ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
William F. Klingensmith, Inc.	)	ASBCA No. 52028
	)	
Under Contract No. 263-93-C-0434	)	

APPEARANCES FOR THE APPELLANT: Branko Stupar, Esq.
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Washington, DC

APPEARANCES FOR THE GOVERNMENT: Jeffrey Robbins, Esq.
Kenneth E. Patton, Esq.
Trial Attorneys
Department of Health and Human Services
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE REED
ON *SUA SPONTE* MOTION TO STRIKE

BACKGROUND

The Contract, Contracting Officer Decision, and Appeal

This appeal arises under Contract No. 263-93-C-0434 (the contract), a construction services contract awarded on 20 September 1993, by the U.S. Department of Health and Human Services, National Institutes of Health (HHS or the Government), to William F. Klingensmith, Inc. (WFK, contractor, or appellant). The contract incorporates by reference the standard provision at FAR 52.233-1 DISPUTES (DEC 1991). (R4, tab 300/00002, 00048)

The contracting officer decision (COD) from which the appeal was taken, dated 10 November 1998, asserts a Government claim for liquidated damages (LDs) in the amount of $917,822, based on alleged late performance by the contractor in each phase of the contract work. The COD credited, against the Government's claim, amounts due the contractor for "Remaining Funds on the Contract" ($125,425) and "Claim [No.] 2 Negotiated Amount" ($126,600). The balance due the Government, according to the CO after crediting those amounts, was $665,797.

By letter dated 8 February 1999, WFK's former counsel timely appealed the COD to the Board. The notice of appeal (NOA) challenged "the Final Decision of the Contracting Officer dated November 10, 1998," by which an assessment was made for LDs "for delay . . . $917,822."

Other Claims and Potential Claims

In a letter dated 28 January 1999, WFK submitted to the CO a certified demand for (1) payment of the amount allegedly negotiated by the parties for Claim No. 2 ($126,600), but not paid by the Government and (2) the "Total Balance Due on Contract" ($353,539) (AR4, tab U-1).

In letters to the CO dated 16 February and 4 March 1999, WFK separately responded to the COD dated 10 November 1998, with a schedule analysis and by listing a number of PDLs (so-called "price determined later," further explained below) and modifications to the contract that allegedly reserved requests for time extensions for later negotiation. The letter dated 4 March 1999, requested that the CO allow the contract time extensions earlier reserved in PDLs but not recognized in modifications to the contract; however, the letter did not request time-related costs caused by those alleged delays, if any. In another letter to the CO dated 5 March 1999, the contractor identified "various days lost on this contract." No request for time-related costs is specified in the letter. (AR4, tabs A-3-5)

The Pleadings

Appellant subsequently filed a three-count, 234-paragraph (with additional *ad damnum* paragraphs) complaint. Counts One and Two of the complaint attacked the LDs as unreasonable for various reasons, as an unenforceable penalty on several grounds, and/or improperly imposed on other bases. Those counts further assert that a number of specific excusable delays occurred during the contract work that preclude the Government's assessment of LDs.

The averments in Count Two of the complaint recite a series of alleged delays that were noticed to the Government in contractor requests for equitable adjustment (REAs). The REAs, in some cases, allegedly sought direct cost increases, excusable and compensable time extensions, and time-related delay costs. Some of the REAs are said to have been resolved in part and that the parties agreed to resolve certain aspects of the REAs later, including time extensions in particular, by way of PDLs. As alleged by WFK, some of the REAs/PDLs were the subject of modifications to the contract, most if not all of which were unilaterally issued by HHS.

The first section of Count Three of the complaint contends that appellant's Claim No. 9, for changes and resulting delays, was wrongfully denied and that the alleged claim

entitled the contractor to a time extension of 158 days plus a contract price increase of $307,285.23. Averments in this count also interweave matters allegedly related to (1) Claim No. 2, (2) interest on an amount said to have been agreed to resolve that claim, (3) various delays that may or may not be included within Claim Nos. 2 and/or 9, and which may or may not duplicate other delays alleged in Counts One and/or Two of the complaint, (4) weather delays, and (5) separately specified sums of additional money sought by WFK that may or may not be included in the amounts claimed under Claim Nos. 2 and/or 9. A second section of Count Three, which appellant later referred to as Count Four in its clarification of complaint, a usage we adopt, seeks interest under the terms of the contract payment provision for amounts allegedly due under various modifications to the contract and associated PDLs as well as the "balance due under the contract."

In an unsolicited "Clarification of Complaint," appellant's counsel stated, in relevant part:

> With respect to the claims set forth in Counts Two, Three and Four of the Complaint herein, [WFK] is appealing from a non-decision by the [CO]. [WFK] filed all of the claims referenced in these counts with the [CO] and has repeatedly requested [CODs] on these claims. Nevertheless, [CODs] on these claims have not been forthcoming from the [CO] despite a substantial period of time. As a result, [WFK] is not appealing from a final decision but from a non-decision by the [CO].

No attempt was made by appellant's counsel to catalog WFK's various claims that might be the subject of the complaint clarification. Neither did appellant's counsel submit documentation of the written claims that are "referenced in these counts" and concern the complaint clarification.

In response to the complaint, the Government filed a four-paragraph general denial. In relevant part, the Government's answer states:

> With regard to the affirmative claims made in Appellant's Complaint, they have not been presented to the [CO] in appropriate form and/or the claims have been dismissed with prejudice in ASBCA Nos. 51518 and 51563 and/or the claims have been the subject of final decision letters where the time for appeal has expired.

The Government has not specified which of the alleged affirmative claims (1) had not been presented to the CO, (2) had been the subject of the cited ASBCA dismissals, or (3) had been the subject of unappealed CODs. Neither has the Government submitted either a

partial motion to dismiss, a partial motion for summary judgment based on issue or claim preclusion, a motion to strike those portions of the complaint said to be affirmative claims, potential claims, matters within the scope of the two cited ASBCA dismissals, or matters within the scope of CODs "where the time for appeal has expired," or any other dispositive motion as a follow-up to its general denial.

Sua Sponte Motion to Strike

The Board's Recorder noted that appellant's complaint appeared to assert affirmative claims in addition to contesting the assessment of LDs. The Board's Order (26 July 2000), opined that the claims allegedly submitted to the CO by WFK were not readily apparent from the record. The Board directed appellant to submit copies of the claims and the responsive COD(s), if any, and to explain how its appeal of affirmative contractor claims was properly before the Board.

Following appellant's request for reconsideration and clarification of the Board's order, the Board's presiding Administrative Judge noted, in part, in an Order on Appellant's Motion for Reconsideration and/or for Clarification (20 September 2000):

> . . . Some of the apparent claims, in whole or in part, particularly those seeking a time extension or which alleged delay caused by the Government, may be in the nature of affirmative defenses to the assessment of [LDs]. Others appear to have no delay and/or time extension component. . . .
>
> A copy of each claim submitted under the contract by Appellant, each [COD], and each notice of appeal to the Board or action taken in a court in response to a COD, will be [submitted]. . . .

In its Statement on Jurisdiction of Affirmative Claims, dated 20 October 2000 (appellant's jurisdictional statement), counsel confirmed, at 1, that "This appeal is the direct consequence of a [COD] issued November 10, 1998 . . . ." Concerning Count One of the complaint, appellant argues that the Board has jurisdiction over matters related to the Government's assessment of LDs.

In its jurisdictional response dated 4 December 2000, the Government does not dispute that Count One of the complaint is properly before the Board because any delay that can be proved by appellant, as a defense, could have the effect of reducing the Government's claim for LDs. However, the Government generally argues in the jurisdictional response, at 1, that any matter that was not the subject of a COD or was denied by the CO but not appealed to the Board "cannot [now] form the basis of an affirmative action for money from the government."

Regarding Count Two of the complaint, appellant's jurisdictional statement cited and provided partial and/or complete copies of a number of PDLs and modifications to the contract by which appellant appears to have reserved its right, at that time, to seek equitable adjustments in the contract terms. Appellant suggests that the COD dated 10 November 1998, from which the appeal was taken, denied "these outstanding [REAs] in terms of Contract performance time . . . ." (Jurisdictional statement at 6)

The Government responds that none of the cited PDLs has been submitted as a claim except PDLs 13 and 23. Regarding PDLs 13 and 23, the Government points to a COD dated 3 September 1996, by which a claim dated 18 July 1996, was denied. The COD refers to PDLs 13 and 23, among others, and a claim for extended overhead. (AR4, tab C-2)

In its reply dated 16 January 2001, to the Government's jurisdictional response, appellant withdrew matters related to PDLs 13 and 23, by withdrawing ¶¶ 62-67, a portion of Count Two of the complaint.

Addressing Count Three of the complaint, appellant refers to a claim letter dated 17 July 1997, which demands a time extension of 158 days and payment of $307,285.23, and includes a claim certificate. The claim asserts various delays caused by the Government, but does not directly mention LDs. (AR4, tab R-1) Appellant's jurisdictional statement asserts, in part at 6, "Claim No. 9 is separate and apart from other moneys and extra days claimed elsewhere in the Complaint." Appellant thereafter contends that the COD dated 10 November 1998, effectively denied Claim No. 9.

In response, the Government raises matters not directly related to LDs, but which concern the correlation of issues presented by contractor Claim Nos. 2-4, 6-7, 8, revised 8, and 9-11 (the dates of some of the claims recited by the Government are not provided; citation to the record concerning some claims was not provided), as intermixed in contractor letters dated 20 March 1996 (two letters), 18 July 1996 (citation to the record not provided), 21 August 1996, 2 June 1997 (citation to the record not provided), 6 June 1997, 17 July 1997, and 24 July 1997, and addressed in CODs dated 3 September 1996, and 9 February 1998 (SR4, tabs 312-18; AR4, tabs C-2, R-1). The Government further contends that the denial of Claim No. 6, dated 21 August 1996, by an uncited COD, was the subject of the Board's dismissal of ASBCA Nos. 51518 and 51563 (SR4, tabs 318-19). The Government concedes that some of the matters raised in Count Three have never been addressed by a COD.

Concerning Count Four of the complaint, appellant's jurisdictional statement at 7, WFK argues that "no authority [permits the Government] to retain amounts admittedly due to a contractor against the offhand chance . . . that the contractor might be liable for an assessment of [LDs]." Appellant contends, by reference to contract Modification No. Four (Mod 4), that the amount agreed by the parties under Claim No. 2, $126,600, was settled sometime after 10 May 1995, that interest is due on that amount, and that issues related to

that sum are before the Board because the Government credited that amount against assessed LDs (AR4, tab S-1). Mod 4 is not the settlement agreement whereby the parties settled Claim No. 2, or agreed to a payment by HHS of $126,600.

At a pre-hearing conference on 2 August 2001, the Government conceded that Claim No. 2, was the subject of a verbal settlement in the amount of $126,600. The parties agree that the settlement agreement has not been reduced to writing.

Further regarding Count Four of the complaint, appellant disputes the amount that, according to the Government, comprises the unpaid contract balance and avers that any unpaid balance under the contract is before the Board because the Government credited the unpaid balance amount against assessed LDs. Finally, appellant asserts that a series of late payments was noticed to the CO by letters dated 18 December 1997, and 31 March 1999 (AR4, tab T-1). Without more, we are unable to correlate the amounts cited in the two letters and those in the complaint. Appellant states in its jurisdictional statement at 9, without elaboration, that the series of alleged late payments for various PDLs is before the Board because "By unilaterally issuing the [LDs] final decision on November 10, 1998, the [CO] has, in effect, issued a final decision denying these outstanding requests by [WFK] for compensation for these late payments."

The Government does not dispute Count Four of the complaint to the extent that the amounts being withheld for Claim No. 2 and the unpaid balance due under the contract both were addressed by the COD dated 10 November 1998, and appealed here. The Government believes that the portion of Count Four related to the series of alleged late payments for various PDLs has been the subject of a request for a COD; however, no documents, dates, or citations to the record have been provided.

DECISION

The scope of an appeal is circumscribed by the scope of the claim, the responsive COD, and the appeal therefrom. *Peter Bauwens Bauunternehmung GmbH & Co. KG*, ASBCA No. 44679, 98-1 BCA ¶ 29,551 at 146,496. This appeal concerns only the Government's imposition of LDs and appellant's defenses attacking the derivation and application of LDs, including assertions of excusable delay for which appellant has the burden of proof. The appeal does not include any affirmative contractor claim for compensable time extensions (except as any such time extension might constitute an excusable delay and defense to the assessment of LDs; *Huntington Builders*, ASBCA No. 33945, 87-2 BCA ¶ 19,898 at 100,655), time-related costs, or the direct costs of any of the alleged changes and/or stop work order(s) under the contract. A contractor claim and appeal for a mere time extension, absent a demand for costs that may result from such time extension, does not encompass any potential contractor claim for delay costs; *a fortiori*, a contractor's appeal from a Government claim for liquidated damages does not. *Eurostyle Inc.*, ASBCA No. 45934, 94-1 BCA ¶ 26,458 at 131,655; *G. Bliudzius Contractors, Inc.*,

ASBCA Nos. 42366, 42367, 93-1 BCA ¶ 25,439 at 126,685-86. Moreover, an appeal's scope cannot be enlarged by the pleadings. *Skip Kirchdorfer, Inc.*, ASBCA Nos. 40515 *et al*., 93-3 BCA ¶ 25,899 at 128,834.

Count One of appellant's complaint, ¶¶ 1-57 and a portion of Count Two, ¶¶ 91-92, set forth appellant's defenses to the Government's assessment of liquidated damages (LDs) as those defenses relate to the asserted unreasonableness of the LDs and the alleged unenforceability of the LDs as a penalty. This portion of the complaint neither seeks specific time extensions (except as the complaint avers specific dates related to occupancy by the Government, the alleged lack of a "final phase," and a stop work order in November 1995) nor an affirmative recovery of money other than a return of LDs. These paragraphs are within the scope of the appeal.

Count Two of appellant's complaint, ¶¶ 58, and 120-121, generally assert that 468 days of excusable delay occurred on account of added work during Phases 2-5 of the contract work. Various REAs for direct cost increases and excusable (and perhaps compensable) time extensions allegedly were not fully resolved and, in some cases, were reserved by the parties for later determination by way of PDLs. Complaint ¶¶ 59-61, 68-90, and 93-119, set forth various contentions related to separate and/or interrelated REAs and PDLs. Complaint ¶¶ 62-67, have been withdrawn by appellant and are hereby removed from the complaint.

To the extent that the remaining portion of Count Two of the complaint seeks specific excusable time extensions as a defense to the imposition of LDs, those assertions are within the scope of the appeal. To the extent that this portion of the complaint could be construed as seeking affirmative relief in the nature of additional direct cost increases and/or time-related costs for excusable and compensable delay, those matters are outside the scope of the appeal. That such matters, as construed, are outside the scope of the appeal is without prejudice either to the contractor's pursuit of those matters as additional contractor claims and/or separate appeals or to any Government defense that the matter has previously been settled through bilateral action of the parties or has been submitted as a claim, denied by the CO, and not timely appealed to the Board.

Count Three of the complaint, ¶¶ 122, and 124-27, generally assert a 158-day time extension and $307,285.23, plus interest, for Claim No. 9, on account of alleged changes and delays. Appellant refers to a claim letter with an incomplete claim certificate dated 17 July 1997 (AR4, tab R-1), argues that the claim does not duplicate any other matter addressed in the complaint, and contends that no COD in response to the claim has been issued, thereby implying an appeal from a deemed denial here. In the alternative, appellant suggests that the COD dated 10 November 1998, effectively denied Claim No. 9.

The COD under which this appeal was taken addresses neither Claim No. 9, nor the contractor's cited claim letter. The NOA does not speak to a deemed denial or any other

matter outside the COD dated 10 November 1998. Therefore, this portion of the complaint will be considered only as it asserts a 158-day excusable delay and as a defense to the LDs, without prejudice either to the contractor's ability to pursue Claim No. 9, as an affirmative matter not yet decided, and/or separately to appeal to the Board a deemed denial. Our decision is also without prejudice to any Government defense that any of the component parts of Claim No. 9 have previously been resolved through bilateral action of the parties or have been submitted as a claim, denied by the CO, and not timely appealed to the Board or have been the subject of a dismissed appeal.

The Government responded to this portion of the complaint with a confusing flurry of citations to various matters outside the scope of the appeal here, including various potential claims, claims, and appeals. To the extent that appellant chooses to pursue any of these matters as additional claims and/or appeals for recovery beyond the return of LDs, it should discretely trace the derivation of each such matter through the REA, PDL, contract modification, claim, and appeal process that the parties apparently employed during administration of the contract.

Count Three of the complaint, ¶ 123(a), seeks interest on Claim No. 2. The Government offset the total asserted LDs amount by the negotiated and informally agreed amount for Claim No. 2 (albeit a different amount than averred in this paragraph of the complaint). Interest on a claim under the Contract Disputes Act, 41 U.S.C. §§ 601-13 (CDA) claim is not a separate claim but is payable on the amount of a claim found to be meritorious. *Peter Bauwens*, 98-1 BCA at 146,496. To the extent that the interest averred is derived from the payment provision of the contract, the COD from which the appeal was taken addressed no such matter. This portion of the complaint is outside the scope of the appeal and is hereby removed from the complaint without prejudice to the contractor's right separately to pursue affirmative recovery under Claim No. 2, the payment provision of the contract, and/or otherwise.

Count Three of the complaint, ¶¶ 123(b-g, j, and l-p), which assert separate delays, will be considered as averments of excusable delay and as defenses to the LDs, only, without prejudice to the contractor's right separately to pursue affirmative recovery by submitting additional claims and/or notices of appeal. The Government may submit a motion to dismiss concerning discrete portions of the complaint based on arguments related to ASBCA Nos. 51518 and/or 51563, other CODs, other claims, the PDLs, and/or other pertinent matters recited in the Government's jurisdictional response. To the extent that the Government chooses to pursue any such motion(s) as to a particular alleged delay, it should separately trace the derivation of each such matter through the REA, PDL, contract modification, claim, and appeal process that the parties employed.

Count Three of the complaint, ¶ 123(h), seeks payment of $17,904, not included in the amount withheld as LDs. This paragraph is hereby removed from the complaint without prejudice to the contractor's right separately to pursue affirmative recovery.

Count Three of the complaint, ¶ 123(k), seeks a time extension and payment of $18,545. The monetary demand is not a part of the amount withheld as LDs. The portion of the paragraph which asserts a time extension will be considered an averment of excusable delay and as a defense to the LDs, only. The portion of the paragraph which reads "and the amount of $18,545" is hereby removed from the complaint without prejudice to the contractor's right separately to pursue affirmative recovery. The Government may submit a motion to dismiss concerning this portion of the complaint based on arguments made in the Government's jurisdictional response and appeals, claims, contract modifications, PDLs, and/or other pertinent matters.

Count Four of the complaint, ¶¶ 128-35, seeks payment of the amount agreed in Mod 4, plus interest pursuant to the payment provision of the contract. To the extent that the interest averred is derived from the payment provision of the contract, the COD from which the appeal was taken addressed no such matter. This portion of the complaint is outside the scope of the appeal and is hereby removed without prejudice to the contractor's right separately to pursue affirmative recovery under Mod 4, or otherwise. To the extent that the amount of the principal sum averred, $126,600, is the same as that used by the Government to offset the contractor's alleged liability under the contract, but by reference to Claim No. 2, not Mod 4, it is within the scope of the appeal but only as to the Government's right to a setoff, without prejudice to the contractor's right separately to pursue affirmative recovery for amounts allegedly due but not paid under Claim No. 2, Mod 4, and/or otherwise.

Count Four of the complaint, ¶¶ 136-39, seeks payment of the alleged balance due under the contract, plus interest. To the extent that the interest claimed is pursuant to the CDA, see the section of this decision related to Count Three of the complaint, ¶ 123(a), above. To the extent that the interest averred is derived from the payment provision of the contract, the COD from which the appeal was taken addressed no such matter. This portion of the complaint, as it relates to interest, is outside the scope of the appeal and is hereby removed without prejudice to the contractor's right separately to pursue affirmative recovery.

To the extent that the amount of the principal sum averred, $226,939, was, in whole or in part, the same as that used by the Government to offset the contractor's alleged liability under the contract (the COD asserted that the balance due under the contract ("Remaining Funds on the Contract") was $125,425), it is within the scope of the appeal but only as to the Government's right to a setoff, without prejudice to the contractor's right separately to pursue affirmative recovery for amounts allegedly due but not paid under the contract.

Count Four of the complaint, ¶¶ 140-234, seek interest under Mods 1-3, 5-8, 10-11, 13, and 15, and/or PDLs 1-35, and 43-45, pursuant to the payment provision of the contract.

The COD from which the appeal was taken addressed no such matter. This portion of the complaint is outside the scope of the appeal and is hereby removed without prejudice to the contractor's right separately to pursue affirmative recovery under the contract, as modified, and/or pursuant to the cited Mods and/or PDLs, or otherwise.

Dated: 31 August 2001

STEVEN L. REED
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. 52028, Appeal of William F. Klingensmith, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ

Recorder, Armed Services
Board of Contract Appeals