ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Government Business Services Group, LLC	)	ASBCA No. 53920
	)	
Under Contract No. F49642-00-D-5003	)	

APPEARANCES FOR THE APPELLANT: Thomas R. Buresh, Esq.
Corporate Counsel

Charles A. Carlson, Esq.
Barnett, Bolt, Kirkwood & Long
Tampa, FL

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
Mark H. Alexander, Esq.
Senior Trial Attorney
Laurie Warnecke, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PEACOCK
ON THE GOVERNMENT' S MOTION TO DISMISS FOR LACK OF JURISDICTION

The Government moves to dismiss the referenced appeal alleging that the claim was not certified. The amount sought by appellant is below the $100,000 certification threshold but was originally submitted as a component of an omnibus uncertified request for a final decision, consisting of items that in aggregate exceeded that threshold. Appellant has voluntarily withdrawn all items set forth in the omnibus request for final decision with the exception of one portion of that request asserting that it is a segregable claim with its own independent set of operative facts. We agree and deny the Government's motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. On 30 August 2000, appellant was awarded the captioned negotiated indefinite quantity contract to provide personnel security investigative, training and support services for the Government. The services included the conduct of investigations used to determine an individual's eligibility for security clearances. The United States Air Force (AF) issued and administered the contract. The Defense Security Service (DSS) was authorized to issue orders for services under the various contract line items. (R4, tab 1) The AF and DSS are sometimes referred to here collectively as the Government.

2. The contractor was required to perform security investigations pursuant to procedures outlined in DSS 20-1-M, "Personnel Security Investigative Manual" (PSIM). After award, DSS issued two "Policy Letters" making "revisions" to a "Decision Logic Table" set forth in an appendix of the PSIM, *i.e.*, Policy Letter PL-01-3, dated 12 March 2001 and Policy Letter PL-01-11, dated 31 August 2001. (R4, tabs 1C, 14, 48)

3. By letter dated 14 September 2001, appellant contended that it had or would incur additional costs totaling $1,365,049.33 as a result of the Government's requirement to implement Policy Letter PL-01-3 and the revised "Decision Logic Table" (DLT) contained therein (R4, tab 14).

4. The revised DLT issue was reviewed by the Government and addressed at a meeting between appellant and the Government on 24 September. By letter dated 25 September 2001, appellant indicated that it would conduct an internal review of the matter and report back to the Government. (R4, tabs 15-16)

5. On 26 October 2001, the AF issued a "stop work order" directing appellant to cease all work under several CLINs for a period of 90 days, cancel pending investigations previously tasked under the line items and return all work in process in accordance with detailed instructions (R4, tab 36). A series of letters, discussions and meetings between the parties discussing the actions required by the stop work order followed in early November 2001 (R4, tabs 37-45).

6. On 16 November 2001, appellant transmitted an electronic mail (e-mail) message to the Government. In addition to addressing the details of implementing the stop work order, the e-mail stated *inter alia* that: (1) appellant had not been afforded access to the PSIM in preparing its proposal and prior to award; and (2) the Government had revised the DLT after award. The e-mail further indicated that the final amount sought with respect to the "Request for Equitable Adjustment" would only be approximately 10% of the amount previously claimed with respect to the revised DLT and that the review process was continuing. (R4, tab 46)

7. By letter to the AF dated 4 December 2001, appellant submitted its "Updated Analysis of the Impact of First Revision to the Decision Logic Table." Appellant indicated that the total estimate of the costs incurred as a result of the impact of the March 2001 revision of the DLT was $70,334.36 (changed thereafter to $70,334.56) and that the impacts of the revised DLT occurred during the period from 12 May through 30 September 2001. Appellant provided a detailed background of the requested adjustment and reasons for sizable reduction in its estimate of the impact, along with supporting documentation. (R4, tab 48)

8. By letter to the AF dated 12 December 2001, appellant identified six enumerated categories of "open issues" on the contract primarily involving the status of invoices and

payments allegedly due under the contract. Item 5 addressed the "Request for Equitable Adjustment (REA)" for the revised DLT with appellant asking for the commencement of negotiations with the Government. (R4, tab 50) None of the other categories of "open issues" have been shown to be related to the revised DLT nor were any of the other issues the subject of an REA. Appellant followed up with further letters of 19 December 2001 and 8 January 2002 addressing solely the DLT REA and renewed its request for negotiations (R4, tabs 52, 56).

9. On 18 January 2002, appellant sent to the AF a nine page "Memorandum Concerning the Government's Questionable Interpretation of the GBSG Contract and Breaches Relating to the Contract." On page 7 of the "Memorandum," appellant separately identified the Government's delay in addressing and processing the DLT REA seeking $70,334.36 as a distinct example of a Government "breach" resulting from its "Refusal to Pay." (R4, tab 58 at 7)

10. In two separate letters dated 1 March 2002 appellant requested the AF contracting officer to issue final decisions on claims set forth in the letters. Neither "Request for Final Decision" (RFD) and none of the various items set forth in the letters were or have been certified. (R4, tabs 62, 63). The "First Request" was for "non-monetary relief, pending submission of a ' quantum' request once damages have been calculated" (R4, tab 62 at 1).

11. The "Second Request" (sometimes referred to herein as the Omnibus RFD) sought "both monetary and non-monetary relief." On pages 3 through 17 of its "Second Request," appellant listed and discussed six separate categories of "CHANGES IN THE CONTRACT PURSUANT TO THE CHANGES CLAUSE" (the Changes items) and six separate allegations of "BREACH OF THE CONTRACT" (the Breach items). Many of the items were not quantified and the precise total amount of the Omnibus RFD is unclear but exceeds $100,000. (R4, tab 63)

12. One of the six enumerated Changes items set forth in the "Second Request" was item 4, "Change with Respect to the Scope of the Decision Logic Table between May and September 2001." That alleged change referenced appellant's 4 December 2001 request for an adjustment and claimed the amount of $70,334.56. Appellant contended that the 12 March 2001 revisions to the DLT constituted a change in the "' Description of services' that differed from the performance specifications and cost proposals that formed the basis of the contract." (R4, tab 63 at 8-9)

13. One of the six enumerated Breach items was item 4, "Breach Concerning the Scope of the [DLT] Equitable Adjustment Request" which was asserted on page 15 of the "Second Request." The latter Breach item is based on appellant's contention that the Government failed to "consider, process and negotiate" appellant's REA which is asserted

to be a breach by the Government of its "implied duties of good faith, of cooperation and of non-interference." This Breach item was not quantified.

14. Between 1 March and 21 May 2002, the Government conducted an extensive technical review of the "GBSG DLT" item and the amount of additional work required by the revised DLT (R4, tab 67). Thereafter, the Government and appellant engaged in substantial discussions and negotiations concerning the revised DLT item. Appellant in a letter dated 22 May 2002 submitted a detailed six page response to the Government' s review disputing some of the Government's conclusions (R4, tab 68). By letter to appellant dated 28 May 2002, the Government reported the results of a "100% audit" of appellant's REA/revised DLT dispute in which the Government identified areas of disagreement with appellant's methodology of computing the impact of the revised DLT (R4, tab 70).

15. By memorandum, dated 30 July 2002, the AF informed DSS that the AF "was prepared to start negotiations with" appellant "in support of [appellant's REA], resulting from the revision to the Decision Logic Table (DLT)." The memorandum asked that the using agency "submit either a funds certified AF Form 9 for $70,334.36, to support negotiations or detail where you would like the current contract to be down scoped [sic] to cover this funding requirement." The memorandum urged prompt attention, stating, "It is in the best interest of the Government to take immediate action on this request versus postponing the Government's response any further." The memorandum does not address any other issues, changes, or matters set forth in appellant's two requests for final decision of 1 March 2002. The negotiations contemplated by this memorandum never transpired. (R4, tab 85)

16. After the CO failed to issue, or provide any date for the issuance of, a final decision, appellant filed its notice of appeal with the Board on 27 August 2002. Appellant's complaint sets out six counts. Separately delineated as Count III is a claim for the amount of $70,334.56 for the REA for "Changes to the Decision Logic Table." In addition to its prayer for that relief, appellant claims entitlement to $2,905,665, which it claims twice, *i.e.*, in Counts IV and V. (Compl. at 20, 28-29)

17. In lieu of an answer, the Government filed a motion to dismiss the appeal.[1] The motion asserts two grounds for dismissal. First, the Government contends that appellant seeks monetary damages without stating a sum certain. Second, the Government argues that to the extent that monetary damages can be ascertained the amount in dispute exceeds $100,000, and appellant has not provided any certification. (Gov' t mot. at 1)

[1] Appellant's appeal was originally docketed under two separate numbers, ASBCA Nos. 53920 and 53921. Following a conference with the parties, and with their concurrence, the latter number was administratively withdrawn from the docket.

18. On 6 November 2002, a conference was conducted with the parties. The Board noted that "it appeared that several of appellant's counts in its claims were either presently unquantified or, where required, uncertified." After a discussion, appellant elected to withdraw all of its counts except for Count III in the amount of $70,334.56, *i.e*., the REA concerning the revised DLT. Accordingly, the remaining counts were stricken from the complaint. The Government then questioned whether the Board had jurisdiction to hear the claim set forth at Count III since it had been "a part of the claims submitted, which included counts that did not include 'sums certain' or certification." Count III of the complaint seeks only an equitable adjustment in the above amount pursuant to the "Changes" clause.[2] The parties were asked to brief the issue, which they have done. (Corres. File, Memo. of Tel. Conf. Call, 7 November 2002) The Government brief concludes that "the Board lacks jurisdiction to decide appellant's claims for failure of certification," and requests dismissal (Gov' t reply br. at 7).

DECISION

The Government alleges that the revised DLT item in the Omnibus RFD was required to be certified under the Contract Disputes Act of 1978, 41 U.S.C. 605(c)(1) because at the time it was presented to the contracting officer it was part of a "unitary" claim that exceeded the certification threshold of $100,000.

To determine whether multiple disputes under the same contract, each involving amounts less than $100,000, together constitute one claim that in the aggregate exceeds the certification threshold, each dispute is examined to determine if it involves independent, unrelated "operative facts." To the extent that the dispute pertains to such discrete, independent "operative facts," it will be treated as a separate claim and the amount sought with respect to the segregable claim is not required to be combined for certification purposes with amounts sought for unrelated disputes. *Placeway Construction Corp. v. United States,* 920 F.2d 903 (Fed. Cir. 1990); *Adkins Construction, Inc.,* ASBCA Nos. 46081 *et al*., 94-1 BCA ¶ 26,575; *Winston Corp.,* ASBCA No. 40591, 92-3 BCA ¶ 25,213; *C.B.C. Enterprises, Inc.,* ASBCA Nos. 43496 *et al*., 92-2 BCA ¶ 24,803; *Prime Roofing, Inc.,* ASBCA No. 30651, 88-2 BCA ¶ 20,617; *Sol-Mart Janitorial Services, Inc.,* ASBCA No. 32873, 87-3 BCA ¶ 20,120; *Penzimer Construction Co., Inc.,* ASBCA No. 33811, 87-2 BCA ¶ 19,737; *Zinger Construction Co.,* ASBCA No. 28788, 86-2 BCA ¶ 18,920; *Dalton Construction Co.,* ASBCA No. 30833, 86-1 BCA ¶ 18,604; *Phillips Construction Co.,* ASBCA No. 27055, 83-2 BCA ¶ 16,618; *B.D. Click Co.,* ASBCA No. 25609, 81-2 BCA ¶ 15,394. In this appeal, the DLT dispute is a separate claim in the sum certain amount

[2] It does not allege that the Government breached the contract as discussed in finding 13 above. To the extent that appellant continues to seek recovery for breach of contract in connection with the post submission processing of the REA, the breach allegations are not argued to be within the present scope of either Count III or this appeal.

of $70,334.56 that did not require certification because its "focus [is] on a different or unrelated set of operative facts" than the other disputes described in the two requests for final decision. *Placeway, supra,* 920 F.2d at 907. The form, manner of submission, or organization of the submission(s) to the contracting officer are not dispositive. The "operative facts" test does not change merely because the contractor opts to treat and pursue separately one of multiple claims arising under the same contract. *Id.* As stated by the Court in *Placeway:*

> It is not established that only one claim exists merely because Placeway' s letter to the CO listed all of the adjustments with a totaled sum requested at the bottom of the page. The court should have determined whether one or more claims existed, regardless of the form in which they were presented to the CO; the court should have decided this question based on whether all claims presented to the CO arose from a common or related set of operative facts.

Id. at 908.

Both parties have consistently treated the DLT dispute as a separate claim. It was the initial dispute between the parties and the subject of the sole REA that was submitted by appellant. The Government conducted reviews and technical audits of that REA, and requested that funds be made available for its payment pending conclusion of negotiations with appellant. There is no indication or argument that facts relating to the DLT REA overlap or interconnect with the other claim items all of which have been withdrawn by appellant. The Government has failed to identify another claim from which the Count III claim has been artificially fragmented and none is apparent. There is no showing that prosecution of this claim separately will confuse or mislead. The REA claim is separate in time (having both a definitive start and end date) as well as subject matter from the other items enumerated in the requests for final decision.

We conclude that appellant's REA based on the revised DLT is an independent claim in a sum certain amount less than $100,000; therefore, certification of the claim is not required under the CDA. The Board has jurisdiction to hear the matter. The Government' s motion is denied.

Dated: 13 March 2003

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. 53920, Appeal of Government Business Services Group, LLC, rendered in conformance with the Board's Charter.

Dated:

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