

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
EJB Facilities Services) ASBCA No. 58314
)
Under Contract No. N44255-05-D-5103)

APPEARANCES FOR THE APPELLANT: Kenneth B. Weckstein, Esq.
Pamela A. Reynolds, Esq.
Brown Rudnick LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Ronald J. Borro, Esq.
Navy Chief Trial Attorney
Robert C. Ashpole, Esq.
Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE YOUNGER
ON APPELLANT'S MOTION TO DISMISS THE GOVERNMENT'S COUNTERCLAIM
AND THE GOVERNMENT'S RENEWED MOTION TO STRIKE
COUNT I OF THE COMPLAINT

This appeal concerns a government claim for fire damage to government property, allegedly caused by the contractor's negligence. In the first of two motions before us, Appellant EJB Facilities Services (appellant or EJB) moves to dismiss the Navy's \$12 million "counterclaim" for fire damage, contending that the contracting officer, in his final decision, asserted a \$500,000 government claim and has not rendered a decision on the claim asserted in the "counterclaim." In the second motion, the Navy seeks to have us strike Count I of the complaint, arguing that EJB impermissibly asserts a claim for declaratory relief that it failed to present to the contracting officer. We deny both motions.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

1. By date of 1 August 2005, the Navy awarded appellant Contract No. N44255-05-D-5103, referred to as the West Sound Base Operations Support Contract, to perform multiple base operating support services, such as management and administration and facilities support, for Navy bases in the West Puget Sound area (compl. ¶ 2; R4, tab 3 at 1).
2. The contract contained various standard clauses, including: FAR 52.233-1, DISPUTES (JUL 2002) – ALTERNATE I (DEC 1991); FAR 52.245-2, GOVERNMENT PROPERTY (FIXED-PRICE CONTRACTS) (MAY 2004) – ALTERNATE I (APR 1984); and FAR 52.237-2,

PROTECTION OF GOVERNMENT BUILDINGS, EQUIPMENT, AND VEGETATION (APR 1984) (R4, tab 1e at 43 of 104).

3. The contract also included specifications. Specification section 2.3.4, INSURANCE, required the contractor to furnish to the contracting officer evidence of “insurance coverage in amounts not less than the amounts specified” in FAR 52.228-5, INSURANCE – WORK ON A GOVERNMENT INSTALLATION (JAN 1997). Specification section 2.3.5, PROTECTION OF GOVERNMENT PROPERTY, required the contractor to “return areas damaged as a result of negligence under this contract to their original condition at no cost to the Government.” Specification section 2.4.1, GOVERNMENT-FURNISHED FACILITIES (GFF), provided that “[t]he Contractor shall be responsible for the cost of any repairs [to such facilities] caused by negligence or abuse.” (R4, tab 1a at 4 of 25, 6 of 25)

4. By date of 8 February 2010, the Navy issued Task Order 3064 to EJB to perform specified electrical work at Substation 2, Naval Base Kitsap, Bangor, Washington (R4, tab 18 at 1-2). It is undisputed that Substation 2 provided electrical power to family housing areas, and to other facilities, at the Base (compl. ¶ 37, answer ¶ 37).

5. It is undisputed that, on 8 July 2010, there was a failure in the insulated cables that connected a transformer to a circuit breaker, causing a short circuit. A fire broke out, damaging Substation 2. (Compl. ¶ 29, answer ¶ 29)

6. By date of 18 June 2012 (incorrectly identified in the decision as 2011), the contracting officer rendered a final decision, asserting a government claim against EJB. The contracting officer concluded that EJB’s personnel negligently executed Task Order 3064, causing fire damage to Substation 2. He stated that “[t]he Government’s claim asserts EJB owes the Government \$3,109,861.57 as compensation for Substation No. 2 fire damage and related expenses.” (R4, tab 50 at 8) He alluded, *inter alia*, to a 31 January 2011 letter from the Navy to EJB, in which the Navy “estimated the cost to repair the substation was approximately \$9.0 million and an additional \$2.26 million was owed for costs...to supply emergency power” to the Base (*id.* at 7).

7. The contracting officer framed the government’s damage calculation as follows:

EJB should be liable in the amount of \$3,109,861.57. This amount includes the costs of repairing the damage [initially] caused by the fire in the amount of \$716,075; and other related expenses including initial response and generator rental, generator fuel, build a temporary substation, and a forensic study. However, [the Government Property clause (*see* statement 2)] expressly provides that the contractor should be liable to the extent of the insurance required to be purchase[d] and maintained, or to the extent of insurance [sic] was actually purchased and maintained, whichever is greater. The contract’s

[Insurance clause (*see* statement 3)]...specifies the minimum insurance amounts (2.3.4.2), relative to this issue, as follows:

Comprehensive General Liability: \$500,000 per occurrence

Per the terms of the contract, at the time of the fire, EJB had a general liability policy with effective dates of coverage from 1 October 2009 through 1 October 2010 covering fire damage in the amount of \$500,000

Therefore based on the general liability insurance limitations specified in the contract and the terms of the insurance policy purchased by EJB, liability is limited to \$500,000.00.

(R4, tab 50 at 12) (boldface in original)

8. By date of 14 September 2012, EJB timely filed its notice of appeal of the contracting officer's decision.

DECISION

A. *Background*

EJB filed a one-count complaint alleging, *inter alia*, that it was not negligent and had used due care in performing Task Order 3064 (compl. ¶¶ 57-58). In its request for relief, EJB formulated the relief that it sought as follows:

A. Denial of the Navy's claim for an equitable adjustment of Navy Contract No. N44255-05-D-5103;

B. A declaratory judgment from the Board that EJB was not negligent in the performance of its duties under Task Order 3604 [sic] and is not liable for any amount of damages under FAR 52.245-2, Alternate I, or any other Contract provision....

(Compl. at 14)

In its answer, the Navy "move[d] that the Board strike Count I [of the complaint] and EJB's request for declaratory judgment and other relief from the Complaint" (answer at 7). The Navy also alleged that, during performance, EJB "attempted to perform a new repair procedure without complying with the contract requirements" (answer ¶ 77). In paragraph 79, the Navy averred that it was entitled to breach of contract damages, asserting that, "[a]s EJB failed to repair the damage at no cost to the Navy after being ordered to do so, it is also

liable to the Navy for the cost of repairs under the Protection of Government Buildings, Equipment and Vegetation [sic] clause” (answer ¶ 79) (*see* statement 2). For relief, the Navy prayed that the Board sustain its claim and “award it \$12 million in contract damages” (answer at 9).

EJB filed a reply to the answer, and a motion to dismiss what it characterized as the Navy’s “counterclaims.” EJB moved to dismiss paragraph 79 of the answer, which EJB contended failed to state a “valid” breach of contract claim, as well as the Navy’s prayer for “\$12 million in ‘contract damages,’” which exceeds the amount specified in the contracting officer’s decision. (Reply to Navy’s Answer, and Motion to Dismiss Navy’s Counterclaims (reply) at 2)

By order dated 11 December 2012, we directed the Navy to file a response to the motion to dismiss, explaining “the difference in the \$500,000 claim amount in the Contracting Officer’s final decision and the \$12 million in damages the government now seeks.” The Navy thereafter filed its response. In substance, the Navy argued that the contracting officer had not asserted a \$500,000 claim against EJB, that his finding that EJB’s liability was limited to \$500,000 “is erroneous and subject to de novo review” (Navy Response in Opposition to “Motion to Dismiss Navy Counterclaims” (response) at 1).

B. Appellant’s Motion to Dismiss Counterclaim

In its motion to dismiss, EJB focuses upon paragraph 79 of the Navy’s answer. EJB urges that the Navy asserts a “counterclaim” in paragraph 79. EJB contends that the Navy has failed to state a breach of contract claim because the cited conduct was remediable under the contract itself. (Reply at 2-3) Alternatively, EJB insists that, to the extent that the answer asserted a claim in excess of \$500,000, such a claim contravened both the contracting officer’s final decision (*see* statement 7) and the Government Property clause (*see* statement 2) (*id.* at 4). EJB tells us that “the Navy’s new \$12 million counterclaim must be dismissed because there has not been a contracting officer’s final decision on that claim and the Board is without jurisdiction to hear a claim first raised on appeal” (*id.* at 3).

In its opposition, the Navy urges that it has not asserted a new claim, defeating jurisdiction. The Navy contends that, “within the limits of the new claim test, it may pursue in discovery and at a hearing alternate claim theories and alternate measures of damages.” (Response at 7) The Navy argues that its present \$12 million claim “is the same claim considered by the Contracting Officer: EJB’s liability to the Navy for damages related to the July 8th Fire at Substation 2” (*id.* at 8).

We deny EJB’s motion because we do not agree that the Navy’s prayer for “\$12 million in contract damages” (answer at 9) constitutes a new claim.

The relevant tests are well established. “Whether a claim before the Board is new or essentially the same [claim] as that presented to the [contracting officer] depends upon

whether the claims derive from common or related operative facts.” *Shaw Environmental, Inc.*, ASBCA No. 57237, 12-1 BCA ¶ 34,956 at 171,844. Accordingly:

The introduction of additional facts which do not alter the nature of the original claim, a dollar increase in the amount claimed before the Board, or the assertion of a new legal theory of recovery, when based upon the same operative facts as included in the original claim, do not constitute new claims.

Trepte Constr. Co., ASBCA No. 38555, 90-1 BCA ¶ 22,595 at 113,385-86.

The present record affords no basis for concluding that the claim asserted in the counterclaim is based upon new or different operative facts from those considered in the claim decided by the contracting officer. Both claims relate to the same fire on the same date in the same location: the 8 July 2010 fire at Substation 2 (*see* statement 5).

The difference in the claims relates to the measure of damages. The contracting officer regarded himself as bound by the interrelated limitations in the Government Property clause and the Insurance clauses, which yielded his \$500,000 calculation (statement 7). He plainly had before him allegations regarding both the direct costs to repair Substation 2 itself, and the consequential damages attributable to the fire. He opined that, but for the limitations in the clauses, “EJB should be liable in the amount of \$3,109,861.57,” which included direct repair costs, together with “related expenses including initial response and generator rental, generator fuel, build a temporary substation, and a forensic study” (*id.*). He also alluded to a 31 January 2011 estimate that “the cost to repair the substation was approximately \$9.0 million and an additional \$2.26 million was owed for costs...to supply emergency power” to the Base (statement 6). These references in the final decision to the components of both direct and consequential damages, together with the absence of any showing of new or different operative facts, we can only conclude that the present Navy claim constitutes “a dollar increase in the amount claimed before the Board, [and] the assertion of a new legal theory of recovery.” *Trepte*, 90-1 BCA at 113,385.

C. *The Government’s Renewed Motion to Strike Count I of the Complaint*

In its renewed motion to strike Count I, the Navy insists that “EJB cannot bring a claim for declaratory judgment or any other...claim directly” to the Board (Navy Renewed Motion to Strike Count I of the Complaint (renewed motion) at 1). Drawing on the principle that “submittal of a valid claim, and issuance of a contracting officer’s final decision, are conditions of the [Contract Disputes Act’s] waiver of sovereign immunity,” *The Boeing Co.*, ASBCA No. 57490, 12-1 BCA ¶ 34,916 at 171,676, the Navy urges that “[n]either EJB’s Notice of Appeal nor the...Final Decision makes any mention of a contractor claim,” such as “[the] prayer for relief requesting a declaratory judgment” in the complaint (renewed motion at 2).

We deny the Navy's motion. Reasonably read, the prayer in EJB's complaint is not a claim for a declaratory judgment that must be submitted to the contracting officer. *See Aeronca, Inc.*, ASBCA No. 51927, 01-1 BCA ¶ 31,230 at 154,145, *aff'd*, 95 F. App'x 346 (Fed. Cir. 2004) (noting that the Board's declaratory judgment jurisdiction "exists only for appeals involving claims for the interpretation or adjustment of contract terms," not for those "seeking monetary relief only"). By its prayer, EJB does not seek "the interpretation or adjustment of contract terms." Instead, EJB seeks a determination, based upon the evidence adduced, that, in the circumstances, it complied with contract requirements. That is, the Protection of Government Buildings, Equipment, and Vegetation clause (*see* statement 2) required EJB to use reasonable care, and specification sections 2.3.5 and 2.4.1 both required EJB to bear the cost of damage to Government property or facilities caused by negligence (statement 3). EJB asks the Board, incident to relieving EJB of liability from the Navy's money claim, to declare that EJB was "not negligent in the performance of its duties" under Task Order 3064 (compl. at 14). EJB's complaint does nothing more than request that the government's claim be denied and EJB's appeal be sustained, and suggests the grounds for such a decision by this Board

CONCLUSION

Appellant's motion to dismiss the government's "counterclaim" is denied. The government's renewed motion to dismiss count I of the complaint is denied.

Dated: 26 September 2013



ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



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

I concur



TERRENCE S. HARTMAN
Administrative Judge
Acting 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. 58314, Appeal of EJB Facilities Services, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals