22 July 2002 (*id.* at 296); for unsatisfactory work performed in July-August 2002 under unilateral Modification No. P00045, dated 23 September 2002 in the amount of $2,736.75 (*id.* at 291); for unsatisfactory work performed in October 2002-February 2003 under Modification No. P00050 dated 28 March 2003 in the amount of $9,421.64 (*id.* at 262); and for unsatisfactory work performed in March 2003-August 2003 under Modification No. P00061 dated 18 September 2003 in the amount of $28,521.74 (*id.* at 218).

5. By letter to the contracting officer (CO) dated 6 August 2002, during option year 2, CMS expressed concern over the deductions taken for alleged performance deficiencies, contending that starting February 2001 (during option year 1), the government had unfairly changed its inspection methods and inspection criteria since the base contract period and caused appellant to incur additional costs for labor and equipment to meet these new inspection requirements that were "extra-contractual." CMS stated as follows:

> CMS is taking this time to alert the Government to out [sic] intentions of further pursuing this matter, legally if necessary. Precedence has been set in many court cases as per our investigations.

(R4, tab 18)

6. By Modification No. P00047, dated 30 September 2002, the government extended the contract by six months from 1 October 2002 to 31 March 2003 (R4, tab 2 at 276).

7. By letter dated 18 March 2003, appellant's counsel advised the government that the government's change in established inspection criteria had resulted in unwarranted deductions and forced appellant to add more manpower to the job. He also stated that the increase in manpower had caused a loss on the contract between $10,000 and $15,000 per

month during peak months of the contract. CMS proposed an equitable adjustment in contract price to $58,478.00 per month for services beyond 1 April 2003. (R4, tab 20) Appellant's president, Mr. Donald Harmon, explained the nature of appellant's request in an affidavit as follows:

> 3. ...The March 18, 2003 REA submitted by CMS sought a monthly increase to $58,478 per month for the remaining months of the contract in order to pay for past cost increases. The monthly amount going forward was proposed by CMS as a way for the government could [sic] compensate CMS for the additional costs it had incurred to date due to the Government's overzealous inspections and constructive changes.

(App. sur-reply, ex. 1) According to appellant, the government never acted on this equitable adjustment request (app. resp. to mot. at 3).

8. By unilateral Modification No. P00052, dated 28 March 2003, the government extended appellant's contract for an additional four months, from 1 April 2003 to 31 July 2003 (R4, tab 2 at 249). On 22 July 2003, the government issued Modification No. P00057 to extend the contract for an additional one month, from 1 August 2003 through 31 August 2003[1] (R4, tab 2 at 229).

9. By letter to the CO dated 29 January 2007, approximately 3½ years after the completion date of the contract, appellant's counsel filed a request for equitable adjustment (REA) in the amount of $359,201.18, which represented the total amount of deductions taken by the government under the contract, plus appellant's claimed excess labor costs to correct the alleged work deficiencies and REA preparation costs. CMS concluded as follows:

> CMS is interested in meeting with the Contracting Officer to attempt to resolve this REA at his earliest convenience, without the need for formal claim procedures or further litigation.

(R4, tab 22 at 661) Appellant certified the REA as follows: "I certify that the request is made in good faith, and that the supporting data are accurate and complete to the best of

[1] Modification No. P00057 contained a typographical error regarding the duration of the extension, corrected by Modification No. P00058, which changed the language from "four months" to "one month" (R4, tab 2 at 227).

my knowledge and belief." By letter dated 15 February 2007, the CO denied the REA in its entirety (R4, tab 23).

10. By letter dated 31 December 2007, CMS submitted a revised REA to the CO in which the amount sought was increased to $374,498.93. The revised REA requested $78,816.78 for all deductions taken, $260,661.59 for excess labor costs to correct alleged work deficiencies and $35,722.82 for REA preparation costs.[2] The revised REA concluded with the same language and certification as the 29 January 2007 REA. (R4, tab 24) By letter dated 18 August 2008, the CO denied the revised REA in its entirety (R4, tab 25).

11. By letter dated 19 September 2008, appellant submitted a claim to the CO, stating that it "does hereby convert its REA into a Claim under the Contract Disputes Act and Disputes Clause of the Contract. All documentation provided with the REA is hereby incorporated into the Claim by reference and in its entirety." The claim was in the amount of $374,498.93. CMS included a claim certification as required by the CDA, 41 U.S.C. § 605(c)(1). (R4, tab 26)

12. By decision dated 18 May 2009, the CO granted appellant's claim in part. The CO granted recovery in the amount of $78,538.39, which represented the deductions taken, according to government records, plus CDA interest. The CO determined that the government "did not sufficiently document the deductions." (R4, tab 29 at 1133) The balance of the claim was denied.

13. By unilateral Modification No. P00062, dated 15 June 2009, the government returned to CMS the amount of $81,815.73 (the deductions plus CDA interest) by unilateral "Claim Settlement" (R4, tab 2 at 214).

14. By letter dated 16 July 2009, CMS filed a timely appeal with this Board from the CO's decision, and the appeal was docketed as ASBCA No. 56885. The government included the subject motion with its answer to appellant's complaint.

DECISION

The CDA provides, 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). A contractor's timely claim to the CO is a necessary predicate to Board jurisdiction under the CDA. *Arctic Slope Native Ass'n Ltd. v. Sebelius*, 583 F.3d 785, 793 (Fed. Cir. 2009), *cert. denied*, 130 S. Ct. 3505 (2010).

[2] CMS requests a total of $374,498.93 in its REA, however its sub-requests actually add up to $375,201.19.

There appears to be no dispute that appellant's certified claim was submitted to the CO on 19 September 2008. The issue before us is the date of claim accrual. At the time of contract award FAR 33.201 defined "accrual of a claim" as follows:

> 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.

In order to determine when the alleged liability was fixed we examine the legal basis of the claim. *Gray Personnel, Inc.*, ASBCA No. 54652, 06-2 BCA ¶ 33,378 at 165,475. CMS contends that the government's wrongful inspection actions constituted a constructive change and/or breach of contract that caused appellant to incur additional labor costs. By letter to the government dated 6 August 2002, during option year 2, appellant objected to the government's alleged wrongful changes in inspection methods that began in February, 2001, during option year 1, and warned of legal action (SOF ¶ 5). Clearly, appellant knew of its potential claim(s) as of the date of this letter. We have held that once a party is on notice that it has a potential claim the limitations period begins to run. *Gray Personnel*, 06-2 BCA ¶ 33,378 at 165,476. This letter predates appellant's claim dated 19 September 2008 by more than six years. Appellant's claim related to wrongful inspections in option years 1 and 2 is untimely.

Appellant contends that because it chose to use the entire contract period, including the option periods, to develop its method of calculating damages (the "measured-mile" approach), the claim did not accrue until the completion of the contract, at which time the full and/or cumulative impact of the government's actions could be determined. We do not agree. Claim accrual need not await contract completion when all the events that fix liability were known at an earlier date, as was the case here. As we stated in *DTS Aviation Services, Inc.*, ASBCA No. 56352, 09-2 BCA ¶ 34,288 at 169,379:

> [T]he FAR definition states that for liability to fix for purposes of claim accrual, only "some" but not necessarily "all" of the injury must be shown. *Accord Gray Personnel, Inc.*, ASBCA No. 54652, 06-2 BCA ¶ 33,378 at 165,476 where we stated as follows:
>
> > We do not think, however, that appellant must have completed the delivery order, or even, as appellant argues, have completed the contract in order for

> liability to be fixed. The CDA permits contractors to submit claims before they have incurred the total costs relating to the claim.

We also reject appellant's alternative argument that the claim accrual date should be in late April or early May of 2003, when CMS realized that the government was not going to increase monthly payments on the contract as requested in its 18 March 2003 letter. As we pointed out above, appellant's awareness of its claim occurred many months before it wrote this letter. Indeed, this 18 March letter confirmed that appellant was keenly aware of previously incurred labor costs that it incurred due to alleged wrongful government conduct substantially before the date of the letter (SOF ¶ 7). We have reviewed the cases and the arguments cited by appellant but they do not persuade us otherwise.

CONCLUSION

For reasons stated, appellant's claim for wrongful government inspection during option years 1 and 2 is time barred pursuant to 41 U.S.C. § 605(a). What remains before us is appellant's claim for wrongful government inspection during the contract extensions after expiration of option year 2 (SOF ¶¶ 6, 8). The government's motion to dismiss the appeal in part is granted for lack of jurisdiction in accordance with this Opinion.

Dated: 24 November 2010

JACK DELMAN
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. 56885, Appeal of Cardinal Maintenance Service, Inc., rendered in conformance with the Board's Charter.

Dated:

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