

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of –)
)
Ken Laster Company) ASBCA Nos. 61292, 61828
)
Under Contract No. W912BV-09-D-1013)
Task Order 0003)

APPEARANCES FOR THE APPELLANT:

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Tulsa, OK

APPEARANCES FOR THE GOVERNMENT:

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U.S. Army Engineer District, Tulsa

OPINION BY ADMINISTRATIVE JUDGE SWEET
ON THE GOVERNMENT'S MOTION TO DISMISS

The government has moved to dismiss these appeals on the grounds that we do not possess jurisdiction because appellant Ken Laster Company (appellant or Laster) asserts a new claim, and appellant's claims are time-barred by the statute of limitations or lack sufficient detail. We deny the motion because appellant does not assert a new claim, and its Original Claim was timely and contained sufficient detail.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

I. Factual Background

1. On September 19, 2009, the government and appellant entered into Contract No. W912BV-09-D-1013 to repair and/or replace gates, liners, seals, and a discharge conduit at Pine Creek Lake and Tenkiller Lake in Oklahoma (R4, tabs 3A, 3B).
2. There were delays in completing the project. Appellant completed the project on March 5, 2012. (R4, tab 10 at 3,691)
3. The government made progress payments during and after performance (R4, tab 5C at 433). On or about June 8, 2011, the government withheld \$36,855 as

liquidated damages from Payment No. 9 (R4, tab 5A at 356; tab 5C at 433; tab 11 at 3,740). On or about September 2, 2011, the government withheld an additional \$52,000 as liquidated damages from Payment No. 12 (R4, tab 5A at 374; tab 5C at 433). Finally, on or about April 23, 2015, the government withheld liquidated damages from Payment No. 14. The government stated that, in total, “\$91,035 are being withheld as liquidated damages.” (R4, tab 11 at 3,755; *see also* R4, tab 5A at 386; tab 5C at 433)

II. Procedural History

4. On April 4, 2017, appellant submitted a claim for \$91,035 (Original Claim) (R4, tab 14). The claim asserted that “Laster disputes the assessment of liquidated damages because any delays in the project were not the fault, or subject to the control, of Laster” (*id.* at 4,202). In support of that assertion, the Original Claim stated that the factors delaying performance “include, but are not limited to, a lack of stop logs on the project, water releases by the Corps of Engineers, expensive and time consuming testing, improper rejection of parts, weather, and other delays” (*id.* at 4,203).

5. On June 2, 2017, the contracting officer (CO) issued a final decision (COFD), denying the Original Claim (R4, tab 2).

6. On August 29, 2017, appellant filed a notice of appeal, which we docketed as ASBCA No. 61292.

7. The government moved to dismiss ASBCA No. 61292 on the grounds that the Original Claim lacked sufficient detail. Appellant opposed that motion.

8. During a conference call to discuss the motion, we stayed ASBCA No. 61292 to allow appellant to file a clarifying claim.

9. On May 11, 2018, appellant submitted another claim (Clarifying Claim) (gov’t supp. R4, tab 15). The Clarifying Claim disputed the withholding of liquidated damages on the grounds that any delays were not the fault, or subject to the control, of appellant (*id.* at 4,208). The Clarifying Claim then explained that the delay factors included the government’s (1) failure to provide stop logs; (2) water releases; (3) interference with Laster’s means and methods for service gates—including the means and method for painting the gate; and (4) unreasonable inspection of roller chains, welding, and brass seals and bolts (*id.* at 4208-15).

10. On July 13, 2018, the CO issued a COFD denying the Clarifying Claim (gov’t supp. R4, tab 16).

11. On October 9, 2018, appellant filed a notice of appeal, which we docketed as ASBCA No. 61828.

12. On October 9, 2018, we consolidated ASBCA No. 61828 with ASBCA No. 61292, and ordered appellant to file a complaint in ASBCA No. 61828 within 30 days.

13. On November 7, 2018, appellant submitted a document which, although captioned an “appeal brief,” substantively was a complaint (61292 Complaint). The 61292 Complaint alleges that the government wrongfully withheld liquidated damages because the government delayed performance by making significant changes to the contract, including changing the means and methods for painting the service gates, and the inspection requirements for the roller chains (*id.* at 1-4). The 61292 Complaint also alleges that those changes materially breached the contract, increased requirements, and constituted constructive changes (*id.*). The 61292 Complaint does not seek delay damages; it merely seeks \$91,035 for the liquidated damages allegedly wrongfully withheld by the government (*id.* at 1, 8).

DECISION

We possess jurisdiction over this appeal because appellant does not assert a new claim, and the Original Claim was timely and contained sufficient detail.

I. Appellant Does not Assert a new Claim

Appellant does not assert a new claim. We do not possess jurisdiction to entertain a claim unless a contractor presented that claim to the CO. *Monica Walker*, ASBCA No. 60436, 16-1 BCA ¶ 36,452 at 177,657. “The introduction of additional facts which do not alter the nature of the original claim...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.

Here, as the government concedes, the 61292 Complaint merely alleges the “new theories” of change, material breach, cardinal change, and increased requirements (SOF ¶¶ 9, 13; gov’t mot. at 6). However, those new legal theories are based upon the same operative facts as the legal theories asserted in the Clarifying Claim because the new legal theories—like the legal theories asserted in the Clarifying Claim—are based upon the means and methods for painting the service gates, and the inspection of the roller chains (SOF ¶¶ 9, 13). Therefore, the 61292 Complaint does not assert a new claim that appellant failed to present to the CO in the Clarifying Claim.

Indeed, the 61292 Complaint does not even assert a new claim that appellant failed to present to the CO in the Original Claim. The 61292 Complaint merely introduces additional facts which do not alter the nature of the Original Claim because the factual allegations in the 61292 Complaint—like the factual allegations in the Original Claim—concern government delays that allegedly led to the late project completion and liquidated damages (SOF ¶¶ 4, 13). Because the 61292 Complaint does not assert a new claim, we possess jurisdiction.¹

II. Appellant’s Original Claim was Timely and Contained Sufficient Detail

Appellant’s Original Claim was timely, and contained sufficient detail. In order for us to possess jurisdiction over an appeal, a contractor must submit the underlying claim to the CO within six years after the accrual of that claim. 41 U.S.C. § 7103(a)(4)(A). A claim accrues when all of the events that fix alleged liability and permit assertion of the claim were known, or should have been known. FAR 33.201. In particular, a claim alleging wrongful withholding of liquidated damages accrues when the government withholds the liquidated damages. *The R.R. Gregory Corp.*, ASBCA No. 58517, 14-1 BCA ¶ 35,524 at 174,111. Moreover, a claim must contain sufficient detail to notify the CO of the basic factual allegations upon which the claim is premised. *Blake Const. Co.*, ASBCA No. 34480, *et al.*, 88-2 BCA ¶ 20,552 at 103,890. “The statement of claim must provide a basis for meaningful dialogue between the parties aimed toward settlement or negotiated resolution of the claim if possible, or for adequate identification of the issues to facilitate litigation should that be necessary following issuance of the decision.” *Id.*

Here, appellant’s claim is for wrongfully withheld liquidated damages. While appellant alleges that the government delayed performance, that is only to establish that the government wrongfully withheld liquidated damages because it was responsible for the delays that resulted in the imposition of liquidated damages. (SOF ¶ 13) Appellant does not seek compensation for any delays; it merely seeks to recover the allegedly wrongfully withheld liquidated damages (*id.*). Because appellant’s claim is for wrongfully withheld liquidated damages, that claim accrued when the government withheld the liquidated damages, which was between June 8, 2011 and April 23, 2015 (SOF ¶ 3).

Even assuming that appellant’s claim accrued on June 8, 2011, and that the Clarifying Claim submitted more than six years later on May 11, 2018, was untimely, we still would possess jurisdiction because the Original Claim was timely, and

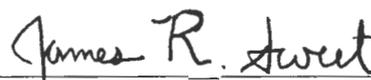
¹ The government’s assertion that appellant failed to file a complaint in ASBCA No. 61292 elevates form over substance (gov’t mot. at 2). While not captioned as a “complaint,” the 61292 Complaint substantively was a complaint (SOF ¶ 13).

contained sufficient detail (SOF ¶¶ 3, 9).² Appellant submitted the Original Claim on April 4, 2017—within six years after the earliest date its wrongfully withheld liquidated damages claim accrued on June 8, 2011 (SOF ¶¶ 3-4). Moreover, the Original Claim provided a basis for meaningful dialogue by identifying some of the specific government delays that purportedly led to the project delay and the imposition of liquidated damages, such as the lack of stop logs, water releases, excessive testing, and improper rejection of parts (SOF ¶ 4). Therefore, the timely Original Claim contained sufficient detail, and we possess jurisdiction.

CONCLUSION

We possess jurisdiction over these appeals because appellant does not assert a new claim, and the Original Claim was timely and contained sufficient detail. Therefore, we deny the government’s motion to dismiss.

Date: July 18, 2019



JAMES R. SWEET
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



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

² To be clear, we do not hold that the potentially untimely Clarifying Claim corrected any lack of detail in the Original Claim, and that that Clarifying Claim related back to the Original Claim. The relation back doctrine does not apply to claims submitted to COs. *Thorington Elec. And Const. Co.*, ASBCA No. 60476, 17-1 BCA ¶ 36,661 at 178,535-36. Rather, we hold that the timely Original Claim contained sufficient detail.

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. 61292, 61828, Appeals of Ken Laster Company, rendered in conformance with the Board's Charter.

Dated:

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals