

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
National Gypsum Company) ASBCA No. 53259
)
Under Contract No. W-ORD-607)

APPEARANCE FOR THE APPELLANT: R. Steven DeGeorge, Esq.
Robinson, Bradshaw & Hinson, P.A.
Charlotte, NC

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
MAJ John B. Alumbaugh, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

National Gypsum Company (NGC) claims indemnification for defending two third party legal actions arising from its operation of a Government munitions plant during World War II. Pursuant to Section 16 of the Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2391, NGC has elected to bring these claims under that Act. The Government moves to dismiss alleging that neither of the indemnification claims has been submitted to the contracting officer for decision in accordance with Section 6(a) of the Act. We deny the motion as to the first claim. We grant the motion as to the second.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. On 9 February 1942, NGC entered into a contract with the United States of America, represented by contracting officers of the War Department, for operation of the Government-owned Bluebonnet Ordnance Plant at McGregor, Texas (R4, tab 1). The contract included the following indemnification provision:

All work under this contract is to be performed at the expense of the Government, and the Government shall indemnify and hold the Contractor harmless against any loss, expense (including expense of litigation) or damage (including personal injuries and deaths of persons and damage to property) of any kind whatsoever arising out of or connected with the performance of the work

(R4, tab 1 at 25)

2. NGC's work under the contract was completed in November 1945 and the plant was closed. In 1952, it was reactivated and operated by other contractors initially under Air Force and from 1966 under Navy contracts. Since 1995, the plant has been inactive with the property under Navy supervision as a Naval Weapons Industrial Reserve Plant. (R4, tab 2 at 79-88)

3. In September 1998, an action was filed in Texas state court by Mr. David Bubert against NGC and other defendants for property damage allegedly caused by their past operation of the Bluebonnet plant (app. supp. R4, tab 12). The Justice and Navy Departments were notified of this action by NGC's counsel in letters dated 8 December 1998 and 13 January 1999 respectively (app. resp. to Gov't rebuttal, exs. A, B). On 1 June 1999, the *Bubert* state court action was settled and dismissed (app. supp. R4, tab 9).

4. By letter dated 2 June 1999, NGC counsel notified Navy counsel that NGC had incurred \$21,586 in defending and settling the *Bubert* state court action. This letter further stated:

If the United States does not honor its indemnity obligation voluntarily, enforcement of the indemnity obligation would be governed by the Contract Disputes Act. In accordance with 42 U.S.C. § 605(a), please allow this letter to constitute our client's claim in the amount of \$21,586. The legal and factual bases of the claim are described in greater detail in my letters dated December 8, 1998 and February 10, 1999, the contents of which are incorporated herein by reference. We request that the applicable contracting officer issue a decision on this claim within 60 days.

(App. supp. R4, tab 13)

5. By letter to NGC counsel dated 27 July 1999, Navy counsel referred to the 2 June 1999 letter and stated that since "the matter" involved a War Department contract, it had been forwarded to the Department of the Army which had "the authority to resolve issues regarding that contract" (app. supp. R4, tab 14). The record does not indicate the exact date that NGC's 2 June 1999 letter was received by an Army contracting officer. However, during the week of 2 December 1999, NGC counsel was in contact with the Army counsel assigned to the claim, and provided additional supporting information (app. resp. to Gov't rebuttal, ex. C).

6. On 5 May 2000, NGC counsel received an e-mail message from Army counsel which referred to a "Draft settlement agreement" on the *Bubert* claim and stated "The contracting officer states that while the check is not in the mail, it will be in a few days."

This message further stated: “Doubt if anything more needs to be done except sign the agreement and contracting officer will effect that . . . next week.” (App. supp. R4, tab 5) There is no evidence in the present record that the draft settlement agreement was in fact signed by the contracting officer.

7. By letter dated 27 October 2000, NGC counsel notified Army counsel that NGC had been joined with other defendants in a second action (the *Hollan* action) in Texas state court for property damage allegedly caused by their past operation of the Bluebonnet plant. This letter requested written confirmation of the Government’s indemnification obligation, and further stated:

If we do not receive such written confirmation within seven days, we will have no alternative but to assert an indemnity claim against the United States in this lawsuit. We would also assert a breach of contract claim against the United States for its continuing failure to honor the settlement agreement we reached in connection with the *Bubert* action. Please understand that it is our strong preference to avoid the assertion of such claims against the United States, although we will proceed in this fashion if we are forced to do so.

(R4, tab 3)

8. By letter to NGC’s counsel dated 3 November 2000, and received on 6 November 2000, an Army contracting officer referred to both the *Bubert* and *Hollan* actions, and stated:

This responds to your letter of 27 October 2000, and is to state that the United States Army Operations Support Command (OSC) specifically denies and disputes any obligation to indemnify your client National Gypsum Company with regard to either of the above matters.

While this command had undertaken efforts to fund and pay the approximately \$20,000.00 submitted by you for representation of [NGC] in [the *Bubert* action] there was no settlement agreement in the matter and consequently no breach of such agreement.

(R4, tab 4; app. supp. R4, tab 7)

9. On 5 February 2001, NGC appealed the 3 November 2000 letter as a denial of its indemnification claims (R4, tab 5). NGC's complaint on appeal seeks all losses, costs and expenses incurred in defending both actions.

DECISION

The Government alleges that we lack jurisdiction over the *Bubert* claim because that claim was not submitted to the contracting officer. We disagree. The 2 June 1999 claim letter was in all respects a proper claim under the Contract Disputes Act of 1978. It expressly stated that it was submitted in accordance with that Act. It demanded payment as a matter of contract right to a sum certain. It provided a legal and factual basis for the claim in referenced correspondence. It expressly requested a contracting officer's decision within the time limit specified by the Act. *See* Finding 4.

Although addressed to counsel for the agency currently supervising the Bluebonnet plant property, the 2 June 1999 claim letter was forwarded by that counsel to the contracting agency's successor. It was in the hands of the successor agency no later than 2 December 1999, and in the hands of an authorized contracting officer no later than 5 May 2000. *See* Findings 4-6. In these circumstances, the route by which the claim letter arrived on the contracting officer's desk is of no jurisdictional relevance. *See Dawco Construction, Inc. v. United States*, 930 F.2d 872, 879-80 (Fed. Cir. 1991), *overruled in part on other grounds*, *Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995) (*en banc*). Moreover, the express request for a contracting officer's decision in NGC's claim letter distinguishes it from the letter in *J & E Salvage Co. v. United States* 37 Fed. Cl. 256, 261 (1997), *aff'd without opinion*, 152 F.3d 945 (Fed. Cir. 1998) (*table cert. denied*, 525 U.S. 827 (1998), cited by the Government.

With respect to the *Hollan* "claim," we agree with the Government that the 27 October 2000 letter was insufficient to invoke the CDA. At most that letter expressed an intent to submit a claim in the future "if we are forced to do so." Neither the 27 October 2000 letter, nor any other document in the record, submitted a present demand to the contracting officer for a decision on a claim for a sum certain for defending the *Hollan* action. *See* Finding 7. An expression of intent to submit a claim in some amount at some time in the future is not a claim for purposes of the CDA. *Management Resource Associates, Inc.*, ASBCA No. 49620, 96-2 BCA ¶ 28,588 at 142,736.

The motion to dismiss is denied as to the *Bubert* claim. The motion is granted as to the *Hollan* matter.

Dated: 24 July 2001

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

I concur

I concur

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

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. 53259, Appeal of National Gypsum Company, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals