

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
JWK International Corp.) ASBCA No. 54075
)
Under Contract No. N62467-00-D-0332)

APPEARANCE FOR THE APPELLANT: Keith L. Baker, Esq.
Barton, Baker, McMahon,
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McLean, VA

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
Anthony K. Hicks, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES
ON CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT
AND JURISDICTIONAL OPPOSITION TO AMENDED COMPLAINT

I.

On 5 December 2003 respondent moved for partial summary judgment with respect to Counts II and IV of the complaint. Appellant's 8 January 2004 reply to that motion stated that appellant "submits herewith an amended complaint that deletes Count IV" and "withdraw[s], without prejudice, Count II" and, therefore, respondent's motion is moot (app. resp. at 2-3). Respondent's 13 January 2004 letter requests the Board to "dismiss those counts with prejudice" and opposed receipt of appellant's amended complaint. In a 16 January 2004 conference call, both appellant and respondent agreed that respondent's 5 December 2003 motion for partial summary judgment was moot because appellant had withdrawn its original Counts II and IV. We dismiss respondent's motion for partial summary judgment, and rule on its opposition to the amended complaint in point III below.

II.

On 5 December 2003 appellant moved for "summary judgment" with respect to Count I of its complaint, which we treat as a motion for partial summary judgment, since it does not address all appeal issues.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. Contract No. N62467-00-D-0332 (the contract) was awarded to JWK International Corp. on 28 January 2002 for "Station and Facility Support Services at Marine Corps Air

Station (MCAS), Beaufort, South Carolina” (R4, tab 1, ¶ C1.1a, tab 2 at 1). For the base period (12 months), contract § B, as amended by Modification No. P00001, provided for payment of a firm fixed price for labor at the rate of \$235,772.26 per month and for reimbursement of material costs (sub-items 0001AA-0001AB), and a “SCHEDULE OF INDEFINITE QUANTITY WORK” (IQ) (items 0002-0007), each with specified estimated hours and material dollar figures. Analogous terms in § B applied to two option year periods. (R4, tabs 1-2)

2. Under the contract JWK submitted 29 invoices, on which it received partial payments (mot., enclosures A-B).

3. On 18 November 2002 JWK submitted a certified claim to the contracting officer (CO) stating that the Navy failed to pay JWK \$845,559.88 for labor invoices 1, 3, 4, 5, 7, 11, 14 and 16; \$367,366.63 for materials invoices 6, 8, 9, 10, 12 and 16 (sic, meant 15); and \$13,386.65 for IQ invoices 3, 4 and 14; totaling \$1,226,313.16 (R4, tab 12).

4. The CO did not issue a final decision on JWK’s 18 November 2002 claim. JWK appealed to the ASBCA on the basis of a deemed denial on 22 January 2003. The appeal was docketed as ASBCA No. 54075.

5. JWK’s 26 February 2003 complaint in Count I, titled “NONPAYMENT OF INVOICES,” alleged:

72. The Navy has failed to pay a total of \$741,927.12 for labor invoices (through Invoice #20), \$739,656.25 for materials invoices (through Invoice #21), and \$167,588.41 for indefinite quantity invoices (through Invoice #20), for a grand total outstanding of \$1,649,171.78.

Respondent’s 1 April 2003 answer alleged that paragraph 72 contained argument and conclusions of law, and that “to the extent they may be deemed allegations of fact, denied.”

6. On 13 March 2003, respondent filed the Rule 4 file. JWK asserts that respondent failed to identify in the appeal file the specific reasons for taking “deductions” and “retentions” from amounts JWK invoiced, except for such statements as “non-performance of specific work requirements” (mot. at 2).

7. Respondent’s answer to appellant’s interrogatory No. 2 stated that the “reason for non-payment of each invoice is in the documents referenced in attachment A hereto” (mot. at 2-3). JWK asserts that respondent’s “attachment A” (mot., “Enclosure B” sic, probably meant C) contains no information or references to documents explaining the Navy’s specific reasons for non-payment of such invoices, and that respondent has not made any documents available for JWK to review, although such documents had been promised on 3 October 2003.

8. On 8 January 2004, respondent filed its response to the motion, including a declaration of CO Charles Daniels dated 6 January 2004. He declared: (a) “During the course of JWK’s contract performance the Navy withheld amounts from various labor invoices, in accordance with the schedule of deductions, for JWK’s failure to perform certain contractually required work”; (b) “the Navy withheld amounts from various materials invoices . . . primarily because JWK did not provide the Navy with documentation establishing that it had purchased the materials and was utilizing them in performance of the contract’s work”; (c) “all invoices pertaining to [IQ] work performed . . . under CLINs 0002-0007 have been paid”; (d) respondent produced 25 boxes of documents to JWK for review in South Carolina on an unidentified date; and (e) “in the 25 boxes, are the contract files, referenced in the Navy’s response to interrogatory 2, which ‘contain the detailed reasons for non-payment of each invoice received from JWK for which payment made by the government do [sic] not equal the amount of the invoice’” (Daniels decl., ¶¶ 2-6).

DECISION

Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c), *U.S. Ecology, Inc. v United States*, 245 F.3d 1352, 1355 (Fed. Cir. 2001). Respondent genuinely disputes whether it has failed to pay amounts due on invoices still in issue and whether it has produced documentation of the specific reasons why it did not pay the full amounts JWK invoiced to the Navy (SOF ¶ 8). The motion is denied.

III.

On 13 and 27 January 2004 respondent opposed receipt of appellant’s amended complaint because it (i) contained or revised allegations regarding invoices which were not the subject of a claim submitted to the CO for final decision, (ii) prayed for *quantum meruit* relief which respondent asserts the Board cannot provide, and (iii) updated the payment status of each invoice. JWK’s 21 and 28 January 2004 responses argue, *inter alia*, that those allegations involve the same operative facts underlying its 18 November 2002 claim and merely update damages for additional deductions and retentions from invoices submitted after the date of such claim. The following additional facts are pertinent to this issue:

ADDITIONAL STATEMENT OF FACTS

9. JWK’s 26 February 2003 complaint alleged deductions and withholdings from invoices not included in its 18 November 2002 claim, *viz.*: (a) labor invoices Nos. 18 and 20 (compl. ¶¶ 23-24, 52-54, 72); (b) materials invoices Nos. 2, 17, 19 and 21 (compl. ¶¶ 32-34, 55, 60-62, 72); and (c) IQ invoices Nos. 13, 18 and 20 (compl. ¶¶ 37, 39-40, 67, 72). Respondent’s 1 April 2003 answer thereto included the “AFFIRMATIVE DEFENSE” of accord and satisfaction and stated: “OTHER MATTERS 1. Certain of the allegations set forth in the complaint do not appear to have been the subject of a claim to the [CO] or a [CO] decision nor do they contain a ‘sum certain.’” Respondent did not identify which were the unclaimed allegations. (Answer at 15)

10. JWK’s 8 January 2004 “Amended Complaint”: (a) alleged deductions and withholdings from invoices not included in its 18 November claim nor in its 26 February 2003 complaint, *viz.* labor invoices Nos. 22, 24 and 29 (compl. ¶¶ 25-27, 54-55) and materials invoices Nos. 23, 25, 26, 28R and 29 (compl. ¶¶ 38-42, 65-67), (b) revised amounts unpaid on some of the invoices listed in its 26 February 2003 complaint due to payments and other actions that occurred after February 2003 (compl. ¶¶ 24, 29-37, 53, 57-64), and (c) added a Count II, labeled “NONPAYMENT FOR MATERIALS/QUANTUM MERUIT,” seeking “the reasonable value of the materials delivered to and used by the government” (compl. ¶¶ 80-84).

11. JWK’s 8 January 2004 Amended Complaint, Count I, “NONPAYMENT OF INVOICES,” alleges:

76. The Navy has failed to pay a total of \$732,108.37 for labor invoices (through Invoice #27), \$823,642.65 for materials invoices (through Invoice #29), as revised, and \$99,722 for indefinite quantity invoice #13, for a grand total outstanding of \$1,655,532.02.

12. JWK dated its pertinent invoices under the contract as follows:

<u>Invoice No.</u>	<u>Date</u>
2	05/01/02
13	09/30/02
17	11/27/02
18	12/18/02
19	12/23/02
20	01/17/03
21	01/24/03
22	02/19/03
23	03/11/03
24	03/17/03
25	03/19/03
26	03/27/03
28R	01/08/04
29	09/22/03

(App. mot., enclosure A; gov’t resp. (1/27/04), attach. 2)

13. The present appeal file does not show whether respondent’s specific reasons for its deductions and retentions from invoices Nos. 2, 13 and 17-29 are the same as, or different from, respondent’s specific reasons for its deductions and retentions from invoices Nos. 1, 3-12 and 14-16 enumerated in JWK’s 18 November 2002 claim. Respondent’s specific

reasons for its deductions and retentions from each invoice may have been factually distinct in whole or in part, and may require the Board to find the specific facts regarding each deduction and retention for each invoice.

DECISION

The Contract Disputes Act of 1978 (CDA) provides that a contractor must submit a written claim, certified if required, to the CO, *see* 41 U.S.C. § 605(a), (c)(2), *H. L Smith, Inc. v. Dalton*, 49 F.3d 1563, 1564 (Fed. Cir. 1995), and appeal from the CO's written decision on, or deemed denial of, that claim, *see* 41 U.S.C. § 605(c)(1), (3), (5), *Fru-Con Construction Corp.*, ASBCA No. 53544, 02-1 BCA ¶ 31,729 at 156,757.

Despite the Board's order (as modified on 26 November 2003) to submit dispositive motions on or before 5 December 2003, the subject matter jurisdiction of a federal tribunal can be raised at any time. *See Bender v. Williamsport Area School District*, 475 U.S. 534, 541, 547 (1986). The burden to establish the Board's jurisdiction of an appeal arising from denial of a contractor claim is on appellant. *See Security Insurance Co. of Hartford*, ASBCA No. 51759, 00-2 BCA ¶ 31,021 at 153,210 (government moved to dismiss contractor claim for lack of Board jurisdiction; appellant had burden to establish jurisdiction).

A claim cannot properly be raised for the first time in the pleadings before the Board. *See Consolidated Defense Corp.*, ASBCA No. 52315, 03-1 BCA ¶ 32,099 at 158,668-69. The criteria for jurisdiction to decide such a claim are whether the claim requires review of evidence on a common or related set of underlying operative facts, or on different or unrelated operative facts. *See Placeway Construction Corp. v. United States*, 920 F.2d 903, 907-08 (Fed. Cir. 1990); *Contel Advanced Systems, Inc.*, ASBCA No. 49073, 02-1 BCA ¶ 31,809 at 157,149.

The present appeal file does not show whether respondent's specific reasons for its deductions and retentions from invoices Nos. 2, 13 and 17-29 are the same as, or different from, respondent's specific reasons for its deductions and retentions from invoices Nos. 1, 3-12 and 14-16 enumerated in JWK's 18 November 2002 claim. Respondent's specific reasons for its deductions and retentions from each invoice may have been factually distinct in whole or in part, and may require the Board to find the specific facts regarding each deduction and retention for each invoice. (SOF ¶ 13)

Accordingly, appellant has not satisfied its burden of proof that the reasons for such deductions and retentions are a common or related set of underlying operative facts. We sustain respondent's objections to those allegations in both the 26 February 2003 complaint and the 8 January 2004 amended complaint, that were not submitted to the CO in appellant's 18 November 2002 claim. We overrule respondent's objections to those allegations in the amended complaint addressing invoices contained in JWK's 18 November 2002 claim and reflecting subsequent government payments and JWK invoice reductions.

With reference to “*quantum meruit*,” appellant has explained that it seeks to recover its material costs irrespective of any cost reimbursement limitation respondent alleges. Therefore, we disregard the label “*quantum meruit*” and determine that we have jurisdiction of the allegations in paragraphs 80-84 of the amended complaint.

We strike from JWK’s 8 January 2004 amended complaint the allegations in ¶¶ 23-28, 35-43, 52-56, 62-67, 71 and 74 without prejudice to appellant’s right to submit a proper claim to the CO with respect to such allegations.

Dated: 10 March 2004

DAVID W. JAMES, 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. 54075, Appeal of JWK International Corp., rendered in conformance with the Board's Charter.

Dated:

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DAVID V. HOUBE
Acting Recorder, Armed Services
Board of Contract Appeals