ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Aeronca, Inc.	)	ASBCA No. 51927
	)	
Under Contract No. F09603-96-C-0010	)	

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OPINION BY ADMINISTRATIVE JUDGE MOED
ON THE GOVERNMENT'S MOTION TO STRIKE
OR DISMISS COUNTS OF THE COMPLAINT

This appeal arises from the contracting officer's written decision dated 27 October 1998 (R4, tab 69) denying, in its entirety, appellant's (Aeronca's) written claim, dated 15 May 1998 (R4, tab 53) (hereinafter referred to as the "CDA claim"). The Government moves for an order striking or dismissing Counts 2, 3, 4, 6, 7, 8 and 9 and related paragraphs 22, 23, and 24 of the complaint for lack of jurisdiction on the ground that they assert claims not contained in the CDA claim. The text below assumes familiarity with our decision dated 22 December 2000, published at 01-1 BCA ¶ 31,230, relating to Aeronca's motion for partial summary judgment.

It should be noted that the recovery requested in various counts of the complaint apparently includes the actual costs of disassembly of 100 ACDs. In our decision on the motion for partial summary judgment, we held that said request was not part of the CDA claim and, therefore, was beyond our jurisdiction in this appeal. *Id.* at 154,145. We do not revisit that issue here.

Count 2

This count seeks an equitable adjustment in the contract price or payment of monetary damages for the Government's alleged failure to furnish special tooling to Aeronca pursuant to the contract clauses relating to Government-furnished property and special tooling. That material was needed for repair of the aft cowl doors (ACDs). There is no reference to this matter in the CDA claim. The Rule 4 file contains two relevant documents. The first is a letter, dated 1 December 1995, from Aeronca to Warner-Robins Air Logistics Center (WR ALC), the cognizant agency, reporting shortages in special tooling and gages received from the Government (R4, tab 7). The second document is the Government's response, as reported in an internal memorandum, dated 8 December 1995 (R4, tab 9), that "all of the tooling that [WR ALC] has available has been shipped to Aeronca; therefore, if any additional tooling is needed, Aeronca will have to manufacture [the same] themsel[ves]." Aeronca contends that the contracting officer was on notice of this claim from the above documents and, on that basis, the claim in Count 2 is properly part of this appeal. In support of that conclusion, Aeronca cites the rule that the determination as to whether a claim has been expressed or submitted adequately is to be based upon examination of the "totality of the contractor's communications." *Marine Construction & Dredging, Inc.*, ASBCA Nos. 38412, 38538, 90-1 BCA ¶ 22,573 at 113,286.

To qualify as the submission of a monetary claim, such communication(s) must have been submitted in writing to the contracting officer, demanding, as a matter of right, the payment of a sum certain. *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1565 (Fed. Cir. 1995). The communication(s) must contain "a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim." *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987). Under these standards, the above-noted communications concerning missing Government-furnished tooling cannot be deemed to be a previous submission of the claim set forth in Count 2. On that basis, the motion to strike is granted as to Count 2 and related paragraph 22.

Count 3

Count 3 seeks additional compensation for the engineering effort expended by Aeronca to remedy the Government's alleged failure to furnish correct, complete, and current technical data for disassembly, repair and reassembly of the ACDs. This demand is set forth in footnote No. 5 of the CDA claim (complaint, ¶ 44; R4, tab 53 at 5). Count 3 alleges, furthermore, that said failure on the part of the Government "delayed Aeronca's progress in the repair and reassembly of the [ACDs] causing [it] to incur increased costs" (complaint ¶ 45). The CDA claim includes a demand for recovery of unabsorbed overhead which was "'absorbed' into the rates for Aeronca's additional labor" (R4, tab 53 at 2). Considering the generality of the pleading, that is a plausible basis for the second element of Count 3. The motion is, accordingly, denied as to that count.

Count 4

Count 4 incorporates by reference all prior allegations of the complaint and then alleges that "the Government breached its implied duty to cooperate for which Aeronca is entitled to all damages arising therefrom" (complaint, ¶ 47). Aeronca defends against the motion to strike on the basis that Count 4 is "merely an alternative legal theory, which [it] is entitled to bring" (app. reply br. at 12). As noted above, the incorporated operative facts contained in Count 2 are not based on operative facts in the CDA claim. It has not been shown, however, that those operative facts are involved in the breach alleged in Count 4. That permits us to view Count 4 as an alternate theory for recovery of the damages sought in the CDA claim. The motion to strike Count 4 is accordingly denied.

Count 6

Count 6 alleges that "by its May 13, 1996 'definitization,'" and through unspecified "actions of [the Government's] authorized representatives," an implied-in-fact contract was formed for disassembly, repair and reassembly of 100 ACD's. Aeronca asserts that the Government subsequently breached that contract by permitting Aeronca to repair and reassemble only 20 of the ACDs (complaint, ¶¶ 53, 55).

The Government offers two grounds for striking Count 6. The first is an alleged "dearth of operative facts that coherently address" the creation of the alleged implied-in-fact contract and the breach thereof (Gov't mot. at 16-17). There is no indication, however, that Count 6 depends upon operative facts which were not presented to the contracting officer. On the face of the pleading, Count 6 contains only facts set forth in the CDA claim.

The other ground for striking Count 6 is Aeronca's description of the implied-in-fact contract as having been formed through the offer and acceptance of contract Modification No. P00001 (app. resp. at 13-14). The Government contends that, as a matter of law, the formation of such an implied-in-fact contract was not possible inasmuch as an express contract employing the same instruments and covering the same work already existed (Gov't reply br. at 8). We are not required to address the merits of that assertion. This motion is not concerned with the legal sufficiency of Count 6 but simply with whether this pleading meets the jurisdictional requirement of being based on operative facts which are "common or related" to those contained in the CDA claim presented to the contracting officer. *Placeway Construction Corp. v. United States*, 920 F.2d 902, 909 (Fed. Cir. 1990). As no facts beyond that scope have been alleged in Count 6, the same is properly before us. The motion is denied as to that count.

Counts 7 and 8

In Count 7, Aeronca alleges that "[i]f and to the extent the Government properly terminated any contract with Aeronca, the only contract terminated was the letter contract" (complaint, ¶ 62). Count 8 relates to the parties' failure to sign a definitized, firm, fixed price contract by 26 April 1996, as provided in the letter contract. *Aeronca, Inc.*, *supra*, 01-1 BCA at 154,144. It is contended that the failure to comply with the definitization schedule served to terminate the letter contract. In these counts, Aeronca seeks to recover its full actual costs for the work on the ACDs. Counts 7 and 8 are alternate theories of recovery based on actions taken by the contracting officer which were also set forth in the body of the CDA claim (R4, tab 53). *Trepte Construction Co., Inc.*, ASBCA No. 38555, 90-1 BCA ¶ 22,595. The motion to strike is accordingly denied as to Counts 7 and 8.

Count 9

Count 9 seeks to recover for disassembly of 100 ACDs and repair and reassembly of 20 such units. It is alleged that an implied-in-fact contract was entered into for that work after the parties failed to enter into a definitized firm, fixed price contract by 26 April 1996, as provided in the letter contract. 01-1 BCA ¶ 31,230 at 154,144. All of the facts alleged in Count 9 (except for recovery as to disassembly) are to be found in the CDA claim. Count 9 therefore constitutes an alternative theory for the monetary recovery sought in the CDA claim. On that basis, the motion to strike is denied as to Count 9.

CONCLUSION

The motion to strike is granted as to Count 2 and paragraph 22 of the complaint. In all other respects, the motion is denied.

Dated: 2 May 2001

PENIEL MOED
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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. 51927, Appeal of Aeronca, Inc., rendered in conformance with the Board's Charter.

Dated:

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