

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Pete Vicari General Contractor, Inc.) ASBCA No. 54419
)
Under Contract No. N62467-96-C-0969)

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OPINION BY ADMINISTRATIVE JUDGE REED
ON GOVERNMENT MOTIONS TO DISMISS AND TO STRIKE

In response to appellant’s complaint, the government asks that we strike a portion of the complaint relating to liquidated damages and dismiss matters over which, the government alleges, the Board has no jurisdiction. Appellant opposes the motions that were incorporated into the government’s answer except for that relating to a request for Equal Access to Justice Act (EAJA) fees. The government submitted a response to appellant’s opposition.

FINDINGS OF FACT FOR PURPOSES OF THE MOTIONS

1. On 21 May 1998, Contract No. N62467-96-C-0969 (the contract) was awarded by a contracting officer (CO) for the U.S. Navy, Naval Facilities Engineering Command (the government) to Pete Vicari General Contractor, Inc. (appellant, the contractor, or PVGC). The lump-sum, fixed-price contract is for construction of “a new Base Civil Engineering [BCE] Complex and renovation of the existing BCE Building for [a] Communications Squadron.” The Board does not yet have a complete copy of the contract in the record; however, each party cites the Contract Disputes Act of 1978, as amended, 41 U.S.C. §§ 601-613 (the CDA) as applicable to the contract and the government, in record documents, refers to standard provisions at FAR 52.233-1 DISPUTES (OCT 1995) and FAR 52.243-4 CHANGES (AUG 1987). (App. supp. R4, tabs A-8, A-9; R4, tab 1 at specifications § 01110, ¶ 1.1.1, tab 2 at contract Modification No.

P00001, Standard Form 30, item 13C) The portion of the contract provided to date does not mention liquidated damages.

2. In a Request for Information (RFI), dated 13 March 2000, PVGC forwarded a “faxed” RFI dated 10 March 2000 on behalf of an electrical subcontractor. The request concerned an “un-darkened triangle” symbol on certain contract drawings. The RFI stated, in pertinent part, “[t]he un-darkened triangle is not identified on Electrical Legend or within the specifications. What is the un-darkened triangle?” The response supplied by the government on or about 27 March 2000 stated, as relevant here: “The undarkened triangle is intended to be an outlet with only one datajack. This symbol was left off the legend.” (App. supp. R4, tab A-11; R4, tab 23)

3. By letter dated 3 April 2000, the contractor offered to furnish 20 data jacks and cables, pursuant to the undarkened triangles shown on the drawings, for the additional price of \$13,357. The offer left open the prospect of a time extension. The government officer in charge declined the contractor’s offer in a letter dated 7 April 2000, denying that extra work was indicated by the undarkened triangles. (App. supp. R4, tabs A-9, A-12)

4. By letter dated 24 April 2000, the contractor submitted a claim “in the amount of \$13,357.00 with a time extension of 10 days.” The claim was based in part on the subcontractor’s written disagreement dated 10 April 2000, with the government’s response and the subcontractor’s further explanation that it had already “installed outlet boxes and raceways so this issue would not cause a delays [sic] in wall closings.” (App. supp. R4, tabs A-8, A-10) Liquidated damages are not mentioned in the claim.

5. The first mention of liquidated damages in the record compiled to date is in a letter dated 27 August 2000 to the contractor from the government resident engineer, not the CO. The letter states that liquidated damages were being withheld as of 27 August 2000. (R4, tab 2)

6. In a letter dated 26 October 2000, a CO wrote that the “claim has been determined to have some entitlement.” Accordingly, the claim was “being returned to the Resident Office in Charge of Contracts (ROICC) . . . for negotiations [related to] quantum” In response, PVGC demanded that “a modification be issued immediately covering the cost and time associated with this claim. This modification should also include interest starting from April 3, 2000” (App. supp. R4, tabs A-4, A-5) The correspondence does not address liquidated damages.

7. In an internal memorandum from the CO to the ROICC dated 26 October 2000, directing that negotiations be initiated with the contractor, the CO opined that “[t]he contractor should have included a price in [its] bid for placing something at the places shown by the [undarkened] triangle, so [PVGC] would only be entitled to the difference

between a voice only and a data only telecom outlet.” The ROICC wrote PVGC on 7 November 2000, asking the contractor for “a revised proposal which reflects the delta between a voice only and a data only outlet for negotiation purposes.” (App. supp. R4, tab A-3; R4, tabs 21, 22) Liquidated damages are not discussed in the memorandum.

8. The subcontractor, by memorandum dated 7 November 2000, advised the contractor that “[t]here is no difference in the wiring requirements, the jack requirements or the termination requirements for the voice and data outlets.” However, the subcontractor further explained that, in its view, the CO’s quantum formulation was incorrect since the work that would have been required by the undarkened triangle was “not included” in the contract and that the CO should “either accept the proposal for \$13,357 or . . . issue a final decision rejecting it.” PVGC forwarded the subcontractor’s memorandum to the ROICC under a letter dated 8 November 2000 and again requested a final decision. (App. supp. R4, tabs A-1, A-2; R4, tab 23) Liquidated damages are not mentioned.

9. A successor CO, in a letter dated 29 March 2001, informed the contractor that “there can be no entitlement” because the subcontractor noted no cost difference, that is, no proof of increased costs or quantum, between the outlet types specified in earlier CO correspondence (R4, tab 24). No appeal rights language was included in the letter; liquidated damages were not discussed.

10. By a so-called amended complaint dated 28 October 2003, submitted to the Board under another appeal before the Board (ASBCA No. 53943), PVGC’s president attempted to include under that appeal the claim “[f]or installing 20 data jacks and cable and a time extension of 10 calendar days in the amount of \$13,357.00. Plus the reduction of liquidated damages for the 10 days at a rate of \$2,113.00 per day = \$21,130.00. For a grand total of \$34,487.00 [sic].” This was the first mention of liquidated damages in connection with the claim. The Board construed the amended complaint to be a new appeal and docketed it as ASBCA No. 54419. (Bd. corr. file)

DECISION

Motion to Dismiss Appellant’s Quantum Claim

The government asserts that when the CO determined there was partial merit to the contractor’s claim, in that “some entitlement” was found (finding 6), “appellant’s claim ripened into one of ‘pure quantum,’ which appellant should have submitted to the [CO] for determination. Appellant did not do so, but instead waited over three years to file this appeal” In effect, the government asks that we dismiss the appeal because PVGC did not submit its so-called “pure quantum” claim to the CO for a final decision. (Gov’t mot. at 12-13)

No legal authority is cited for the proposition that a contractor's claim can somehow be bifurcated into an "entitlement claim" and a separate "pure quantum claim" on account of the CO's recognition of "some entitlement." In the context of this appeal, a claim is defined by applicable law and regulation as a written demand by the contractor seeking, as a matter of right, the payment of money in a sum certain. *England v. Swanson Group, Inc.*, 353 F.3d 1375, 1379 (Fed. Cir. 2004); *ACEquip Ltd.*, ASBCA No. 53479, 03-1 BCA ¶ 32,109 at 158,767; FAR 33.201. The contractor submitted a claim in this instance (finding 4). Upon receipt of the claim, the CO was obliged to decide the claim. 41 U.S.C. § 605(c).

Rather than make a final decision, the initial CO found "some entitlement" and provided a position on costs from which quantum negotiations could proceed. PVGC did not agree with the CO's negotiating position and requested, again, a final decision. After a lengthy wait and having received no CO final decision, PVGC appealed from the CO's deemed denial. (Findings 6-10)

The so-called "pure quantum claim" requires an examination of the same operative facts supported (or not) by the same or related evidence that addresses PVGC's "entitlement claim." Accordingly, we are dealing with a single claim, not two separate claims. *Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990); *The Swanson Group, Inc.*, ASBCA No. 53496, 02-1 BCA ¶ 31,800 at 157,080. The CO's concession of "some entitlement" does not remove the Board's jurisdiction over a claim properly appealed to the Board. *Gaffny Corp.*, ASBCA No. 37639, 89-3 BCA ¶ 22,007 at 110,637. The motion is denied.

Motion to Dismiss Breach of Contract and Tortious Conduct Claims

In ¶ 1 of the complaint, PVGC asserts that the appeal "involves breach of contract, contract changes, and tortious conduct by the" government. At ¶ 3 of the complaint, PVGC describes "misrepresentations, and omissions, [that] have caused [PVGC] to perform more extensive work and services and to incur costs well in excess of those originally contemplated" PVGC characterizes the extra costs as "damages --- including the performance cost, profit, interest, pre-judgment interest, and attorney fees" In the request for relief at ¶¶ B and G, the contractor asks that the Board hold that the government "breached the contract," and that PVGC "be awarded damages for breach of contract"

In its motion, the government simply asserts: "The Board lacks jurisdiction over claims sounding in tort. The Board also lacks jurisdiction over 'breach of contract' claims, except in specific circumstances, not here present. Furthermore, the Board lacks jurisdiction since appellant never submitted these 'claims' to the [CO] for a final decision" (gov't mot. at 13). The contractor's opposition relies on *Rumsfeld v. Applied Cos.*, 325 F.3d 1328 (Fed. Cir.) *cert. denied*, 124 S. Ct. 462 (2003), which addresses

claims arising out of alleged government negligent estimates of work to be performed under a requirements contract, misrepresentation, and resulting breach of contract.

The government is correct that the Board's jurisdiction is limited to cases that are contractual in nature. We lack the authority to adjudicate matters sounding in tort. To the extent that PVGC's complaint of tortious conduct lacks a basis in the contract, we will not consider it further. *Mitch Moshtaghi*, ASBCA No. 53711, 03-2 BCA ¶ 32,274 at 159,669.

The principal issue is whether appellant's complaint allegations differ from the basic operative facts of the original claim or merely represent alternative legal theories. *Consolidated Defense Corp.*, ASBCA No. 52315, 03-1 BCA ¶ 32,099 at 158,668-69; *Trepte Construction Co.*, ASBCA No. 38555, 90-1 BCA ¶ 22,595 at 113,385-86.

The claim submitted by PVGC is a straightforward claim for changes and/or constructive changes arising out of a difference of opinion related to the correct interpretation of the contract (findings 1-4). It is remediable under the terms of the contract. The claim was submitted neither as a breach of contract nor as a claim of tortious conduct based on negligent estimates of work under a requirements contract or other tortious conduct related to the contract. While we cannot agree with the government that the Board lacks jurisdiction over breach of contract claims and we are uncertain what is meant by the government's averred exception for "specific circumstances, not here present," we cannot construe the contractor's claim under the appeal as a breach of contract claim of the type addressed in the *Applied* decision cited by PVGC.

Courts and the Board have alluded to a distinction between claims for adjustments under remedy-granting provisions of government contracts and a breach of contract. *Crown Coat Front v. United States*, 386 U.S. 503, 511 (1967); *Triax-Pacific v. Stone*, 958 F.2d 351, 353-54 (Fed. Cir. 1992); *Consolidated Defense Corp.*, 03-1 BCA at 158,688. As pertinent here, we note that the contractor need not prove misrepresentation or tortious conduct to sustain a claim for changes or constructive changes. If PVGC intends to show more than the straightforward changes claim, then a separate, different claim is indicated. Different operative facts are contended and the potential claim has a different focus. *See, e.g., Facilities Engineering & Maintenance Corp.*, ASBCA No. 39405, 91-3 BCA ¶ 24,239 at 121,212-13 (claim for improper withholding from invoices compared with potential claim for wrongful initiation by government of interpleader action in court).

Pursuant to the CDA and the Disputes provision of the contract, a contractor's claim must first be submitted to the CO for decision as a condition precedent to Board jurisdiction. A claim cannot properly be raised for the first time in the pleadings before the Board. *D.L. Braughler Co. v. West*, 127 F.3d 1476, 1480 (Fed. Cir. 1997); *Consolidated Defense Corp., id.*; 41 U.S.C. § 605(a). Accordingly, any breach of

contract claim or claim for tortious conduct under the contract, which will attempt to prove more than the straightforward changes claim under the appeal, is hereby dismissed without prejudice to proper submittal to the CO if the contractor chooses. To that extent, the government's motion is granted.

Motion to Dismiss Claims for Miller Act Attorney's Fees and Expenses

The government asks that we “dismiss ¶ 38 of appellant's complaint, which sets forth alleged claims for attorney fees and expenses related to defending and settling a Miller Act law suit.” Among other things, the government argues: “No such claims were ever presented to the [CO] prior to appellant filing this appeal with the Board.” (Gov't mot. at 13-14) Appellant argues that matters related to the Miller Act suit, including attorney's fees and expenses, are not new claims but merely increases in quantum under the claim previously submitted.

Paragraphs 34-39 of the complaint allege that the government, in bad faith, refused to negotiate the claim with PVGC, that the electrical subcontractor invoiced the contractor for the amount requested in connection with the alleged extra work under the claim, that the subcontractor filed a lien based on the unpaid invoice plus penalties, interest, and attorney's fees, and that the subcontractor filed a lawsuit pursuant to the Miller Act which appellant defended and later settled by agreeing to pay the subcontractor, thereby accruing the attorney's fees and expenses that appellant purports to add to the claim by way of the complaint. As we stated above, whether a matter is a separate claim requires an examination of whether the same or different operative facts must be considered.

To adjudicate the claim that underlies this appeal, we must determine the correct interpretation of the contract, in particular certain symbols on the contract drawings, as they relate to the contract as a whole (disregarding for the moment such issues as reliance and matters related to quantum). The potential claim in ¶ 38 (and related paragraphs summarized above) of the complaint is based on an alleged bad faith refusal by the government to negotiate an equitable adjustment, the contractor's decision not to pay a subcontractor on account of non-payment of that claim by the government, and the consequent attorney's fees and costs resulting from Miller Act litigation between the contractor and the subcontractor.

The latter potential claim differs from the changes/constructive changes claim submitted to the CO. At the least, the changes claim requires no proof of bad faith by the government while the additional allegations related to the Miller Act lawsuit would seem to require such proof. No bad faith claim has been submitted to the CO and, as we stated above, cannot be added to this appeal for the first time in the complaint. Accordingly, we dismiss any potential claim for attorney's fees and expenses as set forth in ¶ 38 without

prejudice to submittal to the CO if the contractor chooses. To that extent, the government's motion is granted.

Motion to Dismiss Other Claims for Attorney's Fees and Expenses

Appellant correctly notes that the Board's Recorder earlier issued an Order stating that any EAJA request "at this stage of the proceedings is premature and thus not properly before this Board." Board Order dated 13 January 2004 (unpublished). The motion presents a moot point.

Motion to Strike Liquidated Damages Claim as Duplicative

The government asks that we strike the portions of the complaint which address liquidated damages because PVGC has alleged entitlement to return of all liquidated damages in another Board appeal under the same contract. Appellant's opposition to the motion argues, in pertinent part, that the government's assessment of liquidated damages is difficult to follow and that the government contends that additional liquidated damages are due from appellant. The opposition further contends that appellant will attempt to prove that the liquidated damages are punitive and/or that various delays to the overall contract completion date occurred and would require return of liquidated damages to appellant. There is no assertion that the claim under this appeal relates to an assessment of liquidated damages.

At this point in the proceedings, we are satisfied that appellant should have an opportunity to attempt to prove each defense to any liquidated damages assessment. To that extent, the government's motion to strike the liquidated damages aspect of the claim under this appeal is denied on the grounds asserted by the government.

The difficulty we have in the context of this appeal is that no claim related to liquidated damages has been asserted by either party (findings 1, 4-10). Accordingly, we will not consider liquidated damages further under this appeal (compl. ¶¶ 7, 19, 42, 44, 46-47 and E). *ACEquip, Ltd.*, ASBCA No. 53479, 02-2 BCA ¶ 31,978 at 158,019, *aff'd in relevant part*, 03-1 BCA at 158,768.

CONCLUSION

The motion to dismiss appellant's "quantum claim" is denied. The motion to dismiss breach of contract and tortious conduct "claims" is granted and those potential claims are dismissed to the extent explained above without prejudice to the proper submittal of such potential claims to the CO. The motion to dismiss any "claim" for Miller Act attorney's fees and expenses is granted and that potential claim is dismissed without prejudice to the proper submittal of such potential claim to the CO. The motion to dismiss any "claim" for attorney's fees and expenses under the EAJA is moot. The

motion to strike the liquidated damages component of the claim under the appeal is granted because the claim did not address liquidated damages.

Dated: 1 July 2004

STEVEN L. REED
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. 54419, Appeal of Pete Vicari General Contractor, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals