ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
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Greenland Contractors I/S	)	ASBCA Nos. 61113, 61248
	)	
Under Contract No. FA2523-15-C-0002	)	

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OPINION BY ADMINISTRATIVE JUDGE D'ALESSANDRIS
ON THE GOVERNMENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

This appeal concerns the interpretation of the performance work statement regarding the maintenance and repair of electrical generation equipment pursuant to the Thule Greenland base maintenance contract between appellant Greenland Contractors I/S (Greenland) and respondent, the Department of the Air Force (Air Force or government). Greenland appeals from correspondence issued by an Air Force contracting officer that interpreted the contract to impose certain requirements upon Greenland which Greenland contends constitutes a government claim for contract interpretation. The Air Force moves to dismiss for lack of jurisdiction, asserting that the contracting officer's correspondence was contract administration and that the government has not asserted a claim. As explained below, we find that the Air Force's letter constitutes a government claim, though not a claim for contract interpretation.

Subsequent to briefing of the Air Force's motion to dismiss, the Air Force unilaterally reduced the price of Greenland's contract, pursuant to the inspection clause,[1]

[1] The inspection clause gives the government the right to inspect and test contract services. If the services do not conform to contract requirements, the government can require the contractor to perform the services again. If the

by an amount purportedly representing the value of the work required by the contract but not performed. Greenland filed a second appeal, ASBCA No. 61248, from that correspondence. As we find that the contracting officer's letter at issue in this appeal asserts a government claim, we consolidate ASBCA Nos. 61113 and 61248 for future consideration because the appeals involve the interpretation of the same provision of the same contract.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

As a complaint has not yet been filed, we rely on documents contained in the Rule 4 file to provide context to this motion. The Air Force awarded the Thule Greenland Base Maintenance Contract No. FA2523-15-C-0002 to Greenland in September 2015 (R4, tab 2). The contract contains Federal Acquisition Regulation (FAR) 52.246-4, INSPECTION OF SERVICES – FIXED-PRICE (AUG 1996) (the inspection of services clause) (*id.*). Relevant to this appeal, the Performance Work Statement of the contract contains paragraph 3.13.4 "Operate, maintain and repair electrical generation equipment in 'M' plant (Building 1391) and 'J' plant (Building 4016)" (R4, tab 3 at 49). The Air Force and Greenland disagree as to the proper interpretation of paragraph 3.13.4 and specifically the interpretation of a provision of that paragraph providing: "Note: Government will furnish depot level maintenance" (*id.* at 50).

By letter dated 12 May 2016, Stephanie Tancik, the Air Force contracting officer, responded to an 11 May 2016 email (not in the record) from Greenland, and informed Greenland that the Air Force interpreted the performance work statement as requiring Greenland to "accomplish all depot level repairs required on M Plant Diesel Units" (R4, tab 4). By letter dated 26 May 2016, Greenland provided the Air Force with its interpretation of the performance work statement requirements (R4, tab 5). The Air Force responded on 7 September 2016, repeating its prior interpretation of the performance work statement and directing Greenland to "immediately initiate all actions to return Engines #1-5 in M-Plant to full operational capability" (R4, tab 6). On 17 November 2016, Greenland wrote to the contracting officer following meetings between Greenland and the Air Force, apparently held on 7 and 8 November 2016 (R4, tab 8). In the letter, Greenland again set forth its interpretation of the performance work statement and provided that it "hereby asserts that the [government's] failure to complete the 40,000 hour [depot level maintenance] required by the [performance work statement] was a violation of its obligations under the contract" (*id.*). The letter further requested the government's response to Greenland's position (*id.*).

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defects cannot be corrected by re-performance, the government can require the contractor to take steps to ensure performance in the future or reduce the contract price. FAR 52.246-4(e).

On 11 January 2017, the contracting officer responded to Greenland's letter providing that Greenland "is hereby directed to immediately initiate and continue all actions to return electrical generation equipment #1-5 in M-Plant to full operational capability" (R4, tab 9). In conclusion, the letter provided that it:

> stands as the Contracting Officer's Response concerning the maintenance and repairs of the Electrical Generation Equipment at M-Plant under Thule Base Maintenance Contract – FA2523-15-C-0002. To the extent the Electrical Generation Equipment Nos. 1-5 in M-Plant are not brought back to full operational capability by the period of performance end date of 30 September 2017, the Government reserves the right to monetary consideration for any repairs not completed.

(*Id.*) On 30 March 2017, the Air Force issued a notice of rejection of Greenland's work due to Greenland's failure to perform the depot level repairs directed by the contracting officer in her letters of 7 September 2016 and 11 January 2017 (app. supp. R4, tab S-1). The letter stated that Greenland had until 16 June 2017 to perform the depot level maintenance work and requested a response from Greenland by 27 March 2017 (*id.*). By letter dated 27 March 2017, Greenland responded to the contracting officer, again disputing the government's interpretation of the performance work statement and proposing alternative methods[2] of meeting the government's 16 June 2017 deadline (app. supp. R4, tab S-2). On 10 April 2017, appellant submitted an appeal of the contracting officer's 11 January 2017 letter to the Board, which it docketed as ASBCA No. 61113.

On 11 July 2017, the contracting officer issued a unilateral modification of the contract pursuant to the inspection of services clause, reducing the contract price by $3.2 million for work purportedly required by the performance work statement and which cannot be re-performed (app. supp. R4, tab S-3). Greenland subsequently filed an appeal from that final decision which has been docketed as ASBCA No. 61248.

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[2] Greenland's proposed "alternatives" do not appear to be serious options as each alternative notes major obstacles to implementation. For example, one alternative is to shutdown the M-plant and rely only on the back-up generators, a second option proposes to reduce base operations, with a "pre-emptive partial evacuation" of the base based on the likely failure of back-up power, and another option is to airlift in new generators at government expense (app. supp. R4, tab S-2).

DECISION

Pursuant to the Contract Disputes Act (CDA) 41 U.S.C. §§ 7101-7109, a contractor may, "within 90 days from the date of receipt of a contracting officer's decision" under 41 U.S.C. § 7103 appeal the decision to an agency board. 41 U.S.C. § 7104(a). Our reviewing court, the Federal Circuit, has held that CDA jurisdiction requires "both a valid claim and a contracting officer's final decision on that claim." *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010) (citing *James M. Ellett Constr. Co. v. United States*, 93 F.3d 1537, 1541-42 (Fed. Cir. 1996)). Normally, when the CDA claim is a government claim, the contracting officer's final decision is considered to be the claim. *See, e.g., Lockheed Martin Corp.*, ASBCA No. 57525, 12-1 BCA ¶ 35,017. In such instances, the government bears the burden of establishing jurisdiction for a government claim. *See, e.g., Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1584 (Fed. Cir. 1993). Here, however, Greenland contends that the government has asserted a claim, while the government has filed a motion to dismiss, contending that it has not asserted a claim. In such instances, the party asserting jurisdiction, Greenland, bears the burden of establishing jurisdiction. *DynPort Vaccine Company LLC*, ASBCA No. 59298, 15-1 BCA ¶ 35,860 at 175,332 (citing *Cedars-Sinai*, 11 F.3d at 1584).

The parties dispute the significance of the 11 January 2017 letter from the contracting officer to Greenland. We find that the letter constitutes a valid government claim.[3] The 11 January 2017 letter provides that Greenland "is hereby directed to immediately initiate and continue all actions to return electrical generation equipment #1-5 in M-Plant to full operational capability" (R4, tab 9). This direction constitutes a government claim. The situation here is similar to the facts in *Garrett v. General Elec. Co.*, 987 F.2d 747 (Fed. Cir. 1993), where the government directed General Electric to repair or replace purportedly defective jet engines. The Federal Circuit held that, pursuant to that contract's inspection clause, the government had three options; it could have: 1) reduced the contract price by an equitable portion of the contract price; 2) demanded that the contractor repay an equitable portion of the contract price; or 3) directed the contractor to correct or replace the defective product. *General Electric*, 987 F.2d at 749. Rather than seeking monetary options of reducing the contract price or requiring repayment, the government directed performance which constituted "other relief" pursuant to the FAR. *Id.* The Federal Circuit noted in *General Electric* that the government's "choice of relief – a substitute for monetary remedies – fit within the CDA

[3] The correspondence between Greenland and the government prior to the 11 January letter may also constitute a contractor claim seeking contract interpretation, to which the 11 January letter is a final decision. Both parties reject this interpretation. Regardless, we are satisfied that the 11 January letter is a valid claim providing us with jurisdiction.

concept of 'claim.'" *Id.* Similarly, here, pursuant to the inspection clause FAR 52.246-4, the Air Force had the option of directing Greenland to perform the work, or reducing the contract amount by the value of the services not performed. As in *General Electric* this direction constitutes a government claim.

The Air Force asserts that the 11 January 2017 letter does not constitute a claim because it is not styled as a contracting officer's final decision, does not seek interpretation or adjustment of contract terms, and because Greenland's true goal is a monetary claim for work performed beyond the scope of the contract (gov't mot. at 2-3). None of the Air Force's arguments are meritorious. First, the fact that the 11 January 2017 letter was not captioned as a contracting officer's final decision, and does not satisfy the requirements of a final decision contained in the FAR is of no importance to determining our jurisdiction. "The absence of an express styling of a document as a [contracting officer's] decision or of notice of the contractor's appeal rights, or of both, does not render a [contracting officer's] decision ineffective or deprive the Board of jurisdiction." *DynPort Vaccine*, 15-1 BCA ¶ 35,860 at 175,333.

The Air Force's argument that the final decision does not seek adjustment or interpretation of contract terms is similarly unavailing because even though Greenland incorrectly characterizes the decision as one seeking the interpretation of contract terms, it is, nevertheless, one seeking "other relief" as permitted by the FAR. The FAR defines a claim 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 or relating to the contract." FAR 2.101. The Board interprets the term "claim" broadly. *DynPort Vaccine*, 15-1 BCA ¶ 35,860 at 175,333 (citing *Todd Construction, L.P. v. United States*, 656 F.3d 1306, 1311 (Fed. Cir. 2011)). The Board has held that there is a question of contract interpretation when there is a dispute as to whether the contract requires performance of a task. *Kaman Precision Products, Inc.*, ASBCA Nos. 56305, 56313, 10-2 BCA ¶ 34,529 at 170,288. Even though the 11 January 2017 letter does not seek "the adjustment or interpretation of contract terms" – for it, in fact, acts to interpret them – it clearly seeks "other relief arising under or relating to the contract." *See General Electric*, 987 F.2d at 949; *DynPort Vaccine*, 15-1 BCA ¶ 35,860 at 175,333; *see also Donald M. Lake, d/b/a Shady Cove Resort & Marina*, ASBCA No. 54422, 05-1 BCA ¶ 32,920 at 163,071.

The Air Force additionally cites to *Weststar Engineering, Inc.*, ASBCA No. 52484, 02-1 BCA ¶ 31,759 and *Woodington Corp.*, ASBCA No. 37272, 89-2 BCA ¶ 21,602, for the proposition that there is not a valid claim because Greenland's true dispute is a request for an equitable adjustment to the contract. The cited cases do not support this proposition. Neither *Weststar* nor *Woodington* involved a government claim. In *Weststar*, the contractor had submitted requests for equitable adjustments, but had not certified the requests. The contractor was subsequently the subject of a fraud

investigation by the Department of Justice. The contractor asserted a claim for contract interpretation while repeatedly referring to its claim as being for $4.2 million. In fact, the contractor admitted that it was "trying to avoid presentation of its monetary claim because of [Department of Justice] concerns." *Weststar*, 02-1 BCA ¶ 31,759 at 156,852. In *Woodington*, the complaint filed with the Board requested an equitable adjustment without specifying a dollar amount. *Woodington*, 89-2 BCA ¶ 21,602 at 108,758. The Board dismissed the appeal holding that there was "no indication that such claim has been quantified and presented to the contracting officer" and thus, the Board lacked jurisdiction to review it. *Id.* Taken together, *Weststar* and *Woodington* stand for the proposition that a contractor cannot assert a monetary claim as a contractor claim for contract interpretation. Here, Greenland is alleging a non-monetary claim by the government. Both *DynCorp* and *General Electric* provide that that Board possesses jurisdiction to entertain such claims.

In its reply brief, the Air Force asserts that case law demonstrates that contract interpretation claims are filed by contractors and not by the government and that the only reason to bring a contract interpretation claim is to lead to a price adjustment claim (gov't reply at 6-8). As noted above, we agree that this is not a contract interpretation claim by the government, but nevertheless hold that the Board possesses jurisdiction to entertain Greenland's appeal. The government is correct that the typical procedure would be for Greenland to file a request for equitable adjustment of the contract seeking increased compensation, followed by a claim. However, the fact that Greenland did not follow the typical procedure cannot deprive the Board of jurisdiction to entertain a claim within its jurisdiction. *See Kaman Precision Products,* 10-2 BCA ¶ 34,529 at 170,287 ("The fact that a decision on [a claim for contract interpretation] may later result in a monetary claim does not affect our jurisdiction to hear the appeal before us nor does it lead us to conclude that it would be premature to decide [the claim for contract interpretation] at this time.").

As the government notes, resolution of the contract interpretation issue does not obtain any relief for Greenland and can only lead to a request for equitable adjustment in the event that Greenland's interpretation of the contract prevails (gov't reply at 7). Thus, contractors typically follow the request for equitable adjustment process as it is likely more efficient than pursuing two rounds of litigation. The benefit, if any, to Greenland of appealing a government claim, rather than filing a request for equitable adjustment is unclear. The appeal of a contract interpretation claim is not a monetary claim and therefore does not get Greenland an earlier claim accrual date for possible CDA interest. In addition, a claim for contract interpretation is a question of law, so there is no burden of proof. Moreover, we note that the Air Force issued a unilateral

modification reducing the contract amount, and, thus, it appears[4] that the issues in this appeal will largely be duplicated in the second appeal.

By order dated 18 July 2017, the Board requested supplemental briefing from the parties on whether this appeal should be consolidated with ASBCA No. 61248. Greenland indicated that the appeals should be combined because both appeals involve interpretation of the performance work statement and arise from the same operative facts and questions of law, and moved for consolidation (app. supp. br. at 1). The government opposed consolidation of the appeals because the two claims involve different government actions and because the Board lacks jurisdiction to entertain the initially filed appeal (ASBCA No. 61113) (gov't supp. br. at 2-3). As the government's main objection to consolidation (that the Board lacks jurisdiction in this appeal) has been rejected in this opinion, we find that consolidation is appropriate.

Finally, Greenland has filed motions to require the government to file the complaint in each of the appeals. The Air Force has responded to both motions. Briefing of the motion to direct the government to file the answer in ASBCA No. 61113 was held in abeyance by order dated 9 May 2017. The motion in ASBCA No. 61248 was held in abeyance by order dated 20 September 2017. Greenland may file a reply brief in the consolidated appeal within 30 days of this opinion.

Dated: 8 December 2017

DAVID D'ALESSANDRIS
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

[4] We assume, but do not hold, that the modification is properly before us in ASBCA No. 61248. The Air Force may choose to challenge our jurisdiction to entertain that appeal.

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. 61113, 61248, Appeals of Greenland Contractors I/S, rendered in conformance with the Board's Charter.

Dated:

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