

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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The Swanson Group, Inc.) ASBCA No. 53496
)
Under Contract No. N62472-90-D-0840)

APPEARANCE FOR THE APPELLANT: Mr. Johnny Swanson III
President

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
Chuck Kullberg, Esq.
Senior Trial Attorney
Engineering Field Activity
Chesapeake
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE TODD
ON THE GOVERNMENT'S MOTION TO STRIKE

The Government moved to strike portions of the complaint in this quantum appeal, asserting that appellant has raised claims in its complaint which are unrelated to appellant's claim, dated 30 March 1994, that was the subject of the Board's entitlement proceeding. *The Swanson Group, Inc.*, ASBCA No. 47676, 95-1 BCA ¶ 27,472, *modified on reconsid.*, 95-2 BCA ¶ 27,708. Appellant has appealed the Government's unilateral contract modification, dated 18 December 1995, that determined quantum with respect to a claim for increased costs of wage rates and fringe benefits paid to comply with a U.S. Department of Labor (DOL) wage determination. The Board held appellant entitled to an adjustment in the contract price and remanded the dispute to the contracting officer to negotiate the amount of the adjustment with appellant. *The Swanson Group, Inc.*, 95-1 BCA at 136,862. The contracting officer determined that appellant was entitled to an equitable adjustment of \$46,291.38, including interest. The findings that appear of record in the earlier decisions of the Board are deemed a part of the present record.

STATEMENT OF FACTS

On 26 May 1995, appellant invoiced the Government in the amount of \$60,268.75 for increased wages and fringe benefits pursuant to the Board's decision on appellant's claim, dated 30 March 1994. The parties did not reach agreement on a settlement. The contracting officer made a unilateral determination of quantum on 18 December 1995. On 5 January 2001, appellant resubmitted its invoice to the contracting officer for \$60,268.75,

asserting that no payment of the adjustment had been made. Appellant submitted further requests for evidence of payment on 27 February 2001 and 19 April 2001. On 4 May 2001, the Government advised appellant that action had been taken to effect payment to the DOL and Internal Revenue Service (IRS), but did not provide proof of payment that appellant had requested. (Compl. ¶ III.(9); app. letter compl.)

On 11 August 2001, appellant filed a letter complaint with the Board requesting that the Board determine quantum “to include damages and interest” (app. letter compl.). On 22 August 2001, the Board docketed the quantum aspects of the appeal as ASBCA No. 53496.

On 27 October 2001, appellant filed its complaint pursuant to the Board’s Order to submit a statement of costs to serve as the complaint in the appeal. Appellant alleged that there was no agreement on the amount due and that the record reflects that no payment has been made pursuant to the Board’s decision (compl. at 2). Appellant alleged its attempts to settle the matter with the Government and the Government’s refusal since 1995 to resolve the matter in good faith (compl. ¶ III.(10)). Appellant claimed \$41,295.60 for increased costs of wages and benefits, which is the amount of the contracting officer’s determination less interest and undisputed by the Government (compl. ¶ V.(5)(A); Gov’t resp. *¶ 13). The amounts for G&A/overhead (\$3,716.60) and interest (\$28,357.68) claimed on this amount are disputed (*id.*).

Appellant’s quantum calculation in its complaint included, in addition to the aforesaid amounts claimed for wages, benefits, G&A/overhead, and interest, the following:

| | |
|---|------------|
| (B) IRS INTEREST AND PENALTIES . . . | 141,726.31 |
| (C) 100% Damages to account for Corporate losses and losses afforded to Corporate owner guaranter [sic] on debts not paid | 215,096.19 |

(Compl. ¶ V.(5)) Appellant requested total relief in the amount of \$430,192.38 (*id.*).

In its Response the Government alleged that the Government made payment to the DOL in the amount of \$25,273.75 and will determine if \$21,017.63, the balance of the contracting officer’s determination, has been paid to IRS and if not, will advise the Board that the contracting officer will make payment (Gov’t resp. ¶ 11 and at 6).

The Government included the following motion to strike in its Response:

* The Government filed its Response to Appellant’s Statement of Costs in accordance with the Board’s Order on 30 November 2001 (Gov’t resp.).

The Government moves that the Board strike those portions of Appellant's claim, "IRS INTEREST AND PENALTIES" (\$141,726.31) AND "100% Damages to account for Corporate losses . . ." (\$215,096.19) in that both claims are unrelated to the Board's decision on entitlement and Appellant's 30 March 1994 claim. Furthermore, the claimed amounts are unsupported by any prior claim by [sic] the Contracting Officer.

(Gov't resp. ¶ 14)

Appellant filed a reply to the Government's Response which included its objection to the Government's motion to strike on the ground that the items are in fact related as damages resulting from the Government's intentional holding of monies belonging to appellant (app. reply ¶ 13). In a status conference with the parties after the pleadings were filed, the Board noted that the Government's motion to strike portions of appellant's complaint raised the issue of whether appellant has presented separate claims over which the Board does not have jurisdiction. The Board afforded appellant further opportunity to respond to the motion.

Appellant filed Objections to Respondent's Motion to Dismiss Selected Issues asserting that the contract is subject to the jurisdiction of the Board and that damages and interest on taxes are allowable costs. According to appellant, when it realized that the amounts due had not been paid, it added claims for IRS interest and damages and presented its quantum dispute to the Board. A copy of its letter, dated 11 August 2001, was sent to the contracting officer in an alleged attempt to communicate changes in claim entitlement to the contracting officer. Appellant asserts that it relied on the Government's advice that payment had been effected. Appellant refers the Board to the Prompt Payment Act (PPA) for support that the claims are within the purview of the Contract Disputes Act (CDA). Appellant requests that the Board consider as excusable any failure to notify the contracting officer of claims for damages and IRS interest and waive any procedural error that may exist based upon the alleged misrepresentation by the Government and appellant's attempt to communicate the claims to the contracting officer in submitting copies of its filings with the Board.

DECISION

When the Board sustains an appeal involving a contractor's claim for an equitable adjustment as to entitlement only and remands the matter to the parties for a determination of quantum, the Board retains jurisdiction until the matter is settled as to quantum of recovery, or, failing agreement, until the Board finally decides quantum and the time for appealing that decision has run. *Nab-Lord Associates v. United States*, 230 Ct. Cl. 694, 682 F.2d 940 (1982); *Coastal Dry Dock & Repair Corporation*, ASBCA Nos. 31894, 36754, 92-1 BCA ¶ 24,494. The Board's jurisdiction to consider quantum is not

dependent upon appellant's submission of a new claim to the contracting officer and a decision thereon. *Gaffny Corporation*, ASBCA No. 37639, 89-3 BCA ¶ 22,007; *B&A Electric Company, Inc.*, ASBCA Nos. 28649(R), 30721(R), 87-2 BCA ¶ 19,879. The scope of this appeal is defined by the scope of the appeal which was remanded. *See Zinger Construction Company, Inc.*, ASBCA No. 38945, 90-3 BCA ¶ 23,242. Under the CDA, the Board's jurisdiction over an appeal involving a contractor claim is predicated upon the contractor's prior submission of that claim to the contracting officer for decision. 41 U.S.C. § 605(a); *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1564 (Fed. Cir. 1995); *Management Resource Associates, Inc.*, ASBCA No. 49620, 96-2 BCA ¶ 28,588. Thus we have jurisdiction of the claim, dated 30 March 1994, that appellant initially presented to the contracting officer for wages and benefits. The fact that the present proceedings have been assigned a new docket number as a matter of administrative docket management procedure does not affect the nature of the proceeding. *Maitland Brothers Company*, ASBCA No. 29825, 85-3 BCA ¶ 18,234.

To determine whether appellant may have only a single claim before the Board, we must assess whether or not the claims are based on a common or related set of operative facts. If we will have to review the same or related evidence to make our decision, then only one claim exists. If the claims require a focus on a different or unrelated set of operative facts as to each claim, then separate claims exist. *See Placeway Construction Corporation v. United States*, 920 F.2d 903, 909 (Fed. Cir. 1990); *Aeronca, Inc.*, ASBCA No. 51927, 01-1 BCA ¶ 31,395; *Adkins Construction, Inc.*, ASBCA No. 46081 *et al.*, 94-1 BCA ¶ 26,575; *Trepte Construction Company, Inc.*, ASBCA No. 38555, 90-1 BCA ¶ 22,595. Appellant's claims for IRS interest and penalties and damages allegedly caused by the Government's nonpayment of funds are not the same as the claim for increased wages and benefits. Appellant argues they are "related," but that is not sufficient (app. reply ¶ 13). Appellant has alleged a new set of facts underlying its claimed entitlement to recovery of amounts for IRS interest and penalties and damages that arose after conclusion of the entitlement proceeding. The claims are not based on operative facts which are common or related to those contained in the claim that was presented to the contracting officer and do not meet the jurisdictional requirement.

Appellant has not alleged that it has filed separate claims for IRS interest and penalties and damages with the contracting officer. Appellant communicated with the contracting officer when it filed its notice of appeal indicating it was adding these items to its claim, but receipt of copies of filings with the Board does not constitute receipt of a valid CDA claim. Moreover, the Board's jurisdiction is determined by the adequacy of the submission to the contracting officer, and not by the information in the notice of appeal or the complaint submitted to the Board. *T.W.M. Inc.*, ASBCA No. 37583, 89-2 BCA ¶ 21,698. Appellant's submission on 11 August 2001 did not constitute a valid CDA claim.

Appellant has requested that its failure to submit a valid CDA claim be excused. The Board does not have discretionary authority to waive a jurisdictional requirement. *See*

Placeway Construction Corporation v. United States, supra; Cosmic Construction Co. v. United States, 697 F.2d 1389 (Fed. Cir. 1982); *Syntak Industries, Inc.*, ASBCA No. 52630, 00-2 BCA ¶ 31,023.

The PPA is not an independent basis for jurisdiction. *Demontiney v. United States*, 255 F.3d 801 (9th Cir. 2001). Moreover, the PPA interest penalty does not start to accrue when there is a disagreement or dispute over the amount of payment. 31 U.S.C. § 3906(c); *L & A Jackson Enterprises v. United States*, 38 Fed. Cl. 22, 44-45 (1997), *aff'd*, 135 F.3d 776 (Fed. Cir. 1998) (Table); *Zinger Construction Co., Inc.*, ASBCA No. 41690, 92-1 BCA ¶ 24,652. To claim interest pursuant to the PPA, the statute requires that a claim be filed pursuant to the CDA. Appellant has not done so.

Accordingly, there is no CDA claim on which to base jurisdiction of those portions of appellant's complaint that the Government has moved to strike. The Government's motion is granted by striking appellant's allegations in paragraphs 10, 12-15 in Part IV. of the complaint, paragraphs 3-5 in Part V. of the complaint, and as to the first pages before Part I., by striking therefrom the second and third paragraphs and limiting the remainder of appellant's complaint to its claim concerning wages and benefits which are the subject matter of the remand.

Dated: 19 March 2002

LISA ANDERSON TODD
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. 53496, Appeal of The Swanson Group, Inc., rendered in conformance with the Board's Charter.

Dated:

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