

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Joiner Systems, Inc. ) ASBCA No. 57097  
 )  
Under Contract No. N00406-07-P-6441 )

APPEARANCE FOR THE APPELLANT: Steven W. Davies, Esq.  
Comfort, Davies & Smith, P.S.  
Fircrest, WA

APPEARANCES FOR THE GOVERNMENT: Ronald J. Borro, Esq.  
Navy Chief Trial Attorney  
Matthew B. Hawkins, Esq.  
Trial Attorney  
Fleet and Industrial Supply Center,  
Puget Sound  
Bremerton, WA

OPINION BY ADMINISTRATIVE JUDGE FREEMAN  
ON THE GOVERNMENT'S MOTIONS TO DISMISS,  
TO STRIKE, AND FOR MORE DEFINITE STATEMENT

Joiner Systems, Inc. (Joiner) appeals the denial of its claim for additional compensation under the captioned contract. The government moves to dismiss various allegations and claims in the complaint for lack of jurisdiction (which we treat as a motion to strike), to strike a request for attorney's fees as premature, and for more definite statement of various allegations and claims in the complaint to the extent not struck. Joiner opposes the motions. We grant the motions in part.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. The government awarded the captioned contract (hereinafter "Contract 6441") to Joiner on 18 July 2007.<sup>1</sup> This was a firm fixed-price supply contract in the amount of \$93,152 for remodeling a wardroom on the U.S.S. Abraham Lincoln. Attached to the contract were drawings and photographs. The final installation was to "look similar" to the provided photographs. The specified period of performance was 18 July 2007 to 14 September 2007. (R4, tab 2 at 1, 3-5, 14-59, 60-65)

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<sup>1</sup> The contracting officer who awarded the contract is also referred to in the contract and in other documents in the record as "the purchasing agent" (R4, tab 2 at 1).

2. Contract 6441 incorporated by reference the FAR 52.212-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (FEB 2007) clause. Subsection (c) of that clause stated that: “Changes in the terms and conditions of this contract may be made only by written agreement of the parties.” Subsection (d) of the clause provided that the contract was subject to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109, as amended, and that disputes would be resolved in accordance with the FAR 52.233-1, DISPUTES clause. (R4, tab 2 at 5)

3. On 18 July 2007, the contracting officer sent the following message to Joiner:

Here is the contract for the Lincoln Remodel. I am copying the ship so you will have their email addresses. They will pass you to the right person who can answer any questions you may have about the job. The address to send the invoice to is listed on page 3 of the contract. Call or email me if you have any questions. Please respond to this email to let me know you received the contract.

(R4, tab 1)

4. From 19 through 25 July 2007, Joiner requested the government to provide a referenced but missing drawing, better copies of the photographs in the contract, and photographs of existing conditions. Joiner also sent the government questions about the work to be done. (R4, tabs 4-10) On 1 August 2007, Joiner sent the government a preliminary drawing of the work to be done as Joiner understood it. Along with the drawing, Joiner submitted additional questions regarding the work and stated that it needed answers to its earlier questions. (R4, tab 11)

5. On 3 August 2007, the ship’s contact for Joiner suggested that Joiner send an employee to the ship at sea and conduct a “walk-thru” that “would most certainly answer all questions” (R4, tab 13 at 4). The suggested walk-through was conducted on 8 August 2007. Based on the walk-through, Joiner prepared a “Blue Book” with action items. The items involved work that was, according to Joiner, both within and outside the contract requirements. (R4, tab 34 at 4 and ex. 1)

6. On 23 August 2007, Joiner met on board the ship with the contracting officer and ship personnel for a “work definition conference.” At this conference, Joiner provided the government with copies of its Blue Book and a list of work developed during the walk-through. Joiner alleges in its claim that the parties discussed the “requested changes” that were not in the contract, and that the ship’s supply officer stated that he was tired of hearing “not in the contract” and that he had the funds and just wanted the work done. Joiner further alleges that it proceeded with the work based on

assurances by the government representatives that the ship had the funds and authority to have additional work performed. (R4, tab 34 at 4-5)

7. On 25 April 2008, Joiner submitted a certified claim under the CDA to the contracting officer for “the contract amount of \$93,152 + \$750.00 and the additional amount of \$111,953.10.” The claim for \$750 is for an alleged government error in calculating the total contract price at award. The claim for \$111,953.10 is for “inadequate and incomplete” specifications and alleged additional work “due to changes required by the Navy during the performance of the contracted-for work.” (R4, tab 34 at 1, 6) Exhibit 2 to the claim is a detailed break-down of the cost of the additional work (*id.*, ex. 2). On 27 February 2009, Joiner submitted 487 pages of job cost documents to the contracting officer in support of its claim (R4, tab 38).

8. By final decision dated 4 November 2009, the contracting officer denied Joiner’s claim entirely on the grounds that the original contract price of \$93,152 had been paid with interest to Joiner on or about 31 October 2008 and that the remainder of the claim was without merit (R4, tab 44).

9. By letter to the contracting officer dated 11 January 2010, counsel for Joiner alleged that: (i) Contract 6441 was awarded “after a flawed solicitation process”; (ii) the contracting officer “failed miserably in adhering to and completing her assigned duties” (citing 15 alleged particulars thereof); (iii) the government failed to comply with the “requirement of good faith and fair dealing”; (iv) the government failed to pay Joiner for work performed for the benefit of the Navy, in violation of “it[s] own principles, guidelines and regulations”; and (v) the government failed “to follow elementary due process principles” in issuing the 4 November 2009 final decision “without first having a meeting with Joiner Systems” and “lacking in so many procedural and factual areas.” The letter concludes with the following request for relief:

This letter shall serve as a formal request that you review this situation and the documents attached, that the contracting officer’s November 4, 2009 Final Decision be rescinded, that the alternative dispute resolution process as promoted by the Naval Supply Systems Command be utilized, and/or that Joiner Systems receive payment in full. Please respond within ten (10) days of the date of this letter.

(Compl., ex. A) The letter included a CDA claim certification.

10. The allegations and claims in the 11 January 2010 letter described in (i), (ii), (iii) and (v) of SOF ¶ 9 above, are not within the scope of the operative facts in the

25 April 2008 claim for additional work. (See SOF ¶ 7 above) The contracting officer has not issued a final decision on the 11 January 2010 letter and there has been no appeal as to it.

11. On 28 January 2010, Joiner filed an appeal with this Board from the contracting officer's final decision of 4 November 2009. Joiner's complaint on appeal was filed on 17 February 2010. Joiner attached to the complaint copies of its 25 April 2008 claim, its 11 January 2010 letter, another letter, and the contracting officer's final decision on the 25 April 2008 claim. Those portions of the complaint to which the present motions are addressed state in relevant part:

B. Said contract was awarded after a flawed solicitation process. (Solicitation No. N00406-07-T-1420; solicitation issue date July 6, 2007).

....

E. Despite repeated requests by Joiner Systems, alternative dispute resolution procedures were not instituted.

F. The Contracting Officer walked out and refused to participate in a scheduled meeting with Joiner Systems and the ship's personnel, failed to supervise the work done, failed to issue reports as the work progressed....

....

H. The respondent/government has breached the agreement between the parties, has failed to equitably adjust the subject contract, and has violated its own principles, guidelines, regulations, and statutes.

I. Based upon the respondent's actions, Joiner Systems has been damaged in the principal amount of \$112,703.10, together with interest, costs and disbursements, and reasonable attorney's fees.

(Compl. at 2) (Footnotes omitted)

12. The government moves to dismiss or to strike in whole or in part those allegations and claims in statements B, E, F, H and I of the complaint that are not within the scope of the operative facts in the 25 April 2008 claim submitted to the contracting officer, or state a claim that is premature, or are otherwise outside our jurisdiction under

the CDA.<sup>2</sup> The government also moves for more definite statement of the allegations and claims in statements B, H and I of the complaint to the extent those allegations and claims are not struck. (Gov't mot. at 1-2) Joiner responds that the statements in the complaint are within the scope of the "entirety of the record on appeal" (app. resp. at 2), and otherwise with clarifications and in some cases more definite statements of the challenged items in the complaint.<sup>3</sup>

### DECISION

The proper scope of a CDA appeal is determined by the claim submitted to the contracting officer for final decision. Whether pleadings in the appeal constitute a new claim or are merely an extension of a claim that the contracting officer had an opportunity to consider, turns on whether they raise matters that are within the scope of the operative facts of the claim decided by the contracting officer. *Mach II*, ASBCA No. 56630, 10-1 BCA ¶ 34,357 at 169,673.

The operative facts of the 25 April 2008 claim decided by the contracting officer are the allegations that (i) the plans and specifications for the contract were defective, (ii) the contracting officer directed the contractor to seek answers to its questions from the ship personnel, (iii) the contracting officer attended the 23 August 2007 "work definition conference" at which the additional work was discussed; (iv) the ship's supply officer stated at that meeting that the ship had the funds and he wanted the additional work done, and (v) Joiner completed the additional work as directed by the ship's personnel. (See SOF ¶¶ 6-7)

Statement B of the complaint alleges that Contract 6441 "was awarded after a flawed solicitation process." This allegation has been clarified in appellant's response as referring to the alleged "inadequate and defective" specifications in the solicitation and awarded contract. Joiner has also provided a more definite statement of specific specification deficiencies in its response. (App. resp. at 4-6) As so clarified, statement B is within the scope of the operative facts of the 25 April 2008 claim and the additional detail provided in Joiner's response satisfies the motion for more definite statement. Accordingly, the motion to strike and the motion for definite statement as to statement B are denied.

Statement E of the complaint alleges that "[d]espite repeated requests...alternative dispute resolution procedures were not instituted." This allegation is not within the scope of the operative facts in the 25 April 2008 claim. The alleged failure to provide ADR

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<sup>2</sup> Since the motions to "dismiss" do not seek dismissal of the entire appeal but only portions of the complaint, we treat them as motions to strike.

<sup>3</sup> At the parties' joint request, proceedings in the appeal were suspended from 11 May 2010 to 29 April 2011.

was raised for the first time in Joiner's claim letter of 11 January 2010. The allegation is not relevant to any issue in this appeal. We grant the motion to strike statement E.

Statement F of the complaint has four allegations. The first allegation is that "The Contracting Officer walked out and refused to participate in a scheduled meeting with Joiner Systems and the ship's personnel." This allegation refers to the 23 August 2007 "work definition conference" at which the additional work that is the subject of the 25 April 2008 claim was discussed by the parties (app. resp. at 3, n. 5). The contracting officer's presence and conduct at that meeting is within the scope of the appealed claim and is relevant to the issue of contractual authorization of the additional work. We deny the motion to strike that allegation.

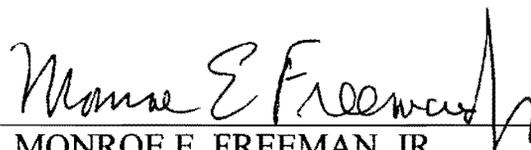
The remaining allegations in Statement F are that the contracting officer failed to supervise the work done, failed to issue reports as the work progressed, and failed to meet with Joiner before issuing the final decision. These allegations are not relevant to the claim for defective specifications resulting in additional work and the contractual authorization for that additional work that are the subject of the 25 April 2008 claim and this appeal. The government motion to strike those allegations is granted.

Statement H of the complaint is a statement of legal conclusions. To the extent those conclusions are intended to apply only to the 25 April 2008 claim, the motion to strike is denied. To the extent they are intended to assert other claims, such as those in the 11 January 2010 letter, the motion to strike is granted.

Statement I of the complaint repeats the monetary claim for compensation in the 25 April 2008 claim and adds a claim for attorney's fees. The government moves for more definite statement of the monetary claim and to dismiss the claim for attorney's fees as premature. The monetary claim is more than sufficiently detailed for pleading purposes in Joiner's job cost documents submitted to the contracting officer on 27 February 2009 (R4, tab 38). With respect to the claim for attorney's fees, Joiner concedes that the claim is for fees available under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (app. resp. at 4). A request for EAJA fees and costs is premature at this stage of the appeal and is not included properly in the complaint. *Advanced American Construction, Inc.*, ASBCA No. 56325, 09-2 BCA ¶ 34,172 at 168,916-17. Accordingly, we deny the motion for more definite statement of the monetary claim and sustain the motion to strike the claim for attorney's fees in the complaint.

The government motions are granted in part and denied in part as indicated above.

Dated: 13 June 2011



MONROE E. FREEMAN, JR.

Administrative Judge  
Armed Services Board  
of Contract Appeals

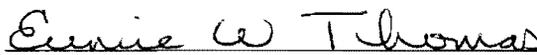
I concur

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. 57097, Appeal of Joiner Systems, Inc., rendered in conformance with the Board's Charter.

Dated:

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