ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Linc Government Services, LLC	)	ASBCA Nos. 58561, 58562, 58563
	)	58565, 58566, 58567
Under Contract Nos. W91B4N-10-C-5006	)	
W91GDW-09-C-4001	)	
W52P1J-10-D-0105	)	
W91GER-06-D-0006	)	
W91GY0-11-D-0001	)	
W91GDW-10-C-6002	)	

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APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
MAJ John R. Longley, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES ON THE GOVERNMENT'S MOTIONS TO DISMISS FOR LACK OF JURISDICTION

Linc Government Services, LLC, (Linc) appealed the contracting officer's (CO's) deemed denial of Linc's alleged claims under the contracts in the captioned appeals. The government moved to dismiss these appeals for lack of Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109, jurisdiction, alleging there were no contractor or government claims and no CO decisions. Linc opposed those motions. The government replied to the opposition.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. The government awarded six contracts to Linc on the following dates to be performed at the sites indicated for the following ASBCA docket numbers:

ASBCA No.	Contract No.	Date	Site
58561	W91B4N-10-C-5006	17/02/10	Afghanistan
58562	W91GDW-09-C-4001	04/23/09	Iraq
58563	W52P1J-10-D-0105	16/09/10	Iraq
58565	W91GER-06-D-0006	03/09/06	Iraq
58566	W91GY0-11-D-0001	03/01/11	Iraq
58567	W91GDW-10-C-6002	03/03/10	Iraq

(Gov't mot. ¶ 1[1]) Hereafter these contracts will be indicated by their last four digits.

2. Five such contracts (omitting contract 0105) included the DFARS 252.225-7040, CONTRACTOR PERSONNEL AUTHORIZED TO ACCOMPANY U.S. ARMED FORCES DEPLOYED OUTSIDE THE UNITED STATES clause, which authorized contractor personnel in designated situations to receive medical care at military treatment facilities, and required the contractor to reimburse the government's costs of medical treatment or transportation of contractor personnel to a civilian medical facility (ASBCA No. 58561 (58561), R4, tab 1 at 31; ASBCA No. 58562 (58562), R4, tab 1 at 38; ASBCA No. 58565 (58565), R4, tab 1 at 9; ASBCA No. 58566 (58566), R4, tab 1 at 62; ASBCA No. 58567 (58567), R4, tab 1 at 44).

3. Five such contracts (omitting contract 0006) included a 952.225-0003, FITNESS FOR DUTY AND MEDICAL/DENTAL CARE LIMITATIONS clause, whose text was essentially identical except for the clause's date of issue and paragraph numbering. That clause provided in pertinent part:

> (c) In accordance with military directives (DoDI 3020.41, DoDI 6000.11, CFC FRAGO 09-1038, DoD PGI 225.74), resuscitative care, stabilization, hospitalization at Level III (emergency) military treatment facilities and assistance with patient movement in emergencies where loss of life, limb or eyesight could occur will be provided. Hospitalization will be limited to emergency stabilization and short-term medical treatment with an emphasis on return to duty or placement in the patient movement system. Subject to availability at the time of need, a medical treatment facility may provide reimbursable treatment for emergency medical or dental care

[1] Citations to a paragraph in the government's motion or to an exhibit attached thereto, and to a Rule 4 document, refer to the paragraphs, exhibits and Rule 4 documents in all six motions, except when an ASBCA number(s) prefixes the citation.

such as broken bones, lacerations, broken teeth or lost fillings.

(d) Routine and primary medical care is not authorized. Pharmaceutical services are not authorized for routine or known, routine prescription drug needs of the individual. Routine dental care, examinations and cleanings are not authorized.

(e) Notwithstanding any other provision of the contract, the contractor shall be liable for any and all medically-related services or transportation rendered [at inpatient daily rate of $2,041 and daily outpatient daily rate of $195].

(58561, R4, tab 1 at 39-40; 58562, R4, tab 1 at 25; 58563, R4, tab 1 at 39; 58566, R4, tab 1 at 37; 58567, R4, tab 1 at 31)

4. During the period 18 July 2011 to 27 March 2012, Linc received several letters from the Defense Finance and Accounting Service (DFAS). These letters were signed by Meggan Mczeal, Rose Seaton and Steven Bunting and requested Linc to pay for allegedly unpaid medical services provided for its employees in various stated amounts. Exhibit A to each DFAS letter set forth the invoice number, patient's name, date of service and amount due. (Gov't mot., attach. 1, ex. A) The appeal records contain no evidence that Meggan Mczeal, Rose Seaton and Steven Bunting were COs.

5. Linc also sent letters dated 18 September 2012 by email to CO Rey Romero on contract 5006, CO Lena Unverrich on contract 4001, CO Barbara J. Voss on contracts 0001 and 0105, MAJ Manuel E. Saenz, USAF, CO on contract 0006, and CO Glenn Basso on contract 6002 (58561, app. supp. R4, tabs 6A-E, 6H).

6. For example, Linc's 18 September 2012 letter to CO Romero stated:

Re: Contract No. W19B4N-10-C-5006

Dear Mr. Romero:

My name is Sean Forbes [of Neel, Hooper & Banes, P.C.] and I represent Linc.... This letter is in response to several letters Linc has received from [DFAS] regarding alleged unpaid medical services (Exhibit A).

...Based on the plain language of [10 U.S.C. § 1079(b), DoD Instruction 3020.41 and DFARS Clause 252.225-7040], there has not been enough evidence presented to demonstrate that Linc is responsible for these medical bills.

...[T]hese regulations were designed to account for situations where a civilian contractor was injured in the course of their duty while in a combat zone, thus requiring emergency care (*see* DODI 3020.41, [§] 4.i...). In the event of such an injury, one of two things happens: either the civilian is rehabilitated with an eye towards returning them to duty, or the civilian is so seriously injured they must be transported to a civilian facility out of theater (*see id.*). If the civilian is rehabilitated with the intent of returning them to duty, the government is responsible for those medical expenses (*see id.*). It is only when the injured civilian is transported out of theater into a civilian facility that the contractor is responsible for that transportation and treatment during transport.... Moreover, when the civilian...must be transported out of the theater due to the extent of their [sic] injuries, the [CO] receives written notification that the employee is being taken out of the theater.... Thus, as Linc's [CO] for the subject contract, you would have received these notifications.... As this would serve to justify the government's claim for reimbursement, we are hereby requesting any such notifications be produced to our offices...on or before 20 days after the date of this letter.

....

...Thus, until such evidence is received Linc disputes the government's allegation that Linc is required to reimburse the government for these medical expenses and will not pay for expenses which it is not responsible.

....

Further, we are notifying you of this issue in the event that DFAS attempts to stop payment on any of Linc's future vouchers associated with this contract to pay these outstanding medical bills. Linc is not responsible for these bills and thus should not suffer any interruption in payment as

a result. We would like you to coordinate with DFAS to reach a resolution on this issue.

(Gov't mot., attach. 1, ex. G-1)

7. Mr. Forbes also sent letters dated 18 September 2012 to DFAS repeating most of the statements in his foregoing letters to the COs, disputing that Linc was required to reimburse DFAS for the medical expenses, and stating: "Please correct this discrepancy immediately and provide written proof thereof. Failure to adjust this debt as requested will result in a claim before the Court of Federal Claims" (gov't mot., ex. G-6).

8. Regarding contract 5006, the government's motion avers that: (a) Linc's 18 September 2012 letters to CO Romero were sent to rey.a.romero@afghan.swa.army.mil, an address Mr. Romero used during his deployment to Afghanistan, but was disabled upon his redeployment before September 2012, he never received Linc's letter and learned about it from respondent's trial attorney (58561, gov't mot. at 4, ¶ 8, exs. G-1 to G-3); (b) Capt Bryce Fiacco, who was PCO on 18 September 2012, never received Linc's 18 September 2012 letter and was not afforded an opportunity to reply thereto (58561, gov't mot. at 4, ¶ 9, ex. G-4); (c) Mr. Adam Goldstein, current CO on the date of respondent's motion, did not receive Linc's 18 September 2012 letter and was not afforded an opportunity to reply thereto (58561, gov't mot. at 4, ¶ 10, ex. G-5).

9. A 4 May 2011 Memorandum of Agreement (MOA) between DFAS and the Department of the Army set out DFAS' billing practices for reimbursing DFAS for medical treatment provided at military medical treatment facilities. The MOA was used for the billings sent to Linc. It specified the responsibilities of DFAS and of the Army, but did not address the topic of a CO's final decision. (Gov't mot. at 4, ¶ 12, ex. G-7, ¶ 4)

10. On 14 February 2013, Linc sent six notices of appeal to the ASBCA which were docketed as ASBCA Nos. 58561-58563 and 58565-58567.[2]

11. Linc's complaint in ASBCA No. 58561 alleged, *inter alia*:

> 2. Rey Romero ("Contracting Officer") was the Agency's contracting officer for the Contract [5006].
>
> ....

[2] Since the parties agreed that ASBCA No. 58561 was duplicative of ASBCA No. 58564, ASBCA No. 58564 was dismissed on 5 November 2013.

9. [O]n September 18, 2012, Linc sent a letter to...[CO Rey Romero] because he was the last known [CO] for the Contract. There were no modifications to the Contract or notices to Linc identifying a different [CO].

....

17. Only after Linc filed its notice of appeal was it informed that the [CO] for the Contract had changed. In fact, Linc did not even learn the name of the new [CO] until the Government filed its motion to dismiss this appeal....

DECISION

The government argues that Linc's 18 September 2012 letters to the COs did not constitute CDA claims (gov't mot. at 8-11). DFAS' billing letters to Linc were not government claims (*id.* at 12-13). Thus, no deemed denial of claims occurred and Linc has the burden to prove CDA jurisdiction (gov't reply br. at 2). The government requested a stay of proceedings until its jurisdictional motions are resolved (gov't mot. at 13).[3] Linc argues that it submitted non-monetary requests for determination of its duty to pay for medical services under the contracts, which constituted CDA claims (app. opp'n at 10-16), and since deemed denials of such claims arose from the COs' inactions (*id.* at 17-22), the Board can direct the COs to issue final decisions (*id.* at 24).

The government's motions raise the issue of whether there is a government or contractor claim that complies with the CDA requisites for Board jurisdiction. A claim is defined as a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under the contract. FAR 2.101 (previously FAR 33.201); *see Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (since the CDA does not define the term "claim," the court turned to the FAR 33.201 definition). When the six contracts here in dispute were awarded, the CDA provided that a contractor shall submit a written claim to the CO, and all claims by the government against a contractor relating to a contract shall be the subject of a CO's decision. 41 U.S.C. § 605(a), now § 7301(a)(1), (3); *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1564, *reh'g, en banc, denied* (Fed. Cir. 1995). A contractor must appeal from the CO's written decision on, or deemed denial of, its claim. *See* 41 U.S.C. §§ 1703(f)(5), 7104(a), (b); *Gray Personnel, Inc.*, ASBCA No. 54652, 06-2 BCA ¶ 33,378 at 165,474.

[3] The Board's 23 May 2013 letter to the parties stated that respondent need not file answers in ASBCA Nos. 58561-58567, effectively granting respondent's request.

In deciding a motion to dismiss for lack of subject matter jurisdiction, a tribunal must accept as true, and construe in a light most favorable to the non-movant, only undisputed factual allegations. When such a motion challenges the truth of alleged jurisdictional facts, the tribunal may consider relevant evidence beyond the pleadings to resolve disputed facts. These rules apply to such motions before the ASBCA. *Raytheon Missile Systems*, ASBCA No. 58011, 13 BCA ¶ 35,241 at 173,015.

We first address Linc's argument (app. reply to mot. at 10) that the six appeals contain a valid CDA government claim against Linc to pay for medical services. The only communications in the appeal records are the letters DFAS sent to Linc from 18 July 2011 to 27 March 2012 seeking such payment (SOF ¶ 4). Those letters do not qualify as government claims. The appeal record contains no evidence that the signatories to those DFAS letters, Meggan Mczeal, Rose Seaton and Steven Bunting, were COs (*id.*). We conclude the DFAS letters did not meet the requirements for government claims under the CDA.

We turn next to Linc's alternate argument, that there is a non-monetary contractor CDA claim regarding liability for medical services. The contractor has the burden to establish Board jurisdiction of a contractor claim. *See Security Insurance Co. of Hartford*, ASBCA No. 51759, 00-2 BCA ¶ 31,021 at 153,210 (appellant had burden to establish Board jurisdiction).

Appellant's 18 September 2012 letters to the various COs of the contracts clearly seek the COs' interpretations of the terms of the contracts under which the alleged liability for medical costs is asserted. While ordinarily a contractor would file a claim for a sum certain since the alleged amount of liability was known, there was no authority for the DFAS letter writers to assert liability against Linc. The fact that the Army and DFAS entered into a MOA that set up a process that allegedly does away with the CDA requirement that government claims against contractors be the subject of a CO's decision necessitated such a procedure by Linc. The source of the alleged liability for the medical costs was the contracts and their terms. It is only a CO that may assert government claims under these CDA contracts. What Linc needed was the COs' interpretations of the clauses and the COs' actions on that interpretation: whether it be the conclusion that no government claim should be asserted, or the issuance of COs' decisions asserting government claims. Linc was not required to merely stand by and continue to operate in a realm of uncertainty. *Kellogg Brown & Root Services, Inc.*, ASBCA No. 58578, 13-1 BCA ¶ 35,411.

The government does not dispute that such letters were written requests for the interpretation of contract terms, or other relief arising under or relating to the contracts. The government does argue that Linc's letters addressing all six contracts did not clearly request CO's decisions and that, regarding contract 5006 (ASBCA No. 58561),

COs Romero, Fiacco, and Goldstein did not receive Linc's September 2012 letter before Linc filed its appeal. (SOF ¶ 8; gov't mot. at 5-10)

We turn first to the government's argument about lack of a request for a CO's decision. The CDA does not require a contractor claim to explicitly request a CO's decision, so long as the contractor implicitly requests a decision. Whether a contractor's communication constitutes a CDA claim is determined on a case-by-case basis, employing a common sense analysis. *See* 41 U.S.C. § 7103(a); *Transamerica Insurance Corp. v. United States*, 973 F.2d 1572, 1576, 1578-79 (Fed. Cir. 1992). To determine whether a contractor implicitly requested a decision, we look at the "totality of the correspondence" and "continuing discussions between the parties." *Lael Al Sahab & Co.*, ASBCA No. 58346, 13 BCA ¶ 35,394 at 173,659.

With respect to Linc's 18 September 2012 letters to the COs, the totality of the circumstances include: (a) DFAS invoices seeking payment for medical services provided to Linc's employees (SOF ¶ 4); (b) Linc's attorney's letters to the five COs on the six contracts (SOF ¶ 6); (c) Linc's 18 September 2012 letters to DFAS (SOF ¶ 7); and (d) the COs' failures to issue final decisions.

It is abundantly clear that Linc was requesting the COs to exercise their authority to decide the issue on whether it was contractually liable for the medical expenses. *Survival Technology, Inc.*, ASBCA No. 37453, 90-2 BCA ¶ 22,817 at 114,577 (request for the CO's prompt attention is a demand for resolution or decision by the CO). *Advanced Materials, Inc.*, ASBCA No. 47014, 94-3 BCA ¶ 27,193 at 135,517. In *Transamerica*, 973 F.2d at 1578, the Federal Circuit stated:

> This court is loathe to believe that...a reasonable contractor would submit to the [CO] a letter containing a payment request after a dispute had arisen solely for the [CO's] information and without at the very least an implied request that the [CO] make a decision as to entitlement. Any other finding offends logic.

Based on these legal authorities, we hold that Linc's attorney's letters to the COs implicitly requested COs' decisions.

We address finally the government's argument about non-receipt of Linc's claim letter under contract 5006, ASBCA No. 58561. Linc sent letters to CO Romero (SOF ¶¶ 5, 11), who was the CO for contract 5006, but whose email address was disabled before Linc emailed him in September 2012 (SOF ¶ 8). Linc's complaint in this appeal alleges that it sent its 18 September 2012 letter to CO Romero because he was the last known CO for contract 5006, there was no modification to that contract or notice to Linc

indentifying a new CO, and Linc did not learn the name of the successor CO until the government filed its 5 April 2013 motion to dismiss (SOF ¶ 11). The government has not disputed Linc's allegations. Therefore, we accept those allegations as true for the purposes of these motions. *Raytheon*, 13 BCA ¶ 35,241 at 173,015.

When a contractor's claim letter was directed to the CO and requested a CO's decision, but, unbeknownst to the contractor, the agency mailroom mishandled the claim and failed to forward it to the CO's mail stop, we held that the Board had jurisdiction of the appeal on a deemed denial basis:

> To hold otherwise would allow the agency to benefit from its own negligence, or might encourage the less scrupulous to lose or misplace properly submitted contractor claims and frustrate a contractor's statutory right under the CDA to have its claim considered administratively with prompt recourse to board or court review. Absent evidence to the contrary, we conclude that the NIH mailroom was authorized to receive and in fact received appellant's claim on behalf of the CO.

Corners and Edges, Inc., ASBCA Nos. 55767, 56277, 08-2 BCA ¶ 33,949 at 167,970.

Similarly, when the CO sent a final decision to the contractor's address stated in the contract, but the contractor had notified the CO of his changed address, the Board denied the government's motion to dismiss, stating that the tardy appeal "may be reasonably ascribed to the Government improperly sending the decision to the home office and is not the fault of the appellant." *Kaufman & Broad Building Co.*, ASBCA No. 9615, 1964 BCA ¶ 4052 at 19,879.

Based on the foregoing precedents, we hold that Linc's 18 September 2012 letter was submitted to CO Romero in compliance with 41 U.S.C. § 7103(a)(1). Moreover, the government's allegations that CO Romero never received Linc's 18 September 2012 email, and successor COs Fiacco and Goldstein had no opportunity to respond to Linc's letter before it filed its appeal in ASBCA No. 58561 (SOF ¶ 8), are inconsequential. Here, the government should have advised Linc who would succeed Mr. Romero as CO.

CONCLUSION

We conclude we have jurisdiction pursuant to the "deemed" denied provision of the CDA, 41 U.S.C. § 7103(f)(5). The government's motions to dismiss for lack of jurisdiction is therefore denied.

Dated: 5 December 2013

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

PETER D. TING
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 Nos. 58561, 58562, 58563, 58565, 58566, 58567, Appeals of Linc Government Services, LLC, rendered in conformance with the Board's Charter.

Dated:

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