ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Abozar Afzali Construction Company	)	ASBCA No. 61561
	)	
Under Contract No. H92257-10-M-9814	)	

APPEARANCE FOR THE APPELLANT: Mr. Mohammad Nazar
Director

APPEARANCES FOR THE GOVERNMENT: Jeffrey P. Hildebrandt, Esq.
Air Force Deputy Chief Trial Attorney
Isabelle P. Cutting, Esq.
Heather M. Mandelkehr, Esq.
Trial Attorneys

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

This is an appeal from a contracting officer's (CO's) denial of a claim by appellant alleging that it is owed $124,945.00 for costs related to the termination for convenience of its contract. The Air Force (AF or government) moves for summary judgment[1] on the basis of the claim being submitted outside the Contract Disputes Act's (CDA's) six-year statute of limitations. Because the evidence supports a finding that the claim was, in fact, submitted after expiration of the statute of limitations and does not support a finding that it was equitably tolled, we grant the government's motion and dismiss the appeal.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. The government awarded appellant the above-captioned contract (the contract) to construct a team house at FOB Pol-E-Kumri in Afghanistan on February 28, 2010. The contract provided that payment would be made by the Bagram Finance Office on Bagram Air Field, Afghanistan (R4, tabs 6-7). The contract was valued at $389,999.60 (R4, tab 6) and incorporated by reference Federal Acquisition Regulation (FAR) 52.233-1, DISPUTES (JUL 2002) (R4, tab 7 at 12).

[1] Appellant has also submitted a document which is initially identified as a motion for summary judgment, but the contents of the document are more akin to a response to the government's motion, so we treat it as such. *Supreme Foodservice GmbH*, ASBCA No. 57884 *et al.*, 16-1 BCA ¶ 36,426 at 177,576.

2. On May 5, 2010, on letterhead from the Department of the Army, Combined Joint Special Operations Task Force – Afghanistan, Bagram Air Field, the CO notified appellant, the contract was terminated for the convenience of the government under subparagraph (l) of FAR 52.212-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (Mar 2009),[2] effective the following day (R4, tab 8 at 1). In subsequent emails between appellant and the CO on May 5, 2010, the CO informed appellant that the compound was no longer needed, and ordered appellant to stop all work (R4, tab 3 at 8-9). The CO further instructed appellant to submit its costs, thus far to the government, and stated that when the government terminated a contract for convenience, it would "pay for the expenses incurred up to that point, as well as for the progress already completed" (R4, tab 3 at 9).

3. Appellant submitted a termination settlement proposal as an invoice in the amount of $124,945.00 for materials and labor to the CO on May 23, 2010 (R4, tab 3 at 12-13, tab 5). The invoice did not include a claim certification as required by the CDA in 41 U.S.C. § 7103(b) for claims over $100,000.

4. Appellant sent another invoice to the government on September 20, 2010, explaining "we have removed some of the items from the invoice, some of the item we have used in the project its in the invoice" (syntax in original) (R4, tab 3 at 14). Though the government initially stated it could not open the attachment, it has since acknowledged the invoice was for $72,545.00 (*cf.* amended answer at 5-6; gov't mot. at 2).

5. On October 4, 2010, the government emailed appellant, stating "you should receive payment in about 15 days or less" (R4, tab 3 at 16).

6. On November 8, 2010, appellant received an email from Defense Finance and Accounting Service (DFAS), stating DFAS had no copy of the contract (R4, tab 3 at 24-25). Appellant then sent several emails in January 2011 to the government email address it had been using for correspondence, requesting news on its payment status (R4, tab 3 at 22-24).

7. Appellant sent a third invoice to the government on September 11, 2011 for $22,845.00 for "partial completion & materials" for "Construction of Pol-E-Kumri 20%" (R4, tab 1). This invoice was paid on October 13, 2011 (R4, tab 9 at 1).

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[2] The contract did not include this clause or any form of termination for convenience clause, for that matter (R4, tab 7). Though the clause cited by the CO was the one for commercial items contracts, nothing on the face of the contract or the record before us clarified whether this is a commercial items contract or a non-commercial items contract (*id*.).

8. Appellant stated in response to the government's interrogatories that it did not have "any communications with anyone [related to this contract] between Septmber [sic] 11, 2011 and December 4, 2017" (gov't mot. ex. 2 at 10). Despite this assertion, on July 11, 2017, appellant submitted an email to seven military email addresses with the contract attached, stating the following:

> We . . . have got the subject contract from the US army in 2010.
>
> We have got the NTP & we purchased the items and we have work & have not received the payment we have got claim on the US army for the subject contract therefore we are requesting from you please view attached contract and please advice us the next step and advice us that we can get our money for the subject Contract (syntax in original)

(App. resp. ex. 4 at 1) Brent Robinson, a CO with the Navy, responded the following day, "These contracts did not originate from our office, so we cannot help you." Appellant replied, "which offfice these contract originate, then? The camp have closed and we didnt received the total cost of our expenses. all officers redeployed at that time. Could you help me to get the correct departmetment that this contract originate in?" (Syntax in original) CO Robinson emailed appellant back, stating only "I'm sorry, I don't know who can help you." In subsequent emails, CO Robinson directed appellant to contact the Board. (*Id.* at 2-6)

9. Appellant emailed the Board on September 15, 2017, seeking information on how to submit its claim (R4, tab 9 at 9-10). The Board responded on September 18, 2017, informing appellant that it was forwarding his correspondence to the email addresses for the Chief Trial Attorneys for the Army and Air Force (R4, tab 9 at 9). On October 5, 2017, appellant and the Board both contacted those addresses regarding appellant's request for information as to where to submit its claim[3] (R4, tab 9 at 8-9). The Air Force replied on November 30, 2017, providing contact information for two COs who would be able to receive the claim and issue a final decision (R4, tab 9 at 6-7).

10. By email dated December 4, 2017, appellant submitted a certified claim pursuant to the terminated contract for $124,945.00 to the two Air Force COs (R4, tab 2 at 1, tab 3 at 1-2). One of the COs, writing on letterhead from Bagram, Afghanistan, issued a final decision denying the claim on February 23, 2018 (R4, tab 10). This timely appeal followed.

[3] Because of appellant's email to the trial counsel, we surmise that their addresses were cc'd in the September 18, 2017 email from the Board to appellant, but this makes no difference to the result of this motion.

DECISION

As noted above, we grant the government's motion for summary judgment because the facts, even considered in the light most favorable to appellant, support a finding that the claim was filed more than six years after it accrued, while there is no basis to toll the statute of limitations. To reach this conclusion, after applying the correct standards for summary judgment, we first address when appellant's claim accrued and whether it submitted that claim late; then we turn to the question of whether there are facts supporting an application of the doctrine of equitable tolling.

I. The Standard of Review for Motions for Summary Judgment

The standards for summary judgment are well established and need little elaboration here. Summary judgment should be granted if it has been shown that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A non-movant seeking to defeat summary judgment by suggesting conflicting facts "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968)). Nevertheless, "[t]he moving party bears the burden of establishing the absence of any genuine issue of material fact and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment." *Mingus Constructors v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

We make the final note that the burden of proof for equitable tolling lies with the party seeking to invoke it, the appellant. *See Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

II. When Did Appellant's Claim Accrue?

The CDA provides that "[e]ach claim by a contractor against the Federal Government relating to a contract . . . shall be submitted within 6 years after accrual of the claim." 41 U.S.C. § 7103(a)(4)(A). And "[p]recedent elaborates that whether and when a CDA claim accrued is determined in accordance with the FAR, the conditions of the contract, and the facts of the particular case." *Kellogg Brown & Root Servs., Inc. v. Murphy*, 823 F.3d 622, 626 (Fed. Cir. 2016) (citations omitted). Thus, we turn to the relevant portion of the FAR, which provides that a claim accrues when "all events that fix the alleged liability of . . . the Government . . . and permit assertion of the claim, were known or could have been known." FAR 33.201; *see also Kellogg Brown & Root*, 823 F.3d at 626.

The government argues that appellant's claim accrued at or near the time of the termination for convenience because that is when appellant knew or should have known what all of its costs would be stemming from the termination. The date, in fact, selected by the government for accrual is May 22, 2010, the day before appellant submitted its first termination settlement proposal (gov't mot. at 5), presumably because, in order to submit such a proposal, appellant must have known what its costs were. The government cites no law supporting this view, though it has a certain logic to it at first blush.

The problem with this date, however, is that for a claim to accrue, it is not enough for the amount of liability to be fixed, but also events must "permit assertion of the claim . . . ." FAR 33.201; *see also Kellogg Brown & Root*, 823 F.3d at 628 (claim does not accrue if it "cannot be filed because mandatory pre-claim procedures have not been completed") (citations omitted). As explained below, this supports a finding that the parties needed to attempt to resolve a termination settlement proposal and come to impasse before appellant could have submitted a claim.

Applying the FAR provisions that govern the procurement of non-commercial items, we have previously held that the termination clause found in FAR 52.249-6, TERMINATION (COST REIMBURSEMENT) (May 2004), requires an attempt at negotiating a termination settlement proposal leading to an impasse prior to the submission of a claim. *See Thorpe See-Op Corp.*, ASBCA Nos. 58960, 58961 15-1 BCA ¶ 35,833 at 175,246. An examination of the termination for convenience clause for firm-fixed-price contracts involving construction contracts,[4] FAR 52.249-2, TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (ALT I) (Sep 1996), shows that the same provisions requiring attempted resolution of termination settlement proposals in FAR 52.249-6, which compelled a requirement for impasse in *Thorpe See-Op*, would also apply in such a contract. We need not decide for now whether the requirement for impasse also attaches to commercial items contracts[5] because this does not appear to be such a contract and, even if it were and even if there were no impasse requirement, the effect would be to move the accrual of the claim to an earlier date, to the detriment of appellant compared to the accrual date we are choosing.[6]

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[4] This is the one that would be applicable here through use of the *Christian* doctrine, *G.L. Christian & Assocs. v. United States*, 312 F.2d 418, 426-27 (Ct. Cl. 1963), given that the government did not include a termination clause in the contract and this does not appear to be a commercial items contract.

[5] A good argument could be made that it does, given the similar policy imperatives that drive both types of convenience clauses. *Cf. SWR, Inc.*, ASBCA No. 56708, 15-1 BCA ¶ 35,832 at 175,233.

[6] Alternatively, even if we found no impasse when we did, FAR 52.249-2(j), provides that the CO's determination of the amount to be paid when there is disagreement is subject to appeal under the contract's Disputes clause. The latest possible date of that determination was October 13, 2011, when the invoice was paid, though there

Finding, as we have, that the claim accrued, at latest, at the time of impasse, the accrual date for purposes of deciding this motion for summary judgment is September 11, 2011. We select this particular date because it appears to be the time that appellant gave up in its attempts to obtain a larger settlement from the government and decided to obtain what it could get, and impasse is defined by the law as "the point where an objective observer would conclude that resolution through continued negotiations is unwarranted or has been abandoned by the parties . . . ." *Ensign-Bickford Aerospace & Defense Co.*, ASBCA No. 58671, 14-1 BCA ¶ 35,599 at 174,407. It is certainly possible that appellant could have recognized the futility of further negotiations earlier in the 2011 time period, but the record is scant on this score in this motion for summary judgment and we resolve all inferences in favor of appellant, given that the government is the movant here.

III. The Statute of Limitations was not Equitably Tolled

With the claim accrual date in hand, it is a simple matter of mathematics to see that the last day that appellant could have submitted a timely claim was September 10, 2017. But all parties recognize that appellant's claim was not submitted until December 4, 2017[7], almost three months too late. This is fatal to the claim unless the doctrine of equitable tolling provides a way to extend the statute of limitations. It does not.

The doctrine of equitable tolling permits the CDA's statute of limitations to be extended so long as an appellant: 1) has been pursuing its rights diligently; and 2) some extraordinary circumstance stood in the way to prevent timely submission of its claim. *Khenj Logistics Grp.*, ASBCA No. 61178, 18-1 BCA ¶ 36,982 at 180,140 (citing *Artic Slope Native Ass'n v. Sebelius*, 583 F.3d 785, 798 (Fed. Cir. 2009) (applying equitable tolling to the CDA) and *Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750, 755 (2016) (setting forth the elements of equitable tolling)). "The diligence required for equitable tolling purposes is 'reasonable diligence,' not 'maximum feasible diligence.'" *Holland v. Florida*, 560 U.S. 631, 653 (2010) (citation and internal citation omitted). When determining diligence, "courts consider the [litigant's] overall level of care . . . in light of [its] particular circumstances." *Doe v. Busby*, 633 F.3d 1001, 1013

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was no formal "decision" by the CO except payment of the invoice. In any event, even if we found that the claim accrued on that date, it would still cause appellant's claim to be late.

[7] This is not an instance where impasse caused a previously-submitted settlement proposal to ripen into a claim. *E.g., Rex Systems, Inc.*, ASBCA No. 52247, 00-1 BCA ¶ 30,671 at 151,489. The termination settlement proposal here was in an amount greater than $100,000 and not certified which means it was unable to ever become a claim. *See* 41 U.S.C. § 7103(b); *Special Operative Grp., LLC*, ASBCA No. 57678, 11-2 BCA ¶ 34,860 at 171,480 (certification requirement for claims over $100,000).

(9th Cir. 2011). "[T]he second prong of the equitable tolling test is met only where the circumstances that cause a litigant's delay are both extraordinary and beyond its control." *Menominee*, 136 S. Ct. at 756. The "extraordinary circumstances" analysis asks whether the circumstances rendered "critical information, reasonable investigation notwithstanding, was undiscoverable[,]" *Gould v. U.S. Dep't of Health and Human Servs.*, 905 F.2d 738, 745-46 (4th Cir. 1990), and there is no requirement that these extraordinary circumstances involve misconduct or fault of the government. *E.g.*, *Holland*, 560 U.S. at 549-50 (extraordinary circumstance involved alleged gross negligence of petitioner's own attorney).

Thus, we turn to the facts presented in this matter, and considered in the light most favorable to appellant. Addressing the second prong of the applicable test, we find that there are no extraordinary circumstances here to justify equitable tolling. To be sure, appellant asserts in its response to the government's motion that "we did not knew where and to which department to submit our claim since 2010 till July 2017" (app. opp'n at 1) (syntax in original) and appellant's July 2017 email to the miscellaneous United States military personnel not involved in this contract alleges that the camps had closed and that the people he was dealing with had all redeployed. But appellant makes no averments explaining what steps it took to try to find authorities to submit the claim to. At most, appellant suggests that it first heard that it could submit claims to Bagram Air Base from another contractor in July 2017 (*id*.). But Bagram Air Base was always the locus of appellant's contract, given that that was where the contract stated payment requests should be submitted and where the CO's termination letter originated. In any event, rotation of military personnel in overseas bases is commonplace, and the appellant has not met its burden (even with all factual inferences in its favor) of alleging circumstances that rise to the level of being extraordinary. In other words, under the circumstances, we do not find that "critical information, reasonable investigation notwithstanding, was undiscoverable." *Gould*, 905 F.2d at 745-46.

Thus, we hold that, even reading facts in the light most favorable to appellant, the company's claim was not equitably tolled.

CONCLUSION

For the reasons stated above, the government's motion for summary judgment is granted.

Dated: May 6, 2020

J. REID PROUTY
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I concur

RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

REBA PAGE
Administrative Judge
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. 61561, Appeal of Abozar Afzali Construction Company, rendered in conformance with the Board's Charter.

Dated: May 6, 2020

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals