ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Kellogg Brown & Root Services, Inc.	)	ASBCA No. 58578
	)	
Under Contract No. DAAA09-02-D-0007	)	

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OPINION BY ADMINISTRATIVE JUDGE GRANT
ON THE GOVERMENT'S MOTION TO DISMISS

The government has moved to dismiss this appeal for lack of jurisdiction, arguing that appellant, Kellogg Brown & Root Services, Inc. (KBRSI), has abandoned its originally-filed claim and now seeks the Board's decision on an issue not previously presented to the contracting officer (CO). Alternatively, the government asks that the appeal be dismissed for "prudential considerations." KBRSI opposes on both points. For the reasons set forth below, the government's motion is denied.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 14 December 2001, the Army awarded KBRSI Contract No. DAAA09-02-D-0007 for combat support and combat service support to military personnel in contingency operations worldwide. The contract, known as the Logistics Civil Augmentation Program III (LOGCAP III) contract, expired 13 December 2011 after exercise of numerous options. (R4, tab 1 at 001-002, tab 50; compl. and answer ¶ 3) The contract has not yet been closed out (compl. and answer ¶ 3). KBRSI is now one of three prime contractors performing under a successor contract, LOGCAP IV, awarded on 17 April 2008 (compl. and answer ¶ 21).

2. The matter at issue here concerns Clause H-29 in the LOGCAP III contract. Clause H-29, Tour of Duty/Hours of Work, states in part:

> The contractor may rotate contractor employees into and out of the theater provided there is no degradation in mission results. For employees who have deployed less than 179 days, the contractor may rotate personnel at his own expense, for employees who have deployed greater than 179 days may be rotated as an allowable cost under the contract [sic]. The contractor will coordinate personnel changes with the contracting officer.

(R4, tab 1 at 48, tab 2 at 9) The LOGCAP IV contract contains the identical Tour of Duty/Hours of Work clause, though numbered H-26 (compl. and answer ¶ 36).

3. KBRSI took the position in contract performance that the language of Clause H-29 as to rotation of employees deployed less than 179 days meant that when KBRSI *voluntarily* rotated employees deployed less than 179 days, KBRSI would have to shoulder those expenses. However, when employees "departed theater less than 179 days after deployment," for other reasons not involving the discretion of KBRSI, the cost for KBRSI to replace them could be an allowable cost under the contract. (*See* R4, tab 63 at 2)

4. A disagreement arose as to KBRSI's position. The Defense Contract Audit Agency (DCAA) audited KBRSI's incurred travel cost submission for the LOGCAP III contract for FY 2004, and on 10 March 2011 issued a Form 1, No. 173, Notice of Contract Costs Suspended and/or Disapproved. Specifically, DCAA stated that "[t]his DCAA Form 1 disapproves" approximately $27,000,000 in travel costs for KBRSI employees who were deployed in theater less than 179 days. (R4, tab 57 at 1, 3 of 4) Although the Form 1, No. 173 only disapproved FY 2004 travel, DCAA is currently conducting "numerous" audits on the contract for other fiscal years (gov't mot., ex. 1, Declaration of Robert Egan (Egan decl.) ¶ 5). Form 1, No. 173 stated that the administrative contracting officer was to "take immediate action to recoup the disapproved costs, i.e. issue a final decision and a demand for payment" (R4, tab 57 at 1 of 4).

5. On 12 August 2011, KBRSI advised the Army that it intended to continue invoicing the government for travel costs for employees who had been deployed in theater for less than 179 days unless KBRSI elected to rotate or transfer them. Referring to previous correspondence, KBRSI's representative stated that "[a]s I have not received any response to your opinion [sic] of this approach, KBR continue[s] to consider this practice acceptable." The same day, the CO responded "[b]ad assumption in your letter." When KBRSI responded that "[w]e have held this position for the past several years and no one has made any objection," the CO replied "[d]oes not matter – if you do not receive approval, not acceptable." (R4, tab 61) Despite this disagreement between KBRSI and the government

(both DCAA and the CO), the Army has not, to date, disallowed any costs under the LOGCAP III contract that were invoiced and paid based on KBRSI's interpretation of Clause H-29, and has not adopted DCAA's position in Form 1, No. 173 (compl. and answer ¶ 40; Egan decl. ¶ 6).

6. In September 2012, a *qui tam* case filed against KBRSI in the Central District of Illinois under the False Claims Act was unsealed. The allegations in that case specifically concern KBRSI falsely billing the government for costs associated with mobilization and demobilization of contractor personnel who had been deployed less than 179 days. (App. opp'n at 3) The United States Department of Justice has not intervened in this matter to date (gov't mot. at 6).

7. KBRSI submitted a claim to the CO on 1 October 2012, seeking the CO's interpretation of Clause H-29. KBRSI expressed its view that the language of Clause H-29 as to rotation of employees meant that when KBR *voluntarily* rotated employees deployed less than 179 days, KBRSI would have to shoulder those expenses, but when employees "departed theater less than 179 days after deployment," for other reasons not involving the discretion of KBRSI, the cost for KBRSI to replace them could be an allowable cost under the contract. (R4, tab 63 at 2)

8. On 13 December 2012, the CO advised KBRSI that he considered the claim to be a "zero dollar claim," not one for contract interpretation as KBRSI alleged, with inadequate detail, no statement of a sum certain, and no certification. The CO noted that even if it was viewed as a claim for contract interpretation, he could not issue a decision "as long as the larger decision regarding the Form 1 #173...remains unsettled." Consequently, the CO rejected the claim. (R4, tab 68) KBRSI appealed to the Board on 4 March 2013, treating the CO's response as a deemed denial.

DECISION

The government originally moved to dismiss for lack of jurisdiction on the basis that KBRSI's claim was not one for contract interpretation as KBRSI alleges, but really a monetary claim, uncertified and thus invalid. The government also moved to dismiss for lack of jurisdiction based on "prudential considerations." (Gov't mot. at 8-12) In later briefing on the motion, the government withdrew its first position (gov't reply br. at 1), and the parties now agree that KBRSI's claim is a non-monetary claim for contract interpretation. However, the government now asserts that KBRSI, in replying to the government's motion, has taken a position in litigation that amounts to an abandonment of its originally-filed claim and an assertion of a new claim not previously presented to the CO, and thus the appeal should be dismissed for lack of jurisdiction. The government continues to argue, in the alternative, that the appeal should be dismissed for prudential considerations. As noted above, KBRSI opposes both points.

Abandonment of Claim

The government argues that the contract interpretation issue sought by KBRSI, as stated in its opposition to the motion to dismiss, is "significantly narrower" than the issue KBRSI raised in its claim and complaint. Specifically, the government asserts that KBRSI is now asking for an interpretation of the meaning of the word "rotate," whereas the claim and complaint focus on interpretations as to compensation, such as reimbursement or cost allowability. Because of this distinction, the government argues the current appeal should be dismissed and KBRSI should submit a new claim to the CO as to the "freestanding" interpretation of the word "rotate." (Gov't reply br. at 1-2) KBRSI, in contrast, contends that the claim did in fact seek interpretation of the word "rotate," and that there is nothing "new or novel" about KBRSI's position before the Board that differs from the claim originally submitted to the CO (app. sur-reply, *passim* and at 6).

We agree with KBRSI, and deny the government's motion to dismiss based on this theory. As KBRSI points out, the entire thrust of its claim relates to rotated employees and the reason for such rotation. KBRSI's claim repeatedly stated the contractor's view that when employees "departed theater less than 179 days after deployment" for reasons *other than* the discretion of KBRSI, this was not "rotation" under the clause, and compensation could thus be possible (SOF ¶ 7). Although KBRSI's claim often referred to allowability and reimbursement, this was in the context of how KBRSI thought the clause should be interpreted. The CO clearly was on notice of KBRSI's request for interpretation, and regardless of terms related to compensation, the "rotation" issue was in fact fairly presented to the government. Nothing KBRSI said in its response to the government's motion changes this. KBRSI's opposition brief may refine the focus, but it does not abandon KBRSI's existing claim or assert a new claim.

Prudential Considerations

The government argues that the Board has discretion to dismiss the appeal for "prudential considerations," and that this should be done under the standards articulated by the Federal Circuit in *Alliant Techsys., Inc. v. United States*, 178 F.3d 1260 (Fed. Cir. 1999). In *Alliant*, the court noted that claims for contract interpretation, essentially calling for declaratory judgments, can lead to piecemeal and/or premature litigation that could justify dismissal. The Federal Circuit stated that "the court or board is free to consider the appropriateness of declaratory relief," including assessing 1) whether the claim involves a live dispute between the parties, 2) whether a declaratory judgment will resolve the dispute, and 3) whether the legal remedies available to the claimant are adequate to protect its interests. *Id.* at 1270-71. As part of its analysis of the issue, the Federal Circuit noted that, under the Contract Disputes Act (CDA), Congress "granted relatively free access" to the boards of contract appeals and the Court of Federal Claims, and that the FAR also implemented a scheme where review of claims would be "relatively easy to obtain." Given

that context and the specifics of the case, the Federal Circuit held that the Court of Federal Claims did not abuse its discretion by entertaining Alliant's request for declaratory relief. *Id.*

KBRSI and the government address the *Alliant* standards from opposite perspectives. The government first argues that KBRSI's claim does not involve a live dispute fundamental to the contract because the Army has not actually disallowed any travel costs that KBRSI has invoiced for, and the dispute to date has been with DCAA, not the Army. As to the *qui tam* case, the Army points out that the Department of Justice has not intervened in that litigation and in any event, KBRSI can litigate the contract interpretation issue there, rather than at the Board (gov't mot. at 9 n.*). Second, the government argues that a declaratory ruling as to the meaning of Clause H-29 and the word "rotate" would not resolve the dispute because of the interplay of other clauses and specific facts of each employee's situation (gov't mot. at 10-11). Third, the government argues that KBRSI has an adequate legal remedy to protect its interests because it can pursue a monetary claim in the event the government ultimately disallows the costs (gov't mot. at 9, 12).

KBRSI counters that a pre-existing dispute is not necessary for requests for contract interpretation, and, in any event, there is a dispute, as evidenced by, among other things, the CO's comments about KBRSI's "bad assumption" and the pending *qui tam* case. KBRSI also contends that the *Alliant* factors for retaining the appeal are met because of issues relating to the LOGCAP III and IV contracts. With regard to LOGCAP IV, KBRSI states that the way in which KBRSI accounts for and bills for personnel demobilizing from theater may be altered depending on the proper interpretation of the clause. As to LOGCAP III, KBRSI asserts that, although it is no longer demobilizing personnel under that contract, the government has not finalized any of KBRSI's incurred costs since 2003, leaving eight years of performance under the contract subject to audit and further controversy on this issue (app. br. at 5-6, 8-10). These respective arguments are addressed in order below.

A. Is There a Live Dispute?

Here there is a disagreement on a contract issue that remains unresolved for finalization of incurred costs. Even if the CO has not yet determined that the costs are unallowable and made a demand for payment, DCAA has stated that it "disapproved" the costs, and more years' audits as to the same issue are being conducted. The CO has stated that KBRSI's view was a "bad assumption" – whether as to the meaning of the clause or the CO's agreement with that meaning or both (SOF ¶¶ 4, 5) – and noted that "the larger decision regarding Form 1 #173...remains unsettled" (SOF ¶ 8). It is obvious the disagreement is not going away. It is true that the matter does not involve the type of situation that arose in *Alliant* as to whether a contractor was required to perform at all, as opposed to what payment is appropriate for that performance. However, the disagreement clearly exists, it has significant ramifications, and it is continuing to impact appellant. This constitutes enough of a dispute to meet the first prong of *Alliant*.

By way of analogy, *TRW, Inc.*, ASBCA Nos. 51172, 51530, 99-2 BCA ¶ 30,407, also supports this conclusion. In that case, the Board addressed the issue of what is a premature claim, although not using the *Alliant* factors as that decision was issued only three days earlier. The Board concluded that even though the government had not yet disallowed the costs and *in fact was currently paying them* did not make the issue premature or academic. *Id.* at 150,330. "The matters at issue involve numerous contracts, appellant's ongoing application of the cost principles at issue, its potential liability for damages and penalties under the False Claims Act, and...the requirement to change its cost accounting practices if its interpretation...prove[s] to be incorrect." *Id.* at 150,331. The facts in *TRW* present enough of a parallel to support our decision to retain jurisdiction. *See also Martin Marietta Corp.*, ASBCA No. 38920, 90-1 BCA ¶ 22,418 at 112,608 (though decision pre-dated *Alliant*, Board retained jurisdiction even though the government had so far allowed recovery of the costs in question).

B. Would a Declaratory Judgment Resolve the Dispute?

To address whether a Board decision would resolve the dispute, we look at the three examples KBRSI proffers: LOGCAP III closeout, the *qui tam* case, and LOGCAP IV performance. Concerning LOGCAP III, DCAA is conducting numerous audits on the contract for other fiscal years and the CO has recognized the issue is "unsettled" (SOF ¶¶ 4, 8). Leaving the issue unresolved will simply magnify the potential impact if with each year's audit there is a successive disapproval. Interpreting Clause H-29 would provide the framework for proper application of the facts by the parties and resolution of the disagreement. Although the *qui tam* case and the LOGCAP IV contract do not drive this analysis, they do contribute to it. Both involve the same clause for interpretation as this appeal, and reflect the increasing expansion of the issue's impact. Declining jurisdiction simply prolongs the uncertainty.[1]

The government cites *Public Warehousing Co., K.S.C.*, ASBCA No. 56116, 09-2 BCA ¶ 34,264 (*PWC*), to support its view that the appeal should be dismissed for prudential considerations (gov't reply br. at 3-4). In *PWC*, the Board dismissed the appeal for not meeting the second *Alliant* factor. In that case, PWC's claim asked for the CO's interpretation as to whether PWC was required under a certain clause to return to the government any prompt or early payment discounts it received from its suppliers. The government had responded that "only 'genuine and legitimate bona fide early payment discounts'" could be retained, and gave a list of six conditions for making that determination. The Board agreed with the government that ruling on whether PWC could retain early payment discounts might well not resolve the dispute because it would not address the "genuine and legitimate" nature of those discounts or the conditions (if valid) established by the CO. *Id.* at 169,301-02.

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[1] With regard to the *qui tam* case, the use the District Court makes of a future Board decision on the interpretation of the clause is up to that forum.

The government argues that the current appeal is similar in that a fact-specific inquiry would be necessary to resolve each instance of cost incurrence, making the issue too involved for resolution via an abstract interpretation of the contract (gov't mot. at 10-11). In contrast, KBRSI asserts that one need not explore each factual situation that the clause could potentially apply to in order to understand what Clause H-29 means (app. opp'n at 11-12). We agree with KBRSI and consider the present situation to be different from *PWC*. Here, an interpretation of Clause H-29 would go a long way toward resolving the issue, even if it does not automatically dictate the result in every employee's situation. Whatever fact-specific analysis may still be necessary, having the framework for that analysis is fundamental to moving forward. *See Martin Marietta*, 90-1 BCA ¶ 22,418 at 112,609 (despite being paid certain home office cost allocations, contractor "is entitled to know where it stands" on the issue of whether those cost allocations involved a change in accounting practice).

C. Is There an Adequate Legal Remedy to Protect KBRSI's Interests?

The government has argued that KBRSI has an adequate legal remedy to protect its interests because it can pursue a monetary claim in the event the government ultimately disallows the costs. Here, however, the determination of disallowance and resultant demand for re-payment under FAR Part 32.6 would be a government claim not a contractor claim. *See Fiber Materials, Inc.*, ASBCA No. 53616, 07-1 BCA ¶ 33,563 at 166,251 (government cost disallowance, via a unilateral rate determination, was a government claim). The government is therefore in control of the timing of this alternate, "adequate legal remedy." It has already been several years since the interpretation issue arose, and the government has given no indication as to when KBRSI could expect a determination by the CO. Forcing KBRSI to wait for an unknown amount of time undercuts the point of contract interpretation: that parties need not always await down-stream money consequences, continuing to operate in a realm of uncertainty, when issues of contract interpretation arise. Such an approach also does not harmonize well with the CDA's purpose of granting "relatively free access to the boards of contract appeals" or the FAR's scheme that "review of contract claims will be relatively easy to obtain." *Alliant*, 178 F.3d at 1270-71.

Taking all the circumstances together, we exercise our discretion and retain jurisdiction.

CONCLUSION

For the reasons set forth above, the government's motion to dismiss is denied.

Dated: 9 September 2013

ELIZABETH M. GRANT
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

DIANA S. DICKINSON
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. 58578, Appeal of Kellogg Brown & Root Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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