ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
American Consulting Services, Inc.	)	ASBCA No. 52923
	)	
Under Contract Nos. DACW49-94-C-0014	)	
DACW49-96-C-0014	)	

APPEARANCE FOR THE APPELLANT: Thomas Peters, Esq.
Chicago, IL

APPEARANCES FOR THE GOVERNMENT: Frank Carr, Esq.
Engineer Chief Trial Attorney
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U.S. Army Engineer District,
Buffalo

OPINION BY ADMINISTRATIVE JUDGE PEACOCK
ON GOVERNMENT'S MOTION TO DISMISS

The Government moves to dismiss portions of the appellant's complaint in the referenced appeal. The Government alleges that the Board lacks jurisdiction over "additional claims" that were first asserted in the complaint without prior submission to the contracting officer.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. Contract No. DACW49-94-C-0014 (the 1994 contract) was awarded to American Consulting Services, Inc. (ACS, contractor or appellant) by the U.S. Army Engineer District, Buffalo, New York (Corps or Government) on 6 May 1994. The 1994 contract required the contractor to provide a Caretaker/Gate Tender (CGT) at the Wisconsin Steel Works (WSW) site in Chicago, Illinois. WSW is an industrial site comprised of approximately 175 acres. The Corps had responsibility for overseeing environmental remediation of this site. The CGT's services were to include presence at the site, maintenance, perimeter control, and public health and safety for a one year period. The Corps exercised its option to renew the contract for an additional one year period. Contract No. DACW49-96-C-0014 (the 1996 contract), awarded to ACS on 8 May 1996, provided for substantially the same CGT services as the 1994 contract. The 1996 contract also required the contractor to provide a temporary field office (trailer) at the WSW site in Chicago. (R4, tabs 7, 14, 37)

2. The "main plant site," comprising 133 of the WSW property's 175 acres, was bounded on three sides by a 6 foot high perimeter chain-link fence and by the Calumet River on the fourth side. Orange plastic interior fences cordoned off hazardous areas of the site requiring remediation. The CGT's maintenance duties included repairing the perimeter and interior fences "as necessary." In addition, the CGT was to perform certain maintenance with respect to the "Main Office Building." (R4, tab 7)

3. The 1994 contract was completed in May 1996 and the 1996 contract was completed in May 1997. During performance of the contracts, the appellant contends that it incurred extra costs as a result of various events which it claims entitle it to increases in the prices of the two contracts. A claim seeking recovery of $30,381.48 was forwarded to the contracting officer by letter dated 20 October 1997.

4. Appellant's October 1997 claim was divided into nine subcategories. The first five were identified with the 1994 contract. Only item 2 under the 1994 contract is in issue in this motion. That item was for (R4, tab 88 at 6):

> 2. Repair of furnace
> Payment to Southside Heating and Cooling $ 236.00

5. Although only a "Payment to Southside Heating and Cooling" is listed in the above quantification of claim item 2, ACS' earlier narrative discussion in the claim of the furnace repairs provides further details. In particular, the appellant contended that furnace maintenance exceeded what it reasonably should have anticipated under the contract because the furnace was water damaged as a result of numerous leaks in the roof. ACS refers to this in the claim as a "change in site condition." ACS stated that it had employed a contractor to inspect and assess the condition of the roof. The roofing contractor determined that the roof was unrepairable and needed replacement. However, the Corps declined to replace the roof. (R4, tab 88 at 3)

6. ACS also sought recovery for four claim items that it identified with the 1996 contract. Only the following two items are relevant to the issues before us in this motion (R4, tab 88 at 6):

> 6. Site Condition: To Provide Water, Sewer and Electric to Trailer
>
> | | |
> |---|---|
> | Engineering Cost | $423.00 |
> | Management Cost and Overhead | $875.16 |
> | Trailer Rewiring and Reset of Alarm | $160.00 |
> | Legal Costs | $1,825.85 |

Moving and Resetting Trailer	$400.00
Telephone Re-installation	$80.00

7. Replacement of Orange Fence, February 1997

52 rolls of orange fencing	52 x $52.00	$2,704.00
Other materials, ties		$100.00
Labor	100 hours x $20.00/hr	$2,000.00
Inspection and Management		$2,550.00

7. Claim item 6 above pertains to the provision in the 1996 contract requiring the appellant to provide a field office trailer. The contractor encountered difficulties in connecting its trailer to electric, water and sewer utilities at the site. These problems were addressed in unilateral Modification No. P00001 (Mod. 1) to the contract. Mod. 1 increased the contract price in the amount of $6,145.00 to reimburse ACS for the cost of "running new electric supply lines to the site." (R4, tab 66) The appellant contended in its October 1997 claim that Mod. 1 did not fully compensate it for all costs associated with what it contends were unanticipated site conditions related to the utility hook-ups (R4, tab 88 at 5):

> ACS had to hire contractors, engineers, and an attorney, who were familiar with the Chicago environment. ACS incurred expenses in studying the site problem and in the presentation of the issues and solution to you. You approved the solution, proposed by ACS, but ACS has not been reimbursed for other costs incurred in remedying the situation.

8. Claim item 7 above, "Replacement of Orange Fence, February 1997," involves the interior fencing surrounding the hazardous waste areas within the site that were to be remediated. The appellant asserted that the orange fencing was "brittle," in a severe state of disrepair and had "outlived its useful life." ACS contended that the fencing was not repairable and required replacement. (R4, tab 88 at 5)

9. Following receipt of the appellant's October 1997 claim, the contracting officer, in her final decision dated 10 November 1998, denied ACS' claim in its entirety (R4, tab 1).

10. By letter dated 1 February 1999, the appellant timely appealed the contracting officer's denial of the claim to the Corps of Engineers Board of Contract Appeals (ENGBCA) (R4, tab 2). That appeal was docketed as ENGBCA No. 6439.

11. The appellant, proceeding *pro se*, filed its complaint with the Board in a letter dated 3 March 1999. ACS' letter complaint generally tracked the claim categories and damages itemized in its October 1997 claim. However, the Government in its answer, maintains that six new claims were included in the appellant's complaint that were not previously submitted to the contracting officer for decision. The six alleged new claims were in the amounts of:

1. $400.00 for roof inspection (complaint ¶ 2);

2. $11,825.00 for legal services (complaint ¶ 6d);

3. $11,000.00 for professional engineering services (water and sewer) (complaint ¶ 6);

4. $11,800.00 for professional engineering services (electrical) (complaint ¶ 6);

5. $2,900.00 for reboarding windows (complaint ¶ 8(a)); and

6. $6,000.00 for fence inspection and boarding of buildings (complaint ¶8(b)).

12. The $400.00 roof inspection amount sought in complaint ¶ 2 was the cost allegedly incurred by ACS in attempting to remedy the unanticipated poor condition of the leaking roof that in turn allegedly caused water damage to the furnace and increased the appellant's maintenance costs. (*See* finding 5, *supra*).

13. The legal services cost claimed, as described in complaint ¶ 6(d) was for "costs related to the change in site conditions [the utility connection/hook-up issue]. ACS had to seek legal advice on the procedures and policies of the City of Chicago. Sewer, water, electric utilities amount still owed ACS."

14. Similarly, the amounts of $11,000.00 and $1l,800.00 sought in complaint ¶ 6 for "professional engineering" services relate to the water/sewer/electrical hook-up issue. The complaint states with respect thereto: "Additionally, more costs had been incurred due to the discovery of the change of condition at the site. These site condition changes resulted in the costs incurred in professional engineering services."

15. ACS' October 1997 claim did not discuss or reference the $2,900.00 amount sought for reboarding windows or the $6,000.00 amount requested for fence inspection and boarding of buildings. The latter amount is supported, however, by a subcontractor invoice. The invoice indicated that the $6,000 was incurred to inspect, "check,

demarcated [the orange interior] fence and windows to be reinstalled." (App's complaint, ex. 7)

16. The Government's answer, dated 30 March 1999, sought dismissal of the alleged six new claims for lack of jurisdiction on the ground that they had not been submitted to the contracting officer for decision as required by the Contract Disputes Act, 41 U.S.C. § 605(a). On 13 April 1999, the ENGBCA issued a pre-trial order, that scheduled the appeal for trial and, *inter alia*, stated as follows with respect to the Government's request that the allegedly new claims be dismissed:

> V. ADDITIONAL CLAIMS
>
> To the extent that there are additional claim items included in the Complaint that were not previously submitted to the Contracting Officer for decision, it is well-established that the Board does not have jurisdiction. Therefore, the Appellant will, within 30 days, respond to the Government's (affirmative defense) Motion to Dismiss various claim items. The Government's Motion to Dismiss is included in its Answer beginning at Paragraph 24. In addition, if the Appellant determines that one or more of the disputed claim items has not been submitted to the Contracting Officer for decision, the Appellant will formally submit them to the Contracting Officer within 30 days. The Board anticipates that any appeal from a subsequent Contracting Officer's decision will be consolidated for processing and trial with the instant appeal.

17. Mr. Allen Bahn is the appellant's employee primarily responsible for the prosecution of this appeal. Mr. Bahn was the author of ACS' above-described "complaint." Following issuance of the Board's pre-trial order on 13 April 1999, Mr. Bahn became severely ill and incapacitated necessitating among other things postponements of the trial dates set for the appeal. On 3 August 1999, a telephone conference was conducted between the parties and the Board to establish new hearing dates and discuss the alleged new claims that had not as yet been submitted to the contracting officer. With respect to those alleged additional claims, appellant indicated that it would forthwith present its entire complaint to the contracting officer for decision. However, Mr. Bahn insisted that all matters in the complaint had previously been submitted to and considered by the contracting officer. He considered that resubmission was unnecessary and redundant but stated he would resubmit them to avoid any possible jurisdictional problems.

18. Following the telephone conference and also on 3 August 1999, Mr. Bahn submitted to the contracting officer a "revised" claim that essentially reiterated, and sought recovery for, all items specified in its complaint. The only significant difference between ACS' 3 August 1999 claim and its prior March 1999 complaint was a reduction in the total amount claimed for "professional engineering services." The amount sought in the complaint for these services totaled $22,800.00 ($11,000.00 + $11,800.00). (*See* findings 11, 14 *supra*) In the August 1999 claim, the appellant sought a combined total amount of $21,253.00 for both types of "professional engineering services."

19. In her final decision dated 19 August 1999, the contracting officer denied the appellant's "revised" claim.

20. It is undisputed that the contracting officer's 19 August 1999 final decision was received by the appellant on 21 August 1999. The appellant failed to appeal that final decision within the 90 days following its receipt.

21. In a "Motion to Dismiss" (motion) dated 24 November 1999, the Government sought to dismiss for lack of jurisdiction the six items in the appellant's complaint first noted in the Government's answer.

22. Following receipt of the Government's motion, the appellant retained an attorney. Under cover of a letter dated 10 February 2000, the appellant's attorney filed a "response" to the motion, requesting that it be denied. The "response" argued in pertinent part (app. resp. at 2):

> 7. Not only was the same case already pending, but, as the Court knows, Mr. Bahn was seriously ill during the time when the Government claims A.C.S.I. should have filed a second Notice of Appeal, about issues that were docketed eight months earlier.
>
> 8. Form does not trump substance in any just system. Why should A.C.S.I. file a second Notice of Appeal when the issues were already before this Court.
>
> 9. The Government had actual notice of A.C.S.I.'s intention to dispute the Contract[ing] Officer's ruling. There was [a] pending appeal on the same contract dispute long before the August 21, 1999, ruling that rehashed the ruling that had been appealed eight months previously.

23. Effective 12 July 2000, the ENGBCA merged into the Armed Services Board of Contract Appeals (ASBCA). Following the merger, ENGBCA No. 6439 was docketed as ASBCA No. 52923.

DECISION

The Government moves to dismiss alleged "new claims" set forth in appellant's complaint. The Government contends that the Board lacks jurisdiction over the "new claims" because they were not submitted to the contracting officer in ACS' original, October 1997 claim. Although the items in dispute were later presented to the contracting officer in the contractor's 3 August 1999 claim, the Government argues that no appeal was taken from the contracting officer's 19 August 1999 final decision denying the "new claims." Thus, the original failure to submit the "new claims" and the subsequent failure to appeal the second decision, preclude exercising jurisdiction over them, according to the Government. For its part, the appellant contends that no "new claims" were included in its complaint. Appellant argues that the itemized amounts in dispute that were sought in the complaint pertained to the same original claim that was presented to the contracting officer in October 1997. Therefore, ACS maintains that submission of the 3 August 1999 claim was an unnecessary precaution and its failure to appeal the 19 August 1999 final decision did not negate our preexisting jurisdiction.

The Contract Disputes Act requires that "all claims by a contractor shall be in writing and shall be submitted to the contracting officer for decision." 41 U.S.C. § 605(a). Prior submission of claims to the contracting officer is a jurisdictional prerequisite to our consideration of claims alleged in the pleadings. *See, e.g., Skip Kirchdorfer, Inc.*, ASBCA Nos. 40515 *et al.*, 93-3 BCA ¶ 25,899. We have frequently had occasion to address the fundamental issue presented by the Government's motion, *i.e.*, whether matters pleaded exceed the scope of the claim submitted to the contracting officer.

As a general rule, allegations in complaints are not subject to dismissal if they involve "a common or related set of operative facts" as set forth in the claim. *Placeway Construction Corp. v. United States*, 920 F.2d 903, 909 (Fed. Cir. 1990). Similarly, so long as the essential nature and operative facts of the claim remain unchanged, the Board has jurisdiction to consider additional elements or increased/modified amounts of damages first raised in pleadings, assuming any applicable certification requirements have been satisfied. *Cf. Tecom v. United States*, 732 F.2d 935 (Fed. Cir. 1984) (involving certification issues). There are no certification-related issues in this appeal. At all times, the amount claimed was below the $100,000 threshold.

For the most part, the increased and additional quantum elements sought in ACS' complaint were not "new claims" and we have jurisdiction to consider them in

accordance with the general rules noted above. The cost elements in dispute fall into four claim categories: 1) furnace maintenance; 2) trailer utility connections; 3) fence maintenance/replacement; and 4) boarding/reboarding of windows. We address each of these categories below.

The furnace maintenance claim involves ACS' assertion that repairs of the furnace exceeded what it reasonably should have anticipated and were exacerbated by the leaky roof. The October 1997 claim sought only the actual additional maintenance cost incurred to maintain the furnace. However, it also notified the contracting officer that appellant had attempted to assess the feasibility of repairing the roof leaks to prevent further damage to the furnace. The cost of the roof inspection was not quantified until the complaint was filed. That cost clearly pertains to the claim submitted to the contracting officer.

The trailer utility connections claim is premised on appellant's allegation that it encountered difficulties in hooking up its field office trailer to utilities at the site. According to the contractor, the connection difficulties exceeded what it reasonably should have anticipated. An equitable adjustment related to this problem was provided for in Mod. 1 to the 1996 contract. In its October 1997 claim, ACS alleged that the increase in the contract price granted in Mod. 1 did not address or cover all of the costs incurred as a result of the utility connection difficulties. Insofar as relevant to the Government's motion, the October 1997 claim indicated that ACS "had to hire contractors, engineers, and an attorney" to study the local issues and develop a solution. As submitted to the contracting officer in October 1997, the claim, *inter alia,* quantified engineering cost in the amount of $423 and legal costs in the amount of $1,825. In its complaint before the Board, ACS also sought recovery of "professional engineering services" expenses in the total amount of $22,800. The complaint also increased the amount requested for legal fees to $11,825. Despite the increase in legal fees and the addition of the "professional engineering services" costs, the essential character of the trailer utility connections claim and the basic operative facts essential to proof of entitlement were not modified by the complaint. Accordingly, we have jurisdiction to consider and include them in any equitable adjustment found due appellant.

The fence maintenance/replacement claim is based on appellant's allegations that the interior orange fencing was not repairable and that it incurred extra costs in maintaining and ultimately replacing the fence. ACS' October 1997 claim identified various costs associated with fence maintenance/replacement but did not itemize specifically the additional $6,000 amount sought in the complaint for "fence inspection." The subcontractor invoice makes clear that at least a portion of these costs relate to appellant's fence maintenance/replacement claim (finding 15). To the extent that a portion of the $6,000 was incurred for maintenance and/or replacement of the interior

fencing, that portion is merely an additional area of damages related to the operative facts of the October 1997 claim and within our jurisdiction.

A different result obtains with respect to the fourth claim category in dispute. There is simply no mention of the underlying factual bases for recovery for boarding/reboarding of windows in appellant's October 1997 claim. The amounts sought therefor first appeared in appellant's complaint. According to the complaint, the costs were allegedly incurred as a result of a "pattern of harassment" by Government personnel. No "pattern of harassment" requiring the contractor to perform extra boarding/reboarding work was asserted as a basis for recovery in ACS' October 1997 claim. These new allegations are outside the scope of that claim and beyond our jurisdiction.

CONCLUSION

We conclude that we have jurisdiction to consider the increased and additional cost elements related to the first three claim categories discussed above, *i.e.* furnace maintenance, trailer utility connections and fence maintenance/replacement. Those claims were submitted to the contracting officer in October 1997 and the contractor timely appealed from the November 1998 final decision. They were not new claims and they were not first asserted in the complaint. Because jurisdiction over these claims properly vested with the filing of the timely appeal, we agree with ACS that it was unnecessary to resubmit them to the contracting officer and unnecessary for the contractor to appeal the contracting officer's subsequent August 1999 decision that addressed the additional and increased cost elements. To that extent, we deny the Government's motion.

However, the boarding/reboarding claim was a new claim that was first asserted in ACS' complaint on appeal, without prior submission to the contracting officer. As argued by the Government in its answer to the complaint, there is a jurisdictional bar to our consideration of such new claims raised in the pleadings. The boarding/reboarding claim was eventually submitted (as was the entire complaint) to the contracting officer on 3 August 1999 and denied by her in a final decision dated 19 August 1999. ACS failed to appeal that final decision. Absent a timely appeal, it is well established that we have no jurisdiction over the boarding/reboarding claim. *Cosmic Construction Co. v. United States*, 697 F.2d 1389 (Fed. Cir. 1982). To that extent we grant the Government's motion.

The Government's motion to dismiss is granted in part and denied in part.

Dated: 15 August 2000

ROBERT T. PEACOCK
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

EUNICE W. THOMAS
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. 52923, Appeal of American Consulting Services, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals