

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Vibration and Sound Solutions Limited) ASBCA No. 56240
)
Under Contract No. N00014-97-C-0140)

APPEARANCE FOR THE APPELLANT: Hilary S. Cairnie, Esq.
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APPEARANCES FOR THE GOVERNMENT: Thomas N. Ledvina, Esq.
Navy Chief Trial Attorney
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Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD
ON GOVERNMENT’S MOTION TO DISMISS

This appeal involves a contract with Vibration and Sound Solutions Limited (VSSL). VSSL asserts a claim relating to government furnished property (GFP). The government has moved to dismiss the appeal. We deny the motion but strike portions of the complaint.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. The Office of Naval Research (government) entered into Contract No. N00014-97-C-0140 with VSSL on 6 August 1997 (Contract 0140). VSSL was to provide the government with research and development (R&D) services with respect to “Project M technology” including the preparation of a number of reports. (R4, tab 1)

2. Under the contract, appellant was to work with government equipment. Clause G.8 of Contract 0140 was titled “Government Furnished Facilities” and provided the following:

In the performance of this contract, the contractor is authorized to use the Project M proof-of-concept raft and control system including the sea-state rig and associated electronics, currently located in the contractor’s laboratory. Disposition instructions will be provided to the contractor at least sixty (60) days prior to completion of this contract.

The Government shall be responsible for disassembling and transporting (including the costs related thereto) these facilities to another site. The Contracting Officer may elect either of the following two options to accomplish this relocation:

1. Within fifteen (15) days after receipt of disposition instructions from the Contracting Officer, the contractor shall submit a cost proposal to the Contracting Officer for the disassembly and removal of the above noted facilities, for the refurbishing of the contractor's facility, and for all reasonable costs associated with storage and maintenance of the raft prior to the relocation of the raft to another site. This proposal shall include plans for detailed marking of individual components and description of connections. Upon receipt and evaluation of this proposal, the Contracting Officer will initiate negotiations to implement the disposition instructions.

2. The Government may elect to make its own arrangements to disassemble and transport the facilities using its own personnel including other contractor personnel. If this option is selected, Vibration and Sound Solutions, Ltd. will provide access for these personnel to its Alexandria, Virginia laboratory where the raft and related equipment are located. The company will additionally assist as requested by the Contracting Officer and its incremental costs of providing such assistance will be reimbursed. In addition, if the Government elects this option, the Contracting Officer will negotiate an equitable adjustment for the storage and maintenance of the raft prior to its removal and for the refurbishment of the contractor's facility.

In either case, Vibration and Sound Solutions, Ltd. will make their facility available to the necessary Government personnel to observe and monitor the disassembly of the equipment.

(R4, tab 1 at GOV6-7)

3. The contract incorporated by reference FAR 52.233-01, DISPUTES (OCT 1995) and FAR 52.245-05, GOVERNMENT PROPERTY (COST REIMBURSEMENT, TIME-AND-MATERIAL, OR LABOR-HOUR CONTRACTS) (JAN 1986) as modified by a Department of Defense class deviation (R4, tab 1 at GOV13).

4. Appellant asserts that it has not issued a final invoice under Contract 0140 and that the contract has not been closed out (compl. ¶ 6).

5. VSSL alleges that it had to make extensive renovations to properly house the GFP (compl. ¶ 7). Appellant also says that under Contract 0140, it developed additional equipment and title to that equipment was transferred to the government (compl. ¶ 9).

6. Appellant says that between August 1997 and June 2006, it received additional government R&D contracts relating to Project M technology (compl. ¶ 8). These contracts are in the record at R4, tab 27 (Contract No. N00014-03-C-0253), tab 41 (Contract No. N00014-04-C-0046), tab 53 (Contract No. N00014-05-C-0142), tab 61 (Contract No. N00014-05-C-0427), tab 64 (Contract No. N00014-05-C-0442), and tab 79 (Contract No. N00014-06-C-0193). Appellant says that the GFP it received under Contract 0140 was transferred to the follow-on contracts, and that the GFP accumulated under those contracts was later transferred to other contracts (compl. ¶ 10; *see, e.g.*, R4, tabs 31, 32). It does not appear that the follow-on contracts contained clauses like clause G.8 of Contract 0140. They did include government furnished equipment clauses which referred in different ways to the GFP in question. (R4, tab 27 at GOV423 (Contract No. N00014-03-C-0253), tab 41 at GOV470 (Contract No. N00014-04-C-0046), tab 53 at GOV587 (Contract No. N00014-05-C-0142), tab 61 at GOV632 (Contract No. N00014-05-C-0427), tab 64 at GOV657 (Contract No. N00014-05-C-0442), tab 79 at GOV728 (Contract No. N00014-06-C-0193)) VSSL asserts that by January 2006, it had collected a lot of GFP (compl. ¶ 14), and that the GFP provided under Contract 0140 was not needed for work on subsequent contracts (compl. ¶ 16).

7. VSSL contends that between August 1997 and June 2006, the government did not remove or cause to be removed from appellant's facility the GFP described in paragraph G.8 of Contract 0140 (compl. ¶ 15).

8. VSSL alleges that in 2005 and 2006, it informed the government of a corporate restructuring requiring that appellant leave the government marketplace. In early 2006, appellant withdrew a proposal that had been submitted to the government and informed the government that VSSL expected to complete work on all open contracts by the end of June 2006. (Compl. ¶¶ 20-23) In a 31 March 2006 letter, appellant listed Contract 0140 and others of the contracts referred to above, and asked the contracting officer for disposition instructions relating to a large volume of government furnished property because it was no longer needed for appellant's work. VSSL specifically cited clause G.8 of Contract 0140. It noted that the government had agreed to pay "the cost of storage and maintenance, labor and related costs," that the last of appellant's contracts was due to expire on 19 June 2006, and that appellant would need additional funds beginning May 1, 2006 to cover disposition activities including storage and maintenance. Appellant said that the government should act quickly to "minimize the cost of storing, maintaining and relocating the GFP." (R4, tab 81 at GOV747-750) The timing of the letter gave the

government about 20 days in which to provide appellant with disposition instructions so that 60 days remained before completion of appellant's open contracts. Clause G.8 of Contract 0140 required disposition instructions 60 days before completion of that contract (SOF ¶ 2). There was additional correspondence between the parties on this matter (R4, tabs 82, 85, 87).

9. Appellant says that the GFP it had in January 2006 had been used exclusively in support of government R&D contracts. Appellant contends that the government did not award new contracts to VSSL from January through June 2006. VSSL says that it notified the government that it should remove GFP, and appellant provided the government with plant clearance data. (Compl. ¶¶ 24-30) By letter dated 17 May 2006, appellant again requested direction from the government "relative to disposing of all GFE residing at their facility" noting that VSSL had "been incurring costs since 1 May to store and preserve all GFE" (R4, tab 88).

10. In a 25 May 2006 email to the contracting officer, appellant's attorneys expressed "disappointment regarding [her] comment about the government not being responsible for the cost of preserving and disposing of GFE – especially given that almost two months have now elapsed since VSSL provide (sic) the GFE notice and this is the first that we have heard, albeit unofficially, that the government does not want to cover the cost of GFE disposition.... It remains our hope that all issues (financial and otherwise) can be resolved to everyone's satisfaction through collaboration and not confrontation. Hence, my request to discuss this matter with agency counsel." (R4, tab 89)

11. Appellant asserts that during the period January 2006 through June 2006, most of the space leased by VSSL was used to house and maintain GFP, and most of appellant's personnel remained on staff to preserve, maintain, and disassemble GFP and to complete any work on the one remaining contract (compl. ¶¶ 31-33). On 8 and 23 June 2006, appellant sent letters to the government enclosing invoices for expenses incurred in storing and maintaining the GFP during May and part of June 2006. The first invoice, Public Voucher 79, sought \$149,138. The second invoice, Public Voucher 80, sought \$139,804. Both invoices were submitted under Contract 0140, and both letters referred to clause G.8 of that contract. At the end of each letter, VSSL said that, if the government disapproved the invoices, the letters should be considered claims. The letters stated that in March 2006 VSSL had provided a proposal for disposition of GFE and that the government appeared to still be considering "how to accomplish the property disposition and how to pay for such." (R4, tabs 91, 96) The government responded on 26 June 2006 saying that it would assume responsibility and control of the GFP as of 1 July 2006. The government also said that appellant's first invoice was excessive and invited VSSL to submit a revised proposal. (R4, tab 98)

12. During August 2006, the parties negotiated regarding the invoices (R4, tab 106). The government wrote to VSSL saying that appellant's recent correspondence did not "form the basis for negotiation of a claim" and that the government did not contemplate further action at that time (R4, tab 109).

13. On 7 November 2006, VSSL submitted a certified claim to the government. The claim consisted of a cover letter, the two invoices previously submitted (although in higher amounts) and selected documentation of the claimed costs. The invoices cited Contract 0140 and were said to be "for services rendered and expenses incurred in connection with preservation and maintenance of government furnished property." The invoice for May 2006 sought \$150,839.28 and the invoice for June 2006 sought \$141,038.73 for a total claim of \$291,878.01. The claim said that the invoices showed the costs appellant had incurred "to preserve and protect government property while [the government] considered how best to dispose of that property." The claim letter also referenced a 24 August 2006 letter from appellant to Mr. Padilla (apparently not in the Rule 4 file) concerning allegations that he made about classified information. VSSL said the 24 August letter had nothing to do with the claim then before the government. (R4, tab 110) It does not appear that in the claim, or other documents mentioned above, appellant asserted rights under the Prompt Payment Act (PPA), 31 U.S.C.A. §§ 3901-3907.

14. The government requested that the Defense Contract Audit Agency (DCAA) audit appellant's claim (R4, tab 112). DCAA issued an audit report on 26 March 2007 questioning \$254,919 of the \$291,878.01 claim. Apparently in error, the audit report stated that the claim had been submitted under Contract No. N00014-05-C-0142. (R4, tab 118)

15. The contracting officer issued a final decision on 10 August 2007. The decision included a detailed discussion of the bases for appellant's claim as well as the facts. The contracting officer found VSSL entitled to \$14,094 which comprised the prorated costs of rent, utilities, and security at a facility leased by appellant from 16 through 30 June 2006. The remainder of the claim was denied for the following reasons, among others. Clause G.8 of Contract 0140 did not apply because it had been superseded by Clause G.5 of Contract No. N00014-05-C-0142. It was not clear to the contracting officer why appellant claimed costs starting on 1 May 2006 when performance under Contract No. N00014-06-C-0193 extended to 14 June 2006. And, certain costs in the claim did not appear to relate to GFP property management. (R4, tab 119)

16. Appellant filed this timely appeal on 8 November 2007.

17. The complaint sets out allegations concerning the 0140 Contract and the other GFP contracts, and describes the discussions between the parties regarding GFP from January through September 2006. Paragraph 43 of the complaint speaks of a meeting

between VSSL, the contracting officer, and her supervisor, Mr. Padilla, among others. Appellant alleges that the supervisor expressed displeasure at dealing with VSSL and made it clear that VSSL would not be compensated for the costs incurred in connection with GFP. Appellant says the supervisor threatened VSSL by suggesting it knowingly abandoned classified information in an unprotected area even though it was later shown that all classified information had been properly handled.

18. In its complaint, VSSL sets out two counts. Each count realleges paragraphs 1 through 43. The first count alleges a breach of clause G.8 of Contract 0140, as well as other contracts to which GFP was transferred based on the government's failure to reimburse appellant for the costs of protecting, preserving, maintaining, and disposing of the government furnished property. This count also alleges a breach of clause G.8 of Contract 0140 based upon the government's "failure to negotiate an equitable adjustment to the 0140 Contract" under clause G.8. Under Count I, VSSL seeks "an adjustment" in the amount of \$291,878.01 which is the same amount sought in the 7 November 2006 claim. The second count asserts that various government actions and inactions breached its implied duty of good faith. The actions or failures listed by VSSL are set out below:

- (i) failure to timely facilitate appellant's delivery of GFP;
- (ii) failure to timely provide disposition instructions under the 0140 Contract;
- (iii) failure to conduct meaningful negotiations on appellant's GFP proposals;
- (iv) failure to reasonably consider the invoices submitted by VSSL;
- (v) failure to cooperate with appellant to resolve its need for GFP compensation;
- (vi) the government allowing personal dislike of, disdain for, prejudice toward VSSL, of government personnel to interfere with the proper administration of Contract 0140 and the later contracts;
- (vii) the government's failure to negotiate an equitable adjustment to the 0140 Contract as required by clause G.8.

Under Count II, VSSL seeks "an adjustment" in the amount of \$291,878.01 which is the same amount sought in the 7 November 2006 claim. Under both counts, VSSL seeks not only the total amount of the invoices but PPA interest as well.

DISCUSSION

The government says the two breach of contract counts in the complaint were not in the claim that was submitted to the contracting officer. Further, many if not all of the factual allegations in the complaint were not in the claim that was submitted to the contracting officer. The government specifically mentions allegations of a controversy as

to the security of classified information that were set out in paragraph 43 of the complaint, allegations of bad faith, and assertions that contracts other than Contract 0140 had been breached. The government also noted that the complaint sought relief not sought in the claim—PPA interest. Appellant says that its claim was a written demand to the government seeking a sum certain, and that its complaint simply expounds on that claim. The claim was based on a contract with the government and therefore sounded in breach of contract. In addition, the claim contained enough information to identify the issues as demonstrated by the contracting officer’s detailed decision on the claim.

The government acknowledges that the claim submitted by VSSL on 7 November 2006 under Contract 0140 was a valid claim (gov’t reply at 2). The claim and the appeal from the denial thereof by the contracting officer are not subject to dismissal for lack of jurisdiction on the basis suggested by the government. The question before us is whether and the extent to which the complaint should be stricken.

The Contract Disputes Act (CDA) requires that contractor claims be submitted to a contracting officer in writing and for a decision. 41 U.S.C. § 605(a); *see also* FAR 2.101 (a “claim” for money is a written demand seeking, as a matter of right, the payment of money in a sum certain); *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987) (all that is required is a “clear and unequivocal statement” giving the contracting officer “adequate notice of the basis and amount of the claim”).¹ No particular format is required. *Dave’s Excavation*, ASBCA No. 35533, 88-2 BCA ¶ 20,745 at 104,821. The sufficiency of a claim is determined on a case-by-case basis, and we employ a common sense analysis. *Todd Pacific Shipyards Corp.*, ASBCA No. 55126, 06-2 BCA ¶ 33,421 at 165,687.

We have stated:

Whether a claim before the Board is new or essentially the same as that presented to the CO depends upon whether the claims derive from common or related operative facts. *Contel Advanced Systems, Inc.*, ASBCA No. 49073, 02-1 BCA ¶ 31,809 at 157,149; *Trepte Construction Co., Inc.*, ASBCA No. 38555, 90-1 BCA ¶ 22,595 at 113,385-86; *see also Placeway Construction Corp. v. United States*, 920 F.2d 903, 908 (Fed. Cir. 1990). The assertion of a new legal theory of recovery, when based upon the same operative facts as the original claim, does not constitute a new claim. *Trepte, id.*

¹ Section 605(c) of 41 U.S.C. also requires certification of claims in excess of \$100,000. The government does not contest that appellant properly certified its claim.

Dawkins General Contractors & Supply, Inc., ASBCA No. 48535, 03-2 BCA ¶ 32,305 at 159,844.

We reject the government's central position that appellant's claim is defined solely by its 7 November 2006 submission. We are not limited, in determining the sufficiency of a claim, to the claim document. *General Construction Co., a Div. of Wright Schuchart, Inc.*, ASBCA No. 39983, 91-1 BCA ¶ 23,314 at 116,917. We may examine the totality of the correspondence, as well as the continuing discussions, between the parties. *Id.*; *Mendenhall v. United States*, 20 Cl. Ct. 78, 83 (1990). Because we may do so to determine the sufficiency of the claim, we may also do so to decide whether VSSL's complaint goes beyond the scope of its claim.

The government's motion is based on its comparison of the complaint to appellant's 7 November 2006 claim document. The November 2006 document was, however, just the culmination of extensive discussions between the parties. In March 2006, appellant cited Contract 0140 (as well as others) and clause G.8 of that contract in requesting disposition instructions from the government.² VSSL noted that the government should act quickly in order to minimize storage, maintenance, and relocation costs. (SOF ¶ 8) In May 2006, appellant told the government that it had been incurring costs since the first of May in storing and preserving GFP (SOF ¶ 9). Later in May 2006, VSSL told the government that it was disappointed the contracting officer had said it would not be responsible for the cost of taking care of the GFP and that appellant hoped the issues could be resolved without confrontation (SOF ¶ 10). In early and mid-June 2006, appellant submitted Public Vouchers 79 and 80 for the costs of storing and maintaining GFP in May and part of June 2006. The invoices were submitted under Contract 0140 and VSSL cited clause G.8 of that Contract. (SOF ¶ 11) The parties negotiated regarding the invoices but did not reach an agreement (SOF ¶ 12).

VSSL submitted its certified claim in November 2006. Included in the claim were amended invoices, Public Vouchers 79 and 80. They cited Contract 0140 and covered "services rendered and expenses incurred in connection with preservation and maintenance of government furnished property." As far as we can tell, in none of the materials mentioned above did appellant cite to the PPA or assert a claim for PPA interest. (SOF ¶ 13) The contracting officer issued a ten-page decision on 10 August

² Clause G.8 stated that the government would provide disposition instructions to the contractor, that if it did so, the contractor would submit a cost proposal, and that the contracting officer would "initiate negotiations to implement the disposition instructions." It went on to say that if the government elected to make its own disposition arrangements, the contracting officer would negotiate an equitable adjustment for storage and maintenance of the GFP before removal. (SOF ¶ 2)

2007. The decision thoroughly discussed the claim, its bases, and the facts leading to the appeal. (SOF ¶ 15)

It is clear that the claim made by VSSL, as exemplified by the totality of the discussions between the parties, centers on clause G.8 of Contract 0140. Essentially, appellant requested disposition instructions for GFP under clause G.8; when such instructions were not forthcoming, it sought negotiations, also under clause G.8, regarding the costs it was incurring to store and maintain the GFP; and finally it requested compensation in the amount of \$291,878.01 for the costs it actually incurred for two months.

The initial concern expressed by the government is that the claim did not assert breach of contract while the complaint consists of a breach of contract count and a breach of good faith count (gov't mot. at 2). Although VSSL did not use the word breach, there is no doubt that its claim asserts that the government did not follow the requirements of clause G.8. And, that is precisely what Count I of the complaint asserts. Moreover, VSSL asks for exactly the same amount sought in the claim, \$291,878.01. Count II of the complaint on the other hand, alleges facts and raises issues that go beyond a mere failure to negotiate or to pay invoices. It alleges a failure to cooperate, personal dislike, disdain and prejudice toward VSSL. Count II goes beyond the claim and is stricken from the complaint.

The government also contends that the complaint contains allegations that it characterizes as allegations of bad faith while the claim does not (gov't reply at 1). The specific allegations are not identified, but we presume they are covered by Count II which we have stricken.

The government notes that the claim refers to Contract 0140 but the complaint also mentions other contracts (gov't mot. at 3; gov't reply at 1). Appellant may have to explain the relationship between the 0140 Contract, the GFP, and the other contracts, but we see this as an appeal under Contract 0140. Thus, we strike the reference in paragraph 46 of the complaint to breach of contracts other than Contract 0140.

The government also says that the complaint mentions a security issue that appellant originally said had nothing to do with the claim (gov't mot. at 2). In part, paragraph 43 of the complaint states that Mr. Padilla, the contracting officer's supervisor, threatened appellant by suggesting it had mishandled classified information and it had later been proved that the information had been properly handled. Similar allegations were included in the claim (SOF ¶ 13). While these allegations may not have formed the basis for a separate claim, they may very well be relevant to Count I of the complaint. Accordingly, we decline to strike them.

It is well settled that a claim for PPA interest must be submitted to the contracting officer before an appeal may be taken. Accordingly, the allegations relating to the PPA

are stricken. *Randolph and Co.*, ASBCA No. 52953 *et al.*, 03-1 BCA ¶ 32,080 at 158,586.

CONCLUSION

The government's motion to dismiss is denied. We strike the reference to breach of contracts other than Contract 0140 in paragraph 46 of the complaint. The claim for PPA interest, first asserted in the complaint, is also stricken. Finally, Count II of the complaint is stricken.

Dated: 15 September 2009

RICHARD SHACKLEFORD
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. 56240, Appeal of Vibration and Sound Solutions Limited, rendered in conformance with the Board's Charter.

Dated:

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