



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS FOR FAILURE TO
STATE A CLAIM DENIED: October 27, 2011

CBCA 2361

ABSOLUTE SOFTWARE, INC.,

Appellant,

v.

DEPARTMENT OF COMMERCE,

Respondent.

Mark R. Vernazza of Edwards Angell Palmer & Dodge, LLP, Boston, MA, counsel for Appellant.

Mark Langstein, Richard Brown, Michael Bogomolny, Shraddha Upadhyaya, and Erin N. Frazee, Office of General Counsel, Department of Commerce, Washington, DC, counsel for Respondent.

Before Board Judges **POLLACK**, **McCANN**, and **KULLBERG**.

McCANN, Board Judge.

Respondent has moved to dismiss count I of the complaint for failure to state a claim upon which relief can be granted. For the following reasons that motion is denied.

Background

On or about August 9, 2007, Absolute Software, Inc. (appellant or Absolute) and the Department of Commerce (respondent or DOC) entered into contract number

DG133R07SE3872. Under this contract Absolute was to provide, among other things, licensing, software assurance, technical support, and consultative services for the SmartTRAC Surveillance System and the United States Vessel Monitoring System. Absolute proceeded with performance and on April 10, 2010, submitted a claim to the contracting officer. That claim was denied on February 14, 2011. Absolute timely appealed that decision to the Civilian Board of Contract Appeals on March 25, 2011.

On April 29, 2011, Absolute filed its complaint. In its complaint Absolute alleges that DOC breached the contract, breached the end user licenses, infringed Absolute's copyright, and misappropriated Absolute's trade secrets.

Discussion

DOC has moved to dismiss count I for failure to state a claim on the grounds that Federal Acquisition Regulation (FAR) clause 52.227-19, *Commercial Computer Software – Restricted Rights* (Jun 1987) 48 CFR 52.227-19 (2006) is not part of the contract and cannot be incorporated into the contract under the Christian Doctrine. *See G.L. Christian and Associates v. United States*, 160 Ct. Cl. 1 (1963). DOC also seems to be arguing, by implication, that this Board lacks jurisdiction over this count if FAR 52.227-19 is not contained in the contract because there would be no contract provision to violate. In deciding a motion to dismiss for failure to state a claim, the Board must accept as true the factual allegations in the complaint. *See Hughes v. Rowe*, 449 U.S. 5, 10 (1980); *Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1584 n.13 (Fed. Cir.1993).

In count I of the complaint, Absolute alleges a violation of FAR 52.227-19, along with other allegations of contract and licensing agreement violations. Accordingly, even if FAR 52.227-19 were not part of the contract, count I would still remain viable because other unrelated allegations of contract and licensing agreement violations exist. Furthermore, even if FAR 52.227-19 were not part of the contract, it is unclear what rights and restrictions DOC would have under the contract in the SmartTRAC software.

Whether or not FAR 52.227-19 is part of the contract is a contract issue over which this Board has jurisdiction, as is the question of whether that contract clause, or any part of the contract, has been violated. At this point we do not have sufficient evidence to determine the status of FAR 52.227-19. If the clause is part of the contract, it sets forth some or all of the rights and restrictions that the Government has in the SmartTRAC software. If FAR 52.227-19 is not part of the contract, the Government's rights and restrictions in the SmartTRAC software are less clearly defined. However, in that event, this Board would still have jurisdiction to decide what rights and restrictions exist and whether the Government violated them. Accordingly, even if FAR 52.227-19 is not part of the contract, the issue of

whether the Government violated the contract remains. Thus, the absence of FAR 52.227-19 from the contract would not defeat Absolute's claim in count I of a data rights violation.

It is premature at this point for the Board to decide whether the Christian Doctrine mandates the inclusion of FAR 52.227-19 in the contract. Additional evidence is needed before this Board can rule on that issue, including evidence on whether the omission of this clause was an oversight or intentional. The Board would also need to know what respondent contends the Government's rights and restrictions are in the SmartTRAC software in the absence of FAR 52.227-19.

Decision

The motion is **DENIED**.

R. ANTHONY MCCANN
Board Judge

We concur:

HOWARD A. POLLACK
Board Judge

H. CHUCK KULLBERG
Board Judge