

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Business Management Research)
Associates, Inc.) ASBCA Nos. 55309, 55862
)
Under Contract No. HHS-100-00-0014)

APPEARANCE FOR THE APPELLANT: Douglas E. McKinley, Esq.
McKinley & Bornmann, PLC
Alexandria, VA

APPEARANCE FOR THE GOVERNMENT: Douglas W. Kornreich, Esq.
Office of the General Counsel
U.S. Department of Health and
Human Services

OPINION BY ADMINISTRATIVE JUDGE STEMLER

This matter comes before the Board on the Board's *sua sponte* inquiry concerning whether jurisdiction for ASBCA No. 55862 properly resides with this Board.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. On 11 September 2000, the Department of Health and Human Services (HHS) and Business Management Research Associates, Inc. (BMRA) entered into Contract No. HHS-100-00-0014. The contract was a firm fixed price task order contract for the provision of procurement training for HHS personnel. (R4, tab 2)

2. By letter dated 23 August 2005, BMRA submitted a \$21,520 claim to the contracting officer. The claim was to "recover costs incurred as a consequence of HHS University's reversal of a DHHS decision to compress the Basic Project Officer Online (BPO-Online) course from 8 weeks to 5 weeks and proceed with delivery of the restructured course in the Fall of 2004 and Spring of 2005." (R4, tab 3)

3. The contracting officer denied the claim by decision dated 27 October 2005 (R4, tab 1).

4. On 5 January 2006, appellant filed a timely appeal of the 27 October 2005 decision.

5. On 19 January 2006, appellant filed its complaint. In its complaint, BMRA pleads that HHS's "reversal" was a partial termination for convenience. Appellant's prayer for relief sought no monetary damages, but requested, in essence, a declaratory judgment that HHS's actions were a partial termination for convenience and that HHS must negotiate a termination settlement with BMRA.

6. Appellant advised the Board and HHS that its claim amount was increasing to \$130,000 and by letters dated 13 and 17 October 2006 the Board advised BMRA to submit its certified claim to the contracting officer and the resulting appeal would be consolidated with ASBCA No. 55309.

7. On 3 November 2006, BMRA submitted a certified "substantially revised claim" to the contracting officer. BMRA explained that it had originally filed the claim in less than its full value in the hopes of a quick settlement, but since that had not materialized; it was requesting the full value of the claim, \$121,082.75. BMRA called this claim a termination for convenience settlement proposal. (Bd. corr. file, ASBCA No. 55862) We find that this claim is based on the same operative facts as the claim in ASBCA No. 55309 and differs only in the amount of compensation demanded.

8. On 12 December 2006, HHS advised the Board and appellant that a contracting officer's decision would be issued within 60 days.

9. On 18 January 2007, HHS filed a motion to dismiss ASBCA No. 55309 for lack of jurisdiction, alleging that the Board lacked jurisdiction because appellant's claim was based on promissory estoppel.

10. On 4 April 2007, we denied the government's motion. *Business Management Research Associates, Inc.*, ASBCA No. 55309, 07-1 BCA ¶ 33,548.

11. On 3 May 2007, BMRA filed a notice of appeal from the failure of the contracting officer to issue a decision on its 3 November 2006 claim. The appeal was docketed as ASBCA No. 55862.

12. By order dated 7 May 2007, the Board advised the parties that BMRA's 3 May 2007 notice of appeal raised the issue of whether jurisdiction over ASBCA No. 55862 was properly at the ASBCA since Board of Contract Appeals jurisdiction over appeals from HHS contracting officers' decisions was properly in the Civilian Board of Contract Appeals effective 6 January 2007 pursuant to 41 U.S.C. §§ 438, 607. We ordered the parties to file their positions on the issue, and particularly whether the claim in ASBCA No. 55862 was the same as the claim in ASBCA No. 55309 by 21 May 2007.

13. On 8 May 2007, BMRA filed a motion to consolidate ASBCA Nos. 55309 and 55862.

14. On 17 May 2007, appellant filed its memorandum. It stated that the same claim was present in both appeals. It also stated that it was not seeking money damages in the appeals, but essentially a declaratory judgment that HHS had partially terminated the contract for convenience and that a termination settlement must be negotiated. The government did not comply with the Board's order to file a memorandum of its position.

DECISION

The issue of jurisdiction before us arises because the consolidation of appeals contemplated (finding 6) was thwarted by the notice of appeal in ASBCA No. 55862 not being filed until after 6 January 2007. It was on that date that jurisdiction for new Board of Contract Appeals appeals from contracting officers' final decisions of HHS vested in the Civilian Board of Contract Appeals pursuant to 41 U.S.C. §§ 438, 607.¹

We have found that the claims in both ASBCA Nos. 55309 and 55862 are based on the same operative facts and differ only in the amount of damages demanded. We realize that appellant's complaint in ASBCA No. 55309 denies that it is seeking monetary relief (finding 5) but that is simply not the case. Appellant's 23 August 2005 claim sought \$21,520 (finding 2). Its claim of 3 November 2006 sought \$121,082.75 (finding 7). Since BMRA's claim in ASBCA No. 55309 was under \$100,000, it did not need to be certified pursuant to 41 U.S.C. § 605(c)(1). We must answer, however the question of whether when BMRA "substantially revised" its claim and increased it above \$100,000 (requiring that it be certified), it was now a new claim for purposes of the subsequent notice of appeal because the notice of appeal was filed after this Board no longer had jurisdiction over new HHS appeals. The 3 November 2006 claim does constitute a new claim because the increase from the 23 August 2005 claim was not due to any new information on damages that was not reasonably available to appellant when it filed the 23 August 2005 claim. (Finding 7) *See Tecom, Inc. v. United States*, 732 F.2d 935, 937-38 (Fed. Cir. 1984). As we recently stated:

The requirement for certification of claims applies not only to the facts of entitlement but also to those of amount. This requirement is too easily circumvented if we allow an uncertified increase in amount based on facts that were clearly known or reasonably available to appellant when the certified claim was submitted. *See D.E.W., Inc.*, ASBCA No. 35173, 89-3 BCA ¶ 22,008 at 110,640.

¹ The statute respecting jurisdiction of Boards of Contract Appeals does not provide for transfer of appeals between the various Boards.

GAP Instrument Corporation, ASBCA No. 55041, slip op. dated 23 April 2007, at 3. We conclude that the 3 November 2006 claim was a new claim and therefore was required to be submitted to the contracting officer for a decision. Since the appeal was filed after the date upon which the ASBCA no longer had jurisdiction over new HHS appeals, we lack jurisdiction over ASBCA No. 55862.²

Appellant's motion to consolidate the appeals is denied. ASBCA No. 55862 is dismissed without prejudice for lack of jurisdiction.

Dated: 1 June 2007

/s/ Mark N. Stempler

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

I concur

I concur

/s/ Elizabeth A. Tunks

ELIZABETH A. TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

/s/ Eunice W. Thomas

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

² We hold only that we have no jurisdiction over ASBCA No. 55862. We express no opinion on the Civilian Board of Contract Appeals jurisdiction. That is a matter for that forum to decide in the circumstances under which any appeal may present itself.

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 55309, 55862, Appeals of Business Management Research Associates, Inc., rendered in conformance with the Board's Charter.

Dated:

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