

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
St. Paul Fire and Marine Insurance Company) ASBCA No. 53228
)
Under Contract No. F41689-96-C-0257)

APPEARANCE FOR THE APPELLANT: Mr. Michael A. Ware
Secretary/Treasurer
Reliable Mechanical, Inc.
Louisville, KY

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
John R. Hart, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE GRUGGEL

The Department of the Air Force (Government) has moved to dismiss for lack of jurisdiction the appeal filed by St. Paul Fire and Marine Insurance Company (St. Paul) on behalf of its subcontractor, Reliable Mechanical, Inc. (Reliable), on the ground that the notice of appeal was deficient. Alternatively, if the Board finds jurisdiction over the appeal, the Government moves to strike the complaint and to require appellant to file a more definite statement of its claim. Appellant opposes the motions.

FINDINGS OF FACT FOR PURPOSES OF THE MOTIONS

1. After the Government terminated the original contractor (AFTT, Inc.) for default, St. Paul, through its wholly owned subsidiary, United States Fidelity and Guaranty Company, entered into a surety takeover agreement with the Government to complete performance of Contract No. F41689-96-C-0257 for renovation of a commissary at Fort Gillem, Georgia (Mod. No. P00002). St. Paul subcontracted with Reliable to complete the project. (R4, tab 1; amended compl. ¶¶ 1, 2; Gov't mot. at 1, attach. B)

2. According to Reliable, although the amount of its contract with St. Paul differed from the unpaid balance of the Government's contract with St. Paul, payment to Reliable from St. Paul was triggered by payment by the Government to St. Paul. Appellant states that "[d]uring the course of performance of the take over [sic] contract, the Government failed to pay [St. Paul] in accordance with the payment provision of the contract. Payments were consistently late, in breach of the contract and in violation of the Prompt Pay[ment] Act." (Amend. Compl. ¶ 3) The contract between St. Paul and Reliable is not in evidence.

3. By letter dated 5 June 2000, Reliable submitted a certified claim to St. Paul seeking \$318,567.36 in damages which Reliable contends were caused “by others.” Reliable’s certification included the statement that “the amount requested accurately reflects the contract adjustment for which the contractor believes the Government and/or [St. Paul] is liable.” (R4, tab 64A)

4. By letter dated 7 June 2000, St. Paul forwarded the 5 June 2000 claim to the contracting officer, included its own certification and requested a contract adjustment for damages “caused by others.” St. Paul’s certification read thus:

I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the Contractor.

(R4, tab 64A) The certification was signed by “Christine T. Alexander, Surety Claims Attorney” on behalf of “The St. Paul Companies” and dated (*id.*).

5. The claim includes a Late Payment Impact Claim Summary which was divided into four sections as follows:

I.	12% interest on money	\$87,763.07
II.	Days Delay plus 150 day contract time extension	\$126,750.00
III.	Incremental cost for lost subs	\$36,598.29
IV.	Anticipated claims by subcontractors for extended job overhead	\$67,450.00

(R4, tab 64A) Sections I - IV equal a total amount of \$318,561.36, *vice* the certified claim amount of \$318,567.36, *supra*. This \$6.00 disparity is not explained in the record. Section I, requesting \$87,763.07 in interest, references an attached itemization chart which contains the following categories: 1) payment numbers; 2) billing dates; 3) payment dates; 4) the number of days late; 5) interest due to late payments; and 6) interest on unpaid balance. No explanation of the chart is included. The precise nature of the “12% interest on money” is not specified or otherwise apparent from the record herein. The billing date category begins with 29 April 1998 and ends with 11 January 2000, but the chart does not reveal who sent the billings or to whom the billings were sent. Likewise, although the dates

the billings were paid are listed, it is not disclosed who received the payments, St. Paul or Reliable. Totals for several of the categories are included, but the total amount of the Section I claim, \$87,863.07, does not appear as a total on the itemization chart nor is the basis for arriving at this amount immediately obvious (*id.*). Sections II, III and IV contain calculations. The claim references no contract clauses (*id.*).

6. The contracting officer issued a final decision, dated 25 October 2000, denying the claim in its entirety stating that “[respondent] was neither privy to subcontractor pay arrangements nor responsible for subcontractor’s payments” (R4, tab 65).

7. By letter dated 29 December 2000, Reliable wrote to St. Paul “[demanding] a contract adjustment to increase the contract price by \$318,567.36 representing restitution of damages incurred by [Reliable], which were caused by others.” Again, Reliable included a certification which mirrored the language in its 5 June 2000 claim letter to St. Paul that “the Government and/or [St. Paul] is liable.” (Notice of Appeal attach.; Gov’t mot. at 2)

8. By its notice of appeal, mailed to the Board on 4 January 2001, St. Paul referenced the “Appeal of Reliable Mechanical, Inc. Under Contract #F41689-96-C-0257” and stated “[e]nclosed please find a claim that we are forwarding to you on behalf of our completion contractor Reliable Mechanical, Inc. (‘Reliable’) in the amount of \$318,567.36 for a contract adjustment for restitution of damages incurred by Reliable that were caused by other [sic].” As attachments, St. Paul included Reliable’s 5 June and 29 December 2000 claim letters, the Late Payments Impact Claim Summary, the itemization chart and the Air Force contracting officer’s final decision relating to Reliable’s claim with respect to “Contract No. F41689-96-C-0257.” As a result of St. Paul’s submissions, the Board docketed the instant appeal on 5 January 2001.

9. By date of 6 April 2001, Reliable filed a complaint in the name of St. Paul “for and on behalf of” Reliable (compl.). The complaint was signed by Michael Ware, a corporate officer of Reliable (R4, tab 66). The complaint contains the following:

3. During the course of performance of the takeover contract, [Reliable] encountered damages resulting from receipt of late payments for work completed. Reliable incurred the following damages; [sic]
 - a) Loss [sic] interest on monies past due.
 - b) Subcontractors abandoning the project.
 - c) Replacement of two subcontractors.
 - d) Anticipated claims by subcontractors.

(Compl.)

10. Prompted by a conference call convened by the Board, St. Paul submitted a letter dated 19 June 2001 and signed by “Christine T. Alexander, Esquire” that gave its permission for Reliable to represent St. Paul in the appeal and deal directly with the Government. (Gov’t mot. attach. G, H)

11. In lieu of an answer to the complaint, the Government filed a Motion to Dismiss and “Motion to Strike the Complaint for a More Definite Statement” dated 23 July 2001. In its dismissal motion, the Government documents what it calls a “conglomeration of defects” that includes: 1) Reliable’s ambiguous certifications as to liability; 2) St. Paul’s seeming indifference and nonparticipation in the prosecution of the appeal; and 3) St. Paul’s notice of appeal to the Board which does not comply with Board Rule 2 and, therefore, does not indicate a clear intent to appeal the final decision issued by Respondent’s contracting officer. (Gov’t mot. at 5-7)

12. In response to the Government’s motions, Reliable filed an amended complaint dated 10 September 2001 which included the following:

3. During the course of performance of the take over [sic] contract, the Government failed to pay St. Paul Fire and Marine in accordance with the payment provision of the contract. Payments were consistently late, in breach of the contract and in violation of the Prompt Pay [sic] Act. Evidence establishing the Government’s liability is reflected in its settlement with St. Paul Fire and Marine of claims for late payments authorized by the Prompt Pay [sic] Act.[*]

(Amend. Compl.)

I. Motion to Dismiss for Lack of Jurisdiction

DISCUSSION

The Government alleges in its Motion to Dismiss that the Board lacks jurisdiction because of numerous defects. These defects include Reliable’s certification of its claim, the lack of participation by St. Paul in the appeal, and St. Paul’s failure to file an acceptable notice of appeal to the Board within 90 days of receipt of the contracting officer’s final decision. The Government asserts the notice does not comply with Board Rule 2 because it allegedly does not refer to the contracting officer’s decision, name the

* ASBCA No. 52980 had been earlier filed by St. Paul seeking Prompt Payment Act interest on alleged late payments by the Government. The parties negotiated a settlement and we dismissed the appeal. (Gov’t mot. at 9, exh. J)

agency involved, or express a clear intent to take an appeal. The Government contends that these actions, taken together, deprive the Board of jurisdiction over the appeal.

DECISION

Our jurisdiction derives from the Contract Disputes Act (CDA), 41 U.S.C. §§ 602-613, as amended, and is limited to disputes between the Government and a “contractor” under the contracts prescribed by the Act. A contractor is defined as “a party to a Government contract other than the Government,” 41 U.S.C. § 601(4). Such an entity is not a subcontractor, whose contractual relationship is with another contractor and not with the Government. The rule is well-established that for the Board to have jurisdiction over appeals from adverse contracting officer decisions on claims as to which a subcontractor is the real party in interest the appeal must be pursued under the sponsorship of the prime contractor, the party in privity with the Government. *Erickson Air Crane Company of Washington, Inc. v. United States*, 731 F.2d 810 (Fed. Cir. 1984).

Here there is ample evidence that St. Paul adequately sponsored Reliable’s claim. St. Paul sent its notice of appeal on Reliable’s behalf to the Board which resulted in the Board issuing a notice of docketing. St. Paul’s 19 June 2001 letter specifically authorized Reliable to represent St. Paul and directly pursue the appeal. The Government posits that St. Paul’s “rubber-stamping” of Reliable’s claims, its failure to perform an independent examination of Reliable’s claims before sending them on to the contracting officer, and its “belated” action in submitting the sponsorship letter after Reliable submitted its complaint amount to “nonparticipation” and “indifference” in the prosecution of the appeal. We do not agree. The prime contractor need not wholly agree with every aspect of the claim or disagree with any aspect of the claim in order to submit the subcontractor’s claim to the Government. Rather, the contractor is required to believe at a minimum that the claim is made in good faith and is not frivolous or a sham. *Taysom Construction Company*, ASBCA No. 41016, 91-2 BCA ¶ 23,710. There is no evidence in the record that St. Paul thought Reliable’s claim frivolous or a sham. St. Paul consistently cooperated with Reliable by sending Reliable’s claims first to the contracting officer and then to the Board. We conclude that St. Paul has properly sponsored and authorized Reliable to represent it and to pursue the instant appeal.

The Government next argues that Reliable’s certifications of its claims are defective because it certified alternatively that the “Government and/or [St.Paul]” were responsible for its damages. The CDA requires a contractor to certify claims in excess of \$100,000. 41 U.S.C. § 605(c)(1). Where no privity of contract exists between the Government and a subcontractor, the prime contractor must certify the claims of its subcontractor for Board jurisdiction over the appeal. *Continental Maritime of San Diego, Inc.*, ASBCA No. 36733, 89-1 BCA ¶ 21,249; *Raymond Kaiser Engineers, Inc./Kaiser Steel Corporation, A Joint Venture*, ASBCA No. 34133, 87-3 BCA ¶ 20,140. It is St. Paul’s certification, not Reliable’s, that must be submitted to the contracting officer and comply with the CDA in

order for jurisdiction to attach. St. Paul submitted its certification to the contracting officer and its certification complied with the CDA.

Finally, the Government argues that the notice of appeal was defective because it does not comply with Board Rule 2 and does not express a clear intent to appeal. Under the CDA, an appeal to a Board of Contract Appeals from a contracting officer's decision must be taken within 90 days of a contractor's receipt of that decision. 41 U.S.C. §§ 605(b), 606. The 90-day filing period is statutory, is strictly construed and cannot be waived by the Board. *Cosmic Construction Co. v. United States*, 697 F.2d 1389 (Fed. Cir. 1982). Board Rule 2 states that a notice of appeal should: indicate that an appeal is being taken, identify the contract, the agency involved, the decision from which the appeal is taken and the amount in dispute. The wording of Board Rule 2 is advisory and not mandatory. The Board has long held that, at a minimum, the necessary elements of an adequate notice of appeal are dissatisfaction with the contracting officer's final decision and indication of an intention to appeal to a higher authority than the contracting officer. *Pantronics, Inc.*, ASBCA No. 20982, 78-2 BCA ¶ 13,285 at 64,982. St. Paul's notice of appeal, *inter alia*, identified the contract and, thus, the agency involved, the amount of the dispute and enclosed the contracting officer's decision. In this regard, the notice was addressed to the Board and included Reliable's 5 June 2000 claim letter, the Late Payments Impact Claim Summary and the contracting officer's final decision. The notice stated that the claim was forwarded "on behalf of" Reliable. With these facts, we find the necessary dissatisfaction with the contracting officer's final decision and an intent to appeal to a higher authority. Ninety days from 25 October 2000, the date of the contracting officer's final decision, is 23 January 2001. St. Paul's notice of appeal was mailed on 4 January 2001 to the Board, within the ninety day appeal period. Appellant's notice of appeal is timely.

II. Motion to Strike

DISCUSSION

The Government moves to strike the complaint and require appellant to file a more definite statement of its claim. The Government challenges the sufficiency of appellant's complaint on the ground that it fails to provide any factual allegations in support of Reliable's assertion of a Government breach of the payment provisions of the Government's contract with St. Paul.

DECISION

Under Board Rule 6, the appellant is required to file a complaint "setting forth simple, concise and direct statements of each of its claims." Appellant's complaint is almost identical to its claim. We are satisfied that the claim and the complaint give the Government adequate notice of the basis of appellant's claims and that there is enough information in the complaint to enable the Government to frame an answer. *See Southeastern Sandblasting and Coating, Inc.*, ASBCA Nos. 30873, 33517, 88-1 BCA ¶ 20,397. The Government's motion to strike is denied.

CONCLUSION

The motions to dismiss, to strike and for a more definite statement are denied. The Government is ordered to file an answer within 30 days from receipt of this opinion.

Dated: 16 September 2002

J. STUART GRUGGEL, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

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. 53228, Appeal of St. Paul Fire and Marine Insurance Company, rendered in conformance with the Board's Charter.

Dated:

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