

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Montage, Inc.) ASBCA No. 56796
)
Under Contract No. N62477-00-D-0211)

APPEARANCE FOR THE APPELLANT: Eric R. Stanco, Esq.
Stanco & Associates
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Thomas N. Ledvina, Esq.
Navy Chief Trial Attorney
Robert C. Ashpole, Esq.
Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE WILSON

The government has filed a motion to dismiss contending that the Board lacks jurisdiction over this matter. Appellant opposes the motion. For the reasons stated below, the motion is denied.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 13 October 2000, the Navy's Engineering Field Activity Chesapeake, Washington Navy Yard (WNY), Washington, DC, awarded Contract No. N62477-00-D-0211, a Section 8(a) multiple-award design-build construction contract for various construction services. Pursuant to FAR 52.216-27, SINGLE OR MULTIPLE AWARDS (OCT 1995), the government elected to award multiple contracts to several offerors including Montage, Inc. (Montage). The contract was for a base period of 12 months, or \$10 million, whichever occurred first. Contract Clause FAR 52.217-9, OPTION TO EXTEND THE TERM OF THE CONTRACT (NOV 1999), limited the total duration of the contract, including options, to 60 months. (R4, tab 1)

2. On 29 September 2003, the government issued Task Order 0013 to Montage in the amount of \$455,042 for the design and construction of a river terrace at the WNY. Completion of the river terrace was scheduled for 255 calendar days on 11 June 2004 (R4, tab 22). However, the project experienced numerous delays.

3. By letter dated 9 February 2005, Montage submitted an uncertified request for equitable adjustment (REA) seeking a time extension of 535 days and delay costs of

\$156,603. The contracting officer responded, by letter dated 29 August 2005, that the REA was “significantly lacking in supporting documentation and analysis of delay impacts to facilitate a decision....” The contracting officer denied the request; however, he stated he would consider a revised request with additional documentation. (R4, tabs 56, 58)

4. By letter dated 30 July 2007, received by the Board on 15 August 2007, Montage submitted a notice of appeal and complaint. The appeal was docketed as ASBCA No. 56137. In its appeal notice, Montage indicated that it was appealing the deemed denial of its claim dated 27 October 2005. A copy of a 27 October 2005 certified claim was attached. The 27 October 2005 claim letter specifically indicated that Montage was requesting a contracting officer’s final decision on its claim for 588 days and \$236,376¹. The letter also indicated that Montage was responding to the contracting officer’s 29 August 2005 letter which requested that Montage provide more information and documentation to support its earlier 9 February 2005 REA.

5. In its answer to Montage’s complaint in ASBCA No. 56137, the government asserted that the 27 October 2005 claim had never been presented to the contracting officer and therefore the Board lacked jurisdiction over the appeal. Montage responded on 8 January 2008 with an unsworn declaration from its operations manager who professed to have personally delivered the claim to the contracting officer on or about 27 October 2005.

6. By motion dated 2 June 2008, the government moved the Board to dismiss ASBCA No. 56137 for lack of jurisdiction and requested a separate hearing on jurisdiction. By letter dated 10 July 2008, responding to the government’s motion and request for hearing, Montage stated its intention to submit a “replacement request” for a contracting officer’s final decision. Montage maintained this action would obviate the need for a hearing on jurisdiction and further requested that the Board stay proceedings in ASBCA No. 56137 to allow the government time to consider its resubmitted request.

7. On 17 November 2008, the Board held a telephone conference with the parties to expedite the submission of appellant’s certified claim. Appellant’s attorney agreed to obtain a signed and certified claim from his client, retain a copy for himself, deliver a copy to the Board, and deliver a copy to government counsel. Upon receipt, government counsel agreed to hand-carry a copy of the claim to the contracting officer for a final decision. Government counsel confirmed that the claim was delivered to the contracting officer on 21 November 2008 (Bd. corr. ASBCA No. 56137). Through this undated

¹ The contract modification proposal accompanying the claim letter indicates total delay damage costs of \$655,294.01. It is not clear how the \$236,376 amount was derived.

claim, appellant requested a time-extension of 588 additional days and payment of \$717,598.31 for associated delays to the project. By letter dated 29 December 2008, the contracting officer issued a final decision denying the claim in its entirety and asserted a government claim for liquidated damages totaling \$134,200.

8. On 5 March 2009, the Board received a filing from Montage dated 4 March 2009, referencing ASBCA No. 56137 and captioned "Status Report." In its filing, Montage stated, in pertinent part:

[T]he Navy contended that Montage never submitted a request to the Contracting Officer for his final decision on Montage's claims and equitable adjustment proposal.

Ultimately, the parties resolved the issue, with the Board's indulgence, by Montage submitting a replacement request for a contracting officer's final decision, thus rendering the jurisdictional issue moot.

In the interim, the Board stayed the Appeal while the parties proceeded to obtain a final decision on the merits of the claim.

II. Report

On January 8, 2009, Montage received the Contracting Officer's Final Decision in this matter.

In sum, the Contracting Officer denied Montage's claim in its entirety.

As a result, Montage intends to proceed with its Appeal of the recent decision.

Unless the Board directs otherwise, Montage desires to submit an Amended Complaint to reflect these events and incorporate its claim submission and recent final decision by the Contracting Officer.

9. Initially the Board, thinking the filing was a routine status report under ASBCA No. 56137, took no action. Subsequently, after further review, the Board determined that Montage's 4 March 2009 status report constituted an appeal from the

29 December 2008 contracting officer's decision. The Board docketed the appeal as ASBCA No. 56796 on 29 April 2009.

10. By letter dated 4 June 2009, Montage submitted its complaint in the instant appeal. In its complaint, Montage indicated that the basis of the appeal is from a claim dated 30 July 2008 for 588 days and \$717,598.31 "at [sic] true copy of which is attached as Exhibit A." (compl. ¶ 39) Although the complaint referenced a 30 July 2008 claim, Montage attached an uncertified claim dated 23 June 2008.

11. In response to appellant's complaint, by letter dated 24 June 2009, the government submitted a motion to dismiss for lack of jurisdiction contending: (1) on its face the complaint fails to allege the Board has jurisdiction and merely notes the existence of the appeal at the ASBCA; (2) appellant never filed a notice of appeal with the ASBCA or the contracting officer; and (3) the purported 30 July 2008 claim attached to the complaint was not submitted to the Navy.

12. By letter dated 27 July 2009, Montage submitted its opposition to the government's motion to dismiss. Montage opposes the government's motion arguing that: (1) an appellant is not required to include an allegation of jurisdiction in a complaint; (2) the notice of appeal issue was rendered a non-issue upon the Board's treating the status report as Montage's notice of appeal; and (3) although the request attached to the complaint was dated 23 June 2008, as opposed to 30 July 2008, it is "inarguable" that Montage submitted its claim on 21 November 2008.

DECISION

Board Rule 6 states:

Rule 6. Pleadings

(a) *Appellant* – ...the appellant shall file with the Board...a complaint setting forth simple, concise and direct statements of each of its claims. Appellant shall also set forth the basis, with appropriate reference to contract provisions, of each claim and the dollar amount claimed, to the extent known. This pleading shall fulfill the generally recognized requirements of a complaint, although no particular form is required.

While appellant's complaint does not directly state that the Board has jurisdiction over the appeal, the contentions in the pleading can be construed as an allegation of jurisdiction. Specifically, appellant alleges that it submitted a claim to the contracting

officer; the contracting officer denied its claim; and its appeal from the contracting officer's final decision "seeks an Order from the Board sustaining Montage's appeal..." (compl. ¶ 39-41) Furthermore, whether the Board has jurisdiction is determined by the adequacy or sufficiency of the submission to the contracting officer, and not by the information in the notice of appeal or complaint submitted to the Board. *Hibbits Construction Co.*, ASBCA No. 35224, 88-1 BCA ¶ 20,505. In this matter, it is undisputed the appellant's claim was submitted to the contracting officer and that the contracting officer issued a final decision denying appellant's claim in its entirety (SOF ¶ 7).

With regard to the notice of appeal, we find the government's argument without merit. Appellant's intent to appeal was evident on the face of the 5 March 2009 "Status Report" filed under ASBCA No. 56137. As such filing was received well within 90 days of receipt of the contracting officer's decision, jurisdiction is proper and the appeal was rightfully docketed. Board Rule 3 "Docketing of Appeals" reads: "when a notice of appeal **in any form** has been received by the Board, it shall be docketed promptly [emphasis added]." As soon as it was discovered that the "Status Report" evinced a desire to appeal the claim denial the Board appropriately docketed the appeal. The fact that the filing was not titled "Notice of Appeal" does not prohibit the Board from treating it as a proper notice pursuant to Board Rule 3.

Finally, although appellant attached the wrong claim to its complaint, this error does not warrant dismissal of the appeal. Accordingly, appellant is ordered to file an amended complaint that references the proper claim and attachments within 20 days of the date of this decision. Upon receipt of the amended complaint, the government shall have 30 days from which to file its answer.

CONCLUSION

The government's motion to dismiss is denied.

Dated: 7 October 2009

OWEN C. WILSON
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continue)

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. 56796, Appeal of Montage, Inc., rendered in conformance with the Board's Charter.

Dated:

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