ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Lockheed Martin Services, Inc.	)	ASBCA No. 58028
	)	
Under Contract No. MDA220-01-D-0002	)	

APPEARANCE FOR THE APPELLANT: Joseph J. Dyer, Esq.
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Defense Finance & Accounting Service
Indianapolis, IN

OPINION BY ADMINISTRATIVE JUDGE CLARKE ON
THE GOVERNMENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The Defense Finance & Accounting Service (DFAS) filed an October 2012 motion for partial summary judgment seeking the return of a $779,089 license fee from Lockheed Martin Services, Inc. (LMSI). Because the motion essentially asserts a new government claim without the support of a contracting officer's final decision we have no jurisdiction to consider that claim. We only include in the Statement of Facts (SOF) that which is necessary for background and to deal with the issue of jurisdiction.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. DFAS awarded Contract No. MDA220-01-C-0002, effective 28 September 2001, to ACS Government Solutions Group, Inc. (ACS) for the performance of retired military and annuitant pay services (R4, tab 1 at 1 of 189). In 2003 LMSI acquired ACS and on 13 March 2006 the contract number was changed to MDA220-01-D -0002 (R4, tab 2 at 1 of 259; gov't mot. at 4, ¶ 5; app. resp. at 3, ¶ 10).

2. The contract contained the following clause:

H.10 VENDOR PROPRIETARY TECHNOLOGY

The contractor shall (a) obtain prior written approval from the Contracting Officer Representative (COR) prior to using contractor or third party proprietary technology to perform

> the services; and (b) provide, upon the Government's request, at no additional cost, a perpetual, irrevocable, non-exclusive, world-wide, royalty-free license to install, use, copy, modify and incorporate into DFAS' proprietary and licensed systems, any of the contractor and third party proprietary technology that the contractor used in providing services to DFAS; provided that clause (b) will not apply to software, code or modifications which are generally commercially available on reasonable terms

(R4, tab 1 at 61-62 of 189)

3. Prior to the contract DFAS was performing the retired military and annuitant pay services itself using government-owned hardware and software known collectively as MIRORS. DFAS provided the contractor with MIRORS as government-furnished equipment under the contract. By letter dated 1 June 2004 LMSI notified the government that it intended to replace MIRORS with an internal Lockheed Martin Corporation product, with terms and conditions to be addressed later. (R4, tab 71 at 1344; app. resp., ex. A (Karen Bell declaration), ¶¶ 1, 2; *see also* gov't mot. at 4, ¶ 9) [1]

4. Appellant's product, known as RAPID, was implemented in December 2004 (R4, tab 89 at 1441, *see also* R4, tab 53 at 590).

5. In about April 2009 DFAS decided not to exercise any remaining contract options and to return to performing the pay services itself. It asked LMSI for a transition plan. (R4, tab 92; app. resp., ex. A, ¶ 7)

6. The parties engaged in discussions concerning issuance of a RAPID license to the government. For example, in October 2009 the government was considering a $2.6 million license fee and suggested that, under clause H-10, above, it was reasonable for it to pay development costs of RAPID, but it asserted that appellant had not supported the $2.6 million amount and it sought further information. (R4, tabs 10, 24 at 244, tab 25; supp. R4, tab 69) The parties were unable to agree.

7. Effective 8 January 2010, contracting officer Steven H. Minnich issued unilateral Modification No. P00089. In his transmittal letter to LMSI he stated that it was entitled to just compensation under H-10 for RAPIDS' cost, which was included in the modification, based upon what a Defense Contract Audit Agency audit could substantiate. He noted that LMSI could seek different terms through a request for

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[1] The letter was from Lockheed Martin Government Services, Inc. but appellant refers to it in briefing as LMSI. Like the parties, we generally refer to Lockheed entities as LMSI or appellant. Any differences are immaterial to our decision.

equitable adjustment or the contract's disputes provisions. (R4, tab 35 at 301-02) The modification added contract line item number (CLIN) 0065 and other terms providing for a firm fixed-price RAPID user license to the government per H-10 in the amount of $779,089.39 and the transfer of hardware and software to the government in the amounts of $485,626.09 and $194,821.96, respectively, for a grand total of $1,459,537.44. CLIN 0065's payment amount was stated as "0.00" (R4, tab 35 at 303). Funding was to be by separate task order. Appellant has not disputed that it was paid the $1,459,537.44. (R4, tab 35 at 301-03, 305-07; gov't mot. at 9, ¶ 27)

8. Unilateral Modification No. P00089 added DFAS LOCAL CLAUSE 2010-01, Price Redetermination – RAPID, which provided for both an increase in the contract amount or a decrease and repayment to the government. The clause stated in part:

> (a) *General.* The total price stated in this contract may be redetermined in accordance with this clause and clause H-10...but in no event shall the total amount paid under this contract exceed $2,600,000.00.
>
> ....
>
> (c) *Data submission.*
>
> > (1) Within 60 days after delivery of all supplies to be delivered and all services to be performed under this contract, the Contractor shall submit [certified cost and pricing data and any other relevant data].
> >
> > (2) If the Contractor fails to submit the data required by subparagraph (c)(1) of this section within the time specified, then Contractor waives all rights under this clause to seek further reimbursement beyond the amount paid under this contract. If it is later determined that the Government has overpaid the Contractor, the excess shall be repaid to the Government immediately. Unless repaid within 30 days after the end of the data submittal period, the amount of the excess shall bear interest, computed from the date the data were due to the date of repayment, at the rate established in accordance with the Interest clause.
>
> (d) *Price determination.* Upon the Contracting Officer's receipt of the certified cost and pricing data required by

> paragraph (c) of this section, the Contracting Officer and the Contractor shall promptly negotiate to redetermine fair and reasonable prices for supplies delivered and services performed by the Contractor under this contract.
>
> ....
>
> (g) *Disagreements*. If the Contractor and the Contracting Officer fail to agree upon redetermined prices...the Contracting Officer shall promptly issue a decision in accordance with the Disputes clause.

(R4, tab 35 at 304-05) Effective 19 February 2010 the modification was replaced in its entirety by unilateral Modification No. P00091, executed by contracting officer Eric Miller. The referenced provisions were not changed. (R4, tab 4 at 38 *et seq.*)[2]

9. On 19 July 2011, LMSI submitted a certified claim to contracting officer Miller requesting that the contract price be raised pursuant to the price redetermination clause from the $1,459,537.44 authorized by Modification No. P00091 to the full capped amount of $2,600,000, for a claimed amount of $1,140,462.56 (R4, tab 53 at 587, 601).

10. By final decision dated 21 December 2011, contracting officer Miller denied LMSI's claim (R4, tab 63). The decision reads in part:

> IV. Contracting Officer's Decision:
> Clause H.10 requires LMSI to provide DFAS a "perpetual, irrevocable, non-exclusive, world-wide, royalty-free license" to "install, use, copy, modify and incorporate" RAPID into DFAS's systems "at no additional cost." Therefore, LMSI must provide the license to DFAS for an amount equal to LMSI's actual costs to develop RAPID. LMSI has argued that its actual costs to develop RAPID exceed $2,600,000.00, so DFAS should increase CLIN 0065 to the not-to-exceed amount of $2,600,000. However, DFAS is unable to validate LMSI's claimed costs because LMSI did not properly account for the development costs at the time the costs were incurred. Therefore, the DFAS Contracting Officer has determined that the original obligated price of $1,459,537.44, based on and supported by the DCAA audit, is the final purchase

[2] We refer only to Modification No. P00091 hereafter in the decision.

> price for the RAPID license, and will not increase the price to the not-to-exceed amount of $2,600,000 as LMSI has demanded in its certified claim.

(R4, tab 63 at 856-7)

11. No contracting officer ever issued a written decision demanding the return of any part of the RAPID license fee the government paid to appellant.

DISCUSSION

In its motion, DFAS requests that the Board require LMSI to return the $779,089 (rounded) license fee:

> Respondent respectfully requests that the Board grant partial summary judgment in favor of Respondent by determining that as a matter of law Appellant is not entitled to the $779,089 paid to it for costs associated with that license in P00091 nor is it entitled to any other costs associated with the license to use RAPID.

(Gov't mot. at 16)

In its response to the motion, LMSI contends that the Board lacks jurisdiction: "the Board does not have jurisdiction over DFAS' motion, the contracting officer not having issued a final decision on the issue presented therein" (app. resp. at 13).

In its reply to LMSI's response, DFAS contends that the Board's jurisdiction derives from LMSI's appeal from the contracting officer's final decision but the "scope of the final decision is not, however, binding on the Board" (reply at 4), because we exercise *de novo* review. DFAS finds support for this contention in *Wilner v. United States*, 24 F.3d 1397 (Fed. Cir. 1994) (en banc).

The Contract Disputes Act (CDA) provides that "[e]ach claim by the Federal Government against a contractor relating to a contract shall be the subject of a written decision by the contracting officer." 41 U.S.C. § 7103(a)(3). Absent a contracting officer's written decision asserting a government claim and a contractor's appeal from that decision under the CDA, 41 U.S.C. § 7103(g), we do not possess jurisdiction to entertain the government's claim. Indeed, in *Wilner* the Claims Court had dismissed the government's claim for repayment of amounts paid because there had been no contracting officer's decision asserting the claim. The government did not appeal that dismissal. *See Wilner*, 24 F.3d at 1399 n.6, 1400; *see also The Boeing Company*, ASBCA No. 57490, 12-1 BCA ¶ 34,916 at 171,671-72 (discussing CDA's jurisdictional

requirements); *Nova Group, Inc.*, ASBCA No. 55408, 10-2 BCA ¶ 34,533 at 170,331 (concluding, *inter alia*, that the Board had no jurisdiction to consider government's attempt to recoup previously paid modification amounts when it had not made demand for repayment in a final decision).

Here, the contracting officer's final decision from which this appeal was taken confirmed that the purchase price the government paid for the RAPID license was the final price. Although we review that decision *de novo*, there was no written contracting officer's decision demanding the return of any part of the RAPID license fee the government paid to appellant. (SOF ¶¶ 10, 11) Accordingly, we lack jurisdiction to consider the government's claim for repayment.

CONCLUSION

For the reasons stated above, the government's motion is denied. We retain jurisdiction to resolve appellant's appeal.

Dated: 20 February 2013

CRAIG S. CLARKE
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

CHERYL L. SCOTT
Administrative Judge
Acting 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. 58028, Appeal of Lockheed Martin Services, Inc., rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals