

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -)
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Kandahar Mahali Transit & Forwarding Ltd.) ASBCA No. 62319
)
Under Contract No. W91B4N-11-D-7009)

APPEARANCES FOR THE APPELLANT: Theodore P. Watson, Esq.
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Army Chief Trial Attorney
Daniel B. McConnell, Esq.
MAJ Sean B. Zehtab, JA
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE O'CONNELL

The government has moved to dismiss the complaint of appellant, Kandahar Mahali Transit & Forwarding Ltd. (KMT), for failure to state a claim upon which relief may be granted. We deny the motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

This appeal involves an August 12, 2011, indefinite-delivery, indefinite-quantity, contract for ground transportation of cargo in Afghanistan. As relevant to the pending motion, the work included the movement of “dry cargo” and “heavy cargo,” each with a price schedule for numerous different types of trucks. (R4, tab 1 at 8-11)

For example, it provided that for a 40-foot flatbed truck transporting dry cargo, the contractor would be paid 33,750 Afghani (AFN) per mission unit (MU) in the base year (*id.* at 8). While the original performance work statement does not appear to be in the record, a subsequent version defined an MU as 50 kilometers of travel (R4, tab 36 at 18).

The contract required KMT to prepare draft invoices and assemble supporting documents. The parties would then meet on a monthly basis and discuss all completed missions (or “transportation movement requests”) against the contract requirements. Each completed mission would be classified as full payment, partial payment, no payment, or missions that required additional investigation. (R4, tab 1 at 4, tab 82)

The contract provided that KMT would not be paid for failed missions (R4, tab 36 at 22). It defined “failed missions” broadly so that it included missions where the cargo had been delivered but some other aspect of the work had been done improperly, such as coordination of security (*id.*)

On February 12, 2018, KMT submitted a claim for demurrage charges. The parties entered into a settlement agreement in June 2018 where the government agreed to pay KMT 57,209,855 AFN. The settlement agreement contained the following language:

KMT remises, releases, and discharges the Government . . . of and from all civil liabilities, obligations, claims, appeals and demands which it now has or hereafter may have, whether known or unknown . . . arising under or in any way related to the disputes which formed the basis of this Settlement Agreement.

(R4, tab 80 at 1-3)

On September 3, 2019, a KMT representative informed the contracting officer that it intended to submit another claim and provided the contracting officer with a spreadsheet containing a list of hundreds of (allegedly) completed truck missions (R4, tabs 82 at 3, 82a).

The contracting officer immediately noticed that many of the missions might be untimely. She wrote to KMT the next day (September 4th), observing that 662 of the 718 dry cargo missions had delivery dates more than six years earlier, as did 175 of the 206 heavy missions.* She stated that if the actual delivery date proved to be later than the “Required Delivery Date” listed in the spreadsheet, she would review the mission to determine if payment were due. She also cautioned KMT that the statute of limitations would continue to run until it submitted a certified claim. (R4, tab 82 at 1)

KMT thereafter submitted a certified claim (albeit lacking the full Federal Acquisition Regulation (FAR) 33.207 certification language) for 201,595,566.07 AFN (R4, tab 83). While the claim is dated September 4, 2019, the parties agree that the actual submission date was September 25, 2019 (am. compl. ¶ 15; R4, tab 97 at 9).

The claim contained no narrative description, although KMT did submit 13 binders of documents and spreadsheets that summarized the claim (R4, tabs 83-96).

* Demonstrating an admirable ability to look at the glass as half-full, KMT presents these facts as an admission by the contracting officer that “at least 56 of the 718” dry missions were timely, as were 31 of the heavy missions (am. compl. ¶ 131).

For each line item in the spreadsheets, KMT wrote: “MISSION IS COMPLETE PER CUSTOMER REQUIREMENTS, PLEASE PAY AS FULL MISSION” (R4, tab 82a). Due to the lack of a claim narrative, it is unclear if KMT submitted these missions in its monthly draft invoice and, if so, whether they were addressed during the monthly meet and confer process.

On September 27, 2019 (two days after submission of the claim), the contracting officer denied the claim, contending that KMT had provided the government a “full release” in the demurrage settlement (R4, tab 97 at 9). There is nothing in the record that indicates that she performed a review of the missions to determine if any of them were otherwise payable.

KMT filed a timely appeal on December 20, 2019, and a complaint dated January 23, 2020. KMT used the complaint (including an argument section) to set forth its contentions as to why it had not released this claim as part of the demurrage settlement, but it once again failed to provide background information that explained how the claim arose except that KMT was allegedly not paid for its transportation costs.

The government filed a motion to dismiss for failure to state a claim. The crux of the motion was that KMT had focused on the alleged release of claims in the demurrage settlement to such an extent that it had failed to allege any violation of the contract or the FAR (gov’t mot. at 5). Importantly, the government did not move to dismiss for either of the two issues raised by the contracting officer, namely, the statute of limitations and the release of claims in the demurrage settlement.

After considering KMT’s response, the Board conducted a status conference, after which it granted KMT an opportunity to clarify its allegations in an amended complaint. KMT filed the amended complaint on May 1, 2020. The government responded with a letter to the Board on May 15, 2020, in which it contended that despite the amended complaint it still “is unable to discern what the claim is about.”

DECISION

FED. R. CIV. P. 12(b)(6) provides that a defendant may file a motion to dismiss for “failure to state a claim upon which relief can be granted.” While the Board’s Rules do not specifically provide for such a motion, they do provide that the Board may consider motions that will “secure, to the fullest extent practicable, the informal, expeditious, and inexpensive resolution of appeals.” Board Rule 7(a). We have considered motions for failure to state a claim and have looked to cases interpreting FED. R. CIV. P. 12(b)(6), or Rule 12(b)(6) of the Court of Federal Claims, for guidance.

A complaint will be dismissed for failure to state a claim ““when the facts asserted do not give rise to a legal remedy or do not elevate a claim for relief to the realm of plausibility.”” *Kellogg Brown & Root Servs., Inc. v. United States*, 728 F.3d 1348, 1365 (Fed. Cir. 2013) (quoting *Laguna Hermosa Corp. v. United States*, 671 F.3d 1284, 1288 (Fed. Cir. 2012)). We must accept well-pleaded factual allegations as true and must draw all reasonable inferences in favor of the claimant. *Id.* (citing *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002)). While we primarily consider the allegations in the complaint, we may also look to ““matters incorporated by reference or integral to the claim, items subject to judicial notice, [and] matters of public record.”” *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1147 (Fed. Cir. 2014) (quoting 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 (3d ed. 2004)).

The Board agrees with the government that it would have been prudent for KMT to have provided more facts in the complaints that demonstrate why it is entitled to be paid and to have explained why missions completed more than six years before submission of the claim were timely. *See* 41 U.S.C. § 7103(a)(4)(A) (“Each claim by a contractor against the Federal Government relating to a contract . . . shall be submitted within six years after the accrual of the claim.”). Nevertheless, from reviewing the record, the basic outline of what KMT alleges is clear: it had a contract with the government to provide truck transportation; the contract provided for payment at various rates; that at least some of the missions were within six years of the date of the claim; that it performed the transportation and is entitled to be paid; and, the government has not paid in full.

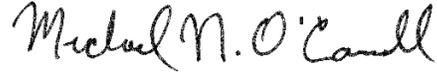
This may be illustrated by returning to the 40-foot flatbed truck, which, as described above, was priced at 33,750 AFN per MU in the base year. In the spreadsheet KMT submitted with the claim, the first six items in the dry cargo claim are for 40-foot flatbed trucks. It seeks payment of one to four MUs for each, or 33,750 to 135,000 AFN. Next to each entry, KMT wrote: “MISSION IS COMPLETE PER CUSTOMER REQUIREMENTS, PLEASE PAY AS FULL MISSION.” (R4, tab 82a) While some more background information would have been helpful, we believe it is reasonable to infer that KMT contends it performed these six missions in full and that the government’s failure to pay is wrongful and a breach of the contract.

Accordingly, KMT has pled sufficient facts, when considered in light of the claim and contract, for it to survive the government’s motion to dismiss.

CONCLUSION

The government's motion to dismiss is denied.

Dated: June 16, 2020



MICHAEL N. O'CONNELL
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



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

I concur



J. REID PROUTY
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. 62319, Appeal of Kandahar Mahali Transit & Forwarding Ltd., rendered in conformance with the Board's Charter.

Dated: June 30, 2020



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