

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
Systems Development Corporation ) ASBCA No. 56682  
 )  
Under Contract No. DAAH01-00-C-0077 )

APPEARANCE FOR THE APPELLANT: Howell Roger Riggs, Esq.  
Dick Riggs Miller LLP  
Huntsville, AL

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.  
Army Chief Trial Attorney  
Robert T. Wu, Esq.  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE FREEMAN ON THE  
GOVERNMENT’S MOTION TO DISMISS OR, IN THE  
ALTERNATIVE, FOR PARTIAL SUMMARY JUDGMENT

Systems Development Corporation (SDC) appeals the contracting officer’s denial of its monetary claims for defective specifications, breach of the duty of fair dealing and cooperation, bad faith, and convenience termination settlement costs in connection with the captioned contract (hereinafter Contract 0077). The government moves to dismiss for lack of jurisdiction or, in the alternative, for partial summary judgment. We grant the motion to dismiss.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

There are no genuine issues of material fact with respect to the following:

1. Effective 9 May 2000, the government awarded Contract 0077 to SDC for the production of two first article and 22 production quantity circuit card assemblies (CCAs) for the HAWK missile system. The contract included five successive “outyear” option quantities but those options were never exercised. The total price for the base year was \$430,000. (R4, tab 1 at 1-5)

2. The two first articles were required to be delivered by 8 August 2000 and the 22 production units were to be delivered on 2 and 3 February 2001 (R4, tab 1 at 3-5). The contract included among other general provisions the FAR 52.233-1, DISPUTES (DEC 1998) clause and the FAR 52.249-2, TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (SEP 1996) clause (R4, tab 1 at 18).

3. The CCAs were to be manufactured in accordance with a technical data package (TDP) provided by the government and designated in the contract specifications as “TOP DRAWING NR. 13235072” (R4, tab 1 at 3-4, tab 8). After award, SDC found numerous defects in the TDP including, among others, illegible drawings, missing drawings, missing digital data referenced on drawings, and obsolete (unprocurable) parts on drawings. By letter dated 26 July 2000, SDC complained that the mylar artwork provided by the government was of “insufficient quality to effectively manufacture [the specified product]” (R4, tab 25). In numerous communications thereafter, SDC requested government assistance in getting the technical data required to manufacture the product. But the assistance given was ineffectual and did not provide a corrected TDP. (R4, tabs 29, 32, 35, 37, 39, 44, 45)

4. The defects in the TDP and the failure of the government to correct those defects reached a point that on 13 July 2001, SDC and its principal subcontractor, Teledyne Brown Engineering (TBE) decided to stop ordering parts for the contract and to seek a “termination for impossibility” (R4, tab 47). By letter dated 30 July 2001 to the commander of the procuring activity, SDC stated that “because of the Government delay in providing requested data, we have been unable to deliver a finished product as required by our contracts.” This letter further stated that “[i]n view of the inordinate amount of time that has elapsed and the impossibility of performance,” SDC was recommending either government funding for it to procure the necessary data or termination of the contract for convenience. (R4, tab 49)

5. On 13 November 2001, SDC sent another letter to the commander of the procuring activity requesting a termination for convenience of Contract 0077 and another contract not at issue in this appeal. This letter stated in pertinent part:

As a result of your response to our July 30, 2001 letter and recent communications, SDC, Inc. hereby formally requests that the subject contracts be Terminated for Convenience per FAR clause 52.249-2. SDC was awarded [Contract 0077] in May 2000...SDC has requested the necessary data in the format required by the contracts, and the documentation to properly manufacture the products. However, more than a year has elapsed and SDC still does not have the data specified in the contracts to produce the products as intended in our original proposal. Examples of the insufficient data are as follows:

....

The examples cited above are two cases where SDC still does not have sufficient data to complete the effort as proposed, and the answers or alternatives offered by the Government will have an adverse financial impact upon this program. To complete a contract of this type, SDC assumed that the normal, basic technical data and documentation would be made available. As a Small Disadvantaged Business, SDC cannot continue to absorb the financial impacts caused by the Government's failure to provide the required data. We have already expended a significant amount of time and resources as we have attempted to come up with "work-arounds" to these problems.

(R4, tab 60)

6. In response to SDC's letters of 30 July and 13 November 2001, the government neither provided the funding for SDC to procure the needed data nor terminated the contract for convenience. Instead, in January 2002 it offered to program a board submitted by SDC from which SDC could derive the needed data to complete the contract (R4, tab 63 at 2). However, this effort failed to provide the needed data because the board programmed by the government failed its test in June 2002 (R4, tab 69). In August 2002, the government proposed an extension of time for the contract if SDC would waive all claims (R4, tab 70). SDC rejected this proposal (R4, tab 71).

7. On 29 April 2003, SDC submitted to the contracting officer a certified claim for a termination for convenience settlement in the net amount of \$596,123. This claim consisted of a Standard Form 1436 Settlement Proposal (Total Cost) for a net payment of \$596,123. It did not include any claims for price adjustment for defective specifications, failure to cooperate or bad faith. (R4, tab 79) By letter dated 2 June 2003, the contracting officer declined to issue a final decision because the claimed settlement proposal provided "insufficient information upon which to render a Final Decision" (R4, tab 81).

8. On 17 February 2004, the contracting officer terminated the contract for convenience (R4, tab 89). On 23 April 2004, SDC submitted a termination settlement proposal in the net payment amount of \$789,058. This proposal included, among other items, \$14,316 for termination settlement expenses. (R4, tab 92 at 1, 2) By letter dated 12 November 2004, SDC offered to accept a termination settlement of \$617,641 including settlement expenses of \$19,316. SDC argued in this letter that it was entitled to more than the contract price of \$430,000 because the defective TDP entitled it to an equitable adjustment. (R4, tab 108 at 1, 6-7) SDC, however, had not up to that time, nor thereafter until 14 February 2008, submitted any certified claim under the Contract

Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, for an equitable adjustment in the contract price. (*See* SOF ¶ 11 below)

9. By final decision dated 25 March 2005, the Termination Contracting Officer (TCO) found SDC entitled to a termination settlement of \$403,563. The contracting officer denied all of the claimed termination settlement expenses on the ground that the full salaries of the personnel involved in the settlement were charged to G&A and not directly to the contract. (R4, tab 110 at 1, 3)

10. On 24 March 2006, SDC appealed the TCO's final decision on the termination settlement to the United States Court of Federal Claims (COFC). SDC's complaint in the COFC also included counts for money damages for (i) defective specifications, (ii) alleged government breach of the covenant of fair dealing and cooperation, (iii) alleged government bad faith, and (iv) the government failure to pay termination settlement expenses. (R4, tab 117 at 2, 7-9) On 31 January 2008, the parties filed a joint stipulation of dismissal without prejudice of the action in the COFC. The Court granted the stipulation on 5 February 2008. (R4, tabs 136, 137)

11. On 14 February 2008, SDC submitted a certified claim to the procuring contracting officer (PCO) for (i) defective specifications, (ii) breach of the duty of fair dealing and cooperation, (iii) bad faith, and (iv) termination settlement expenses. The claimed amounts for the first three items are \$242,162 for direct cost and \$7,441,145 for loss of profit, loss of company value, increased G&A costs, lease payments for unused facility space, and "[e]mployment costs and associated litigation expense resulting from layoffs." The claimed amount for the termination settlement expenses is \$19,316. (R4, tab 138 at 1, 14-17, tab 130 at 3-4)

12. SDC's claim alleged that the government breach of its duty of fair dealing and cooperation consisted of (i) "continuously exhorting SDC to perform on a contract that [the government] knew, or reasonably should have known, was defective in its specifications," and (ii) failing "to act upon numerous notices of specification defects and the advice of its technical staff prior to contract award" (R4, tab 138 at 15).

13. SDC's claim alleged that the government's bad faith in its award of the contract to SDC and in its subsequent administration of that contract consisted of the following:

[The government's] contracting staff did not want to make any award to SDC, but was pressured by the Command Staff to find work for SDC. Having been forced to make an award by higher authorities, the Contracting Officers found the perfect revenge, an award of a contract which they had been advised by technical staff, could not be performed by SDC.

They then exhorted performance with the ultimate goal of terminating SDC for default. During the course of discussions between SDC and the Contracting Staff, [the government] provided a set of false mylar artwork. The mylar artwork material produced by the government was a copy produced on mylar material, which could not be used to produce the product. [The government] while having full knowledge of the defects in the mylar artwork, continued to exhort [SDC] to perform the contract. [The government's] actions were, either attended [sic] with intent to injure and animus toward SDC and its officers, or were so grossly negligent to amount to bad faith.

(R4, tab 138 at 15-16)

14. On 15 September 2008, the PCO denied SDC's claim entirely (R4, tab 139 at 1, 14). This appeal followed (R4, tab 140).

#### DECISION

The government moves to dismiss for lack of jurisdiction SDC's claims for defective specifications, breach of the duty of fair dealing and cooperation, and bad faith on the grounds that that these claims all accrued before 14 February 2002 and are therefore barred by the six-year statute of limitations in the CDA at 41 U.S.C § 605(a). The cited statute states in relevant part: "Each claim by a contractor against the government relating to a contract...shall be submitted within 6 years after the accrual of the claim."

Contractor compliance with this statutory time limit on the presentment of a claim to the contracting officer is a jurisdictional prerequisite for any subsequent appeal of a contracting officer's decision on that claim to this Board. *Arctic Slope Native Ass'n v. Sebelius*, 583 F.3d 785, 793 (Fed. Cir. 2009), *cert. denied*, 130 S. Ct. 3505 (2010). The "accrual of a claim" is defined in FAR 33.201 as:

[T]he 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 SDC's case, the defects in the Contract 0077 TDP were present in the contract at award. They were known to SDC no later than its 26 July 2000 letter to the government (SOF ¶ 3). The events giving rise to SDC's allegations of government

failure to cooperate and government bad faith began prior to contract award and continued during the following year when the government failed to correct the defective TDP as requested by SDC. Those events resulted in the July 2001 decision of SDC and its principal subcontractor TBE to cease purchasing material for the contract and seek a termination for convenience because of “the inordinate amount of time that has elapsed and the impossibility of performance.” (SOF ¶ 4)

SDC’s actual knowledge in 2001 of the basis for its present claim and the fact that it had incurred injury as a result of the defective TDP and the government’s failure to cure the defects is further established by its letter of 13 November 2001. That letter stated in its conclusion that “SDC cannot continue to absorb the financial impacts caused by the Government’s failure to provide the required data” and that it had “already expended a significant amount of time and resources as we have attempted to come up with ‘work-arounds’ to these problems.” (SOF ¶ 5)

SDC contends that the present claim did not accrue until 2 June 2003 when the contracting officer refused to issue a decision on its 29 April 2003 claim for a termination for convenience settlement. SDC argues that, up to 2 June 2003, “SDC did not know, and could not have known, that it had been damaged, because, at that time, [it] still expected to be paid for its efforts.” (App. opp’n at 3) We find no merit in this argument. SDC’s letters of 30 July and 13 November 2001 clearly establish that, at that time, SDC knew of its injury caused by the defective TDP and the government failure to cure the defects (SOF ¶¶ 4, 5). See *Robinson Quality Constructors*, ASBCA No. 55784, 09-1 BCA ¶ 34,048 at 168,395-96, *aff’d on recon.*, 09-2 BCA ¶ 34,171.

On this record, we find that that the alleged liability of the government for defective specifications, failure to cooperate and bad faith in failing to correct the TDP accrued no later than 13 November 2001. The certified claim under the CDA for those actions that is the subject of this appeal was not submitted to the contracting officer until 14 February 2008. The claim was submitted outside the six-year statute of limitations in 41 U.S.C § 605(a) and we accordingly have no jurisdiction over the appeal on those items of the claim.

We also have no jurisdiction over the claim item for termination settlement expenses. Those expenses were a required part of SDC’s termination settlement proposal and were in fact included therein. (SOF ¶ 8) Pursuant to the Termination for Convenience of the Government clause, the Disputes clause and the CDA at 41 U.S.C §§ 606, 609, SDC had the election of appealing the contracting officer’s unilateral termination settlement decision either to this Board within 90 days of receipt of that decision, or to the COFC within one year of receipt of the decision. SDC did not appeal that decision to this Board within 90 days of receipt. It waited a year and then appealed the decision to the COFC. The dismissal of the appeal without prejudice in the COFC left the parties “as if the action had never been brought.” *Bonneville Associates, Ltd.*

*Partnership v. Barram*, 165 F.3d 1360, 1364 (Fed. Cir. 1999). That dismissal did not permit SDC to file an untimely appeal of the termination settlement decision to this Board. The 90-day time limit for appeals to this Board under 41 U.S.C § 606 is jurisdictional and we have no authority to waive it. *SET Dis Ticaret ve Sanayi Limited Sirketi*, ASBCA No. 56428, 08-2 BCA ¶ 33,935 at 167,932.

The appeal is dismissed for lack of jurisdiction.

Dated: 15 October 2010

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MONROE E. FREEMAN, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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MARK N. STEMLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

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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. 56682, Appeal of Systems Development Corporation, rendered in conformance with the Board's Charter.

Dated:

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