

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Triad Mechanical, Inc.) ASBCA No. 57971
)
Under Contract No. W912EF-10-C-0041)

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APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
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U.S. Army Engineer District,
Walla Walla

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

Triad Mechanical, Inc. (Triad) appeals an alleged deemed denial of a convenience termination settlement proposal. The government moves to dismiss the appeal for lack of jurisdiction or in the alternative, for a stay pending completion of the termination settlement procedures specified in the contract. The appellant opposes on the ground that its settlement proposal was also a claim under the Contract Disputes Act of 1978 (CDA), 41 U.S.C §§ 7101-7109, and that it is entitled to proceed with its present appeal under the 60-day decision provisions of that Act. We conclude that the settlement proposal was not a CDA claim, and grant the motion to dismiss.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 31 August 2010, the government awarded Contract No. W912EF-10-C-0041 (hereinafter "Contract 0041") for installation of new cable components and weld repairs at a dam in Washington State. At award, the firm fixed contract price was \$1,147,189 and the specified completion date was 6 March 2011. (R4 tab C-2 at 1, 3, 32) The contract included, among other provisions, the FAR 52.249-2, TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (MAY 2004), ALTERNATE 1 (SEP 1996) clause (Termination clause) and the FAR 53.233-1, DISPUTES (JUL 2002) clause (*id.* at 7-8).

2. Subsequent contract amendments increased the total contract price to \$1,212,920, and extended the specified completion date to 10 March 2011 (R4, tabs C-3, C-4, C-5, C-6).

However, the work was not completed on 10 March 2011. On 11 March 2011, the government issued a partial termination for convenience order terminating the weld repair work (R4, tab D-26). On 6 June 2011, the government terminated the entire contract for convenience (R4, tab D-32).

3. The procedure for compensating Triad for the termination was specified in the Termination clause in pertinent part as follows:

(e) After termination, the Contractor shall submit a final termination settlement proposal to the Contracting Officer in the form and with the certification prescribed by the Contracting Officer....

(f) Subject to paragraph (e) of this clause, the Contractor and the Contracting Officer may agree upon the whole or any part of the amount to be paid or remaining to be paid because of the termination. The amount may include a reasonable allowance for profit on work done....

(g) If the Contractor and Contracting Officer fail to agree on the whole amount to be paid the Contractor because of the termination of work, the Contracting Officer shall pay the Contractor the amounts determined as follows....

....

(j) The Contractor shall have the right of appeal under the Disputes clause, from any determination made by the Contracting Officer under paragraph...(g)...of this clause....

4. On 5 July 2011, Triad submitted to the government an initial termination settlement proposal. On 24 October 2011, Triad submitted to the government "our certified 'final termination settlement proposal' per FAR Clause 52.249-2, section 9(e) [sic]." The same document also stated that it was a "certified claim to you for payment." The proposed total final termination settlement amount was \$1,335,329.33. Less payments received of \$660,999.37, the proposed net settlement amount was \$674,329.96. The proposal was not submitted on Standard Form 1436. (R4, tab D-1 at 1-2)

5. Triad's termination settlement proposal was reviewed by the Defense Contract Audit Agency (DCAA) as required by FAR 49.107(a). In a memorandum to the contracting officer dated 9 November 2011, the DCAA identified 21 specific "deficiencies" in the proposal and stated that the proposal was "inadequate" to plan and perform an audit (R4, tab E-1).

6. By letters to Triad dated 6 and 8 December 2011, the contracting officer listed the deficiencies identified by DCAA and told Triad that further documentation and clarification of its proposal were needed “in order to complete the audit, which is required before we can reach a final settlement” (R4, tabs D-45, D-46). Triad responded on 13 December 2011 with 292 pages of accounting records and clarifications (R4, tab D-47). The record also includes a Standard Form 1436 executed on 12 December 2011 in the same amount as the 24 October 2011 final termination settlement proposal (R4, tab C-1). The record before us on the motion does not show any contacts between the parties between 13 December 2011 and 29 January 2012.

7. On 29 January 2012, Triad submitted an appeal to this Board. The notice of appeal cited the 6 June 2011 convenience termination and Triad’s 24 October 2011 final termination settlement proposal. It then stated as the ground for the appeal that “[t]he contracting officer has not provided Triad with a decision within a reasonable time.”

8. The government moves to dismiss the appeal for lack of subject matter jurisdiction on the grounds that (i) Triad did not properly certify its termination settlement proposal as a CDA claim; (ii) the proposal was not a CDA claim because it did not claim a sum certain; and (iii) the proposal had not “ripened” into a CDA claim when the appeal was submitted. The government also moves, in the alternative, that proceedings in the appeal be suspended pending completion of the settlement procedures specified in the Termination clause and FAR 49.107(a).

9. Triad opposes the motion arguing that (i) defective certification is not a jurisdictional bar; (ii) the termination settlement proposal met the definition of a claim in that it was “a written demand or assertion by one of the contracting parties seeking as a matter of right the payment of money in a sum certain;” (iii) the government failed to issue a timely decision on the claim as required by the CDA; and (iv) this failure entitled Triad to appeal a deemed denial of its claim.

DECISION

The Termination clause of Contract 0041 set forth a procedure for determining the monetary compensation due Triad for the termination. This procedure required that (i) Triad submit a termination settlement proposal in the form and with the certification prescribed by the contracting officer; (ii) the parties attempt to negotiate a settlement agreement; and (iii) if the parties failed to agree on the whole amount to be paid, the contracting officer would issue a determination from which Triad could then appeal under the Disputes clause. (*See* SOF ¶ 3) A termination settlement proposal submitted pursuant to the Termination clause does not become a claim under the CDA until the settlement negotiation required by the clause has reached an impasse and the proposal has been submitted to the contracting officer for a decision. *James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1543-45 (Fed. Cir. 1996).

When Triad filed this appeal on 29 January 2012, the latest messages it had received from the contracting officer regarding the progress of the termination settlement were the letters of 6 and 8 December 2011. Those letters identified the 21 deficiencies found by the DCAA in Triad's termination settlement proposal, requested additional documentation and clarifications supporting the proposal, and expressly stated that the additional documentation and clarifications were needed "to complete the audit, which is required before we can reach a final settlement." (SOF ¶ 6) Considering the foregoing and the substantial amount of additional documentation provided by Triad on 13 December 2011 that had to be evaluated by the government, we find no basis for concluding that on 29 January 2012 there was an impasse in negotiations, or that the proposal had otherwise "ripened into" a CDA claim. *See Ellett*, 93 F.3d at 1544.

Triad was and is contractually obligated to follow the procedures specified in the Termination clause for a termination settlement. It cannot bootstrap itself prematurely into the CDA procedures by simply designating its termination settlement proposal as also a "certified claim to you for payment" when submitting the proposal to the contracting officer under the Termination clause.

The appeal is premature and dismissed for lack of jurisdiction.

Dated: 13 April 2012



MONROE E. FREEMAN, JR.

Administrative Judge
Armed Services Board
of Contract Appeals

I concur



MARK N. STEMLER

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. 57971, Appeal of Triad Mechanical, Inc., rendered in conformance with the Board's Charter.

Dated:

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