

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Environmental Chemical Corp.) ASBCA No. 53958
)
Under Contract No. (Unidentified))

APPEARANCES FOR THE APPELLANT: Thomas M. Abbott, Esq.
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Los Angeles, CA

APPEARANCES FOR THE GOVERNMENT: Thomas B. Pender, Esq.
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OPINION BY ADMINISTRATIVE JUDGE JAMES
ON THE GOVERNMENT'S MOTION TO DISMISS
FOR LACK OF JURISDICTION

On 4 December 2002, respondent moved to dismiss this appeal for lack of Contract Disputes Act (CDA) jurisdiction on a claim seeking the contracting officer's final decision on the allowability of state income taxes whose payment allegedly was appellant's obligation, because (i) such claim did not identify any contract under which the claim was asserted, and (ii) appellant did not submit to the contracting officer any claim alleging that it received a Defense Contract Audit Agency (DCAA) Form 1 disallowing such taxes. Appellant opposed the motion on 6 January 2003.

STATEMENT OF FACTS (SOF)

1. In the course of DCAA's review of Environmental Chemical Corp.'s (ECC) proposed provisional billing and forward pricing rates, correspondence between ECC and DCAA dated 27 March, 2 April, 4 June and 6 June 2002 voiced opposing views on whether state income taxes imposed on "S corporations" were allowable indirect costs. None of those communications identified any specific ECC contract or contracts or any sum certain with respect to such taxes. No forward pricing proposals are in the record. (R4, tabs 1-3, 1-2, 1-1, and "APP")

2. ECC's 11 June 2002 letter to the Administrative Contracting Officer (ACO) requested the ACO to issue a final decision on the allowability of the state income taxes of ECC, an Internal Revenue Code Subchapter "S corporation." ECC's letter did not demand any sum certain or identify any specific ECC contract or contracts to which such tax issue applied and contained no certification.* (R4, tab 1)

3. On 6 August 2002, in reply to ECC's 11 June 2002 letter, the ACO stated that ECC had not submitted any claim "pursuant to the [CDA] and FAR Part 33" and concluded: "Until ECC has filed a 'claim' . . . on a particular contract for a sum certain, it would be premature to issue a contracting officer's final decision" (R4, tab 2).

4. On 30 September 2002: (a) ECC received DCAA's 30 September 2002 Form 1 notice of disapproval of \$176,020 in state income taxes under ECC's following contracts and subcontracts for calendar year 1998: DACA45-95-D-0026 (\$70,494); DACW33-98-D-0001 (\$28,988); DACW41-98-D-9005 (\$33,820); DACW62-96-D-0037 (\$31,542); DTRS57-96-D-0020 (\$3,941); F41624-97-D-8009 (\$329); N62742-98-D-1809 (\$5,370); and subcontract 02-97-S-0042 (\$1,536) (AR4, tab 6); and (b) the Board received ECC's 25 September 2002 notice of appeal from the ACO's "decision of August 6, 2002," which it deemed a denial of its 11 June 2002 claim. The Board docketed the appeal as ASBCA No. 53958.

5. ECC's 1 November 2002 complaint in ASBCA No. 53958 alleged that the Board has jurisdiction of the appeal pursuant to the CDA and the "Disputes" clause of unidentified contracts (§ 8); that on 30 September 2002 "ECC received DCAA Form 1 for fiscal year 1998, notifying ECC that claimed S Corporation state taxes had been disallowed, and could not be included in ECC's pricing rates" (§ 16), that there were procedures for proposing, auditing and negotiating Forward Pricing Rate Agreements and final indirect costs for ECC's fiscal years 1998 to 2003 (§§ 21-25), and prayed "that the Board confirm that the state income taxes paid by ECC as a Subchapter S corporation are allowable costs that are allocable to ECC's government contracts" (§ VIII).

6. On 16 December 2002, ECC received DCAA's 16 December 2002 Form 1 notice of disapproval of state income taxes amounting to "\$143,985" (*sic*; actually \$167,160) under ECC's following contracts and subcontracts for calendar year 1999: DACA45-95-D-0026 (\$30,123); DACW33-98-D-0001 (\$13,062); DACW41-98-D-9005 (\$4,872); DACW62-96-D-0037 (\$77,933); DTRS57-96-D-0020 (\$16,626); F41624-97-D-8009 (\$12,130); N62742-98-D-1809 (\$12,166); N62742-99-D-1800 (\$203); DACA87-92-D-0126 (\$28); and subcontract 02-97-S-0042 (\$17) (AR4, tab 7).

* We do not address and need not decide whether CDA certification was required.

7. Undated, draft audit report Nos. 4281-1998A10100048 and 4281-1999A10100048 for ECC's fiscal years 1998 and 1999, issued sometime after an unidentified date in September 2002, stated: "The ACO was advised of the disagreement in [or on] . . . unallocable S-Corporation state taxes, which led to the issuance of DCAA Form(s) 1" and listed the numbers of each of the foregoing contracts and subcontracts set forth in SOF ¶¶ 4, 6 (R4, tab 4 at 4, 16, 19, 27-28; tab 5 at 3, 9, 14, 23-24).

POSITIONS OF THE PARTIES

Respondent argues that the lack of any identified Government contract or contracts in ECC's correspondence with DCAA before taking this appeal is fatal to the Board's jurisdiction to entertain this appeal (mot. at 1-4), and ECC's "claims" concerning receipt of DCAA Forms 1 and procedures for proposing, auditing and negotiating Forward Pricing Rate Agreements and final indirect costs for ECC's fiscal years 1998 to 2003 alleged in its complaint, ¶¶ 16, 21-25, were not presented to the contracting officer, and thus the Board lacks CDA jurisdiction to decide them (mot. at 5-7).

ECC argues that legal authorities found CDA jurisdiction even when the contractor did not identify a specific Government contract, but the contracting officer had notice of the cost reimbursable and flexibly priced contracts to which the cost allowability dispute pertained (opp'n at 5-7), and that the allegations in ¶¶ 16, 21-25 of its complaint are not new matters, but relate to the pre-existing issue of the allowability of the state income taxes (opp'n at 7-8).

DECISION

The CDA provides that: "Each agency board [of contract appeals] shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency . . ." 41 U.S.C. § 607(d). An essential prerequisite to a board's jurisdiction under 41 U.S.C. § 607(d) is the existence of a contract to which the Government and the contractor are parties. In the absence of such a contract, the board lacks jurisdiction. *See Celtech, Inc.*, ASBCA No. 38219-423, 89-3 BCA ¶ 22,240 at 111,799-800 (implied in fact contract did not exist). Further, a CDA claim must identify the contract, contracts, or test contract under which the dispute arises. *See Martin Marietta Corp.*, ASBCA No. 38920, 90-1 BCA ¶ 22,418 at 112,609; *T.J.D. Services, Inc. v. United States*, 6 Cl. Ct. 257, 261 (1984).

ECC on 11 June 2002 requested a CO's final decision on the state income taxes allowability issue and on 6 August 2002 the CO declined to issue such decision as premature for lack of designation of a "particular contract for a sum certain" (SOF ¶¶ 2-3). On 30 September 2002, the Board received ECC's appeal on the basis of a deemed denial of ECC's 11 June 2002 claim. Also, on 30 September 2002, appellant received a DCAA Form 1 which identified the contracts and amounts of state income taxes disapproved for

fiscal year 1998 (SOF ¶ 4). Undated, draft DCAA audit reports stated, “The ACO was advised of the disagreement in [on] . . . unallocable S-Corporation state taxes, which led to the issuance of DCAA Form(s) 1” (SOF ¶ 7). So the dispositive issue is, did the lack of identification of such contracts and such monetary amounts in ECC’s 11 June 2002 letter requesting a CO’s final decision deprive this Board of jurisdiction of the appeal, or was such lack cured by DCAA’s notice to the ACO of the DCAA Form 1 disapproval of the state income tax costs in September 2002?

The legal authorities ECC cites are cases in which the contracting officer had prior or concurrent information about the contractor’s claim, the contract(s) affected, and the sum certain amounts in issue before issuing his final decision. None have facts analogous to those in ECC’s appeal. In *Bath Iron Works*, ASBCA No. 32770, 88-1 BCA ¶ 20,438, the contractor claimed amounts of \$1,709,590 and \$3,779,463 concerning the allowability of certain compensation, of which \$1,221,629 pertained to one contract identified and the balance to its other flexibly priced contracts in fiscal year 1980.

In *Holmes & Narver, Inc.*, ASBCA No. 51430, 99-1 BCA ¶ 30,131, a 1996 DCAA report identified \$402,050 in costs and listed the DoD contracts affected by a cost allowability issue; DCAA issued a DCAA Form 1 regarding such costs, and in 1998 the contractor requested a contracting officer’s decision on the issue. The Board held it had CDA jurisdiction of the appeal.

In *Systems & Electronics, Inc.*, ASBCA No. 47811, 96-2 BCA ¶ 28,501, the contractor disputed a DCAA Form 1 disapproval of \$817,939 under contract No. N00019-87-D-0249 in December 1993; the contractor discussed that DCAA Form 1 issue with the contracting officer in 1994, and when the contracting officer declined to issue a final decision for lack of supporting information, the contractor appealed on the basis of a deemed denial. The Board denied the Government’s motion to dismiss for lack of jurisdiction.

In *Dillingham Shipyard*, ASBCA No. 27458, 84-1 BCA ¶ 16,984, the contractor requested a CO’s final decision on the allowability of certain legal fees in its indirect cost pool, but identified no sum certain or specific job orders under the contractor’s designated master ship repair (MSR) contract to which such costs pertained. At that time, the CO knew the number of 40,977 hours under the MSR job orders, the disputed \$ 0.10 per hour rate, and by simple arithmetic could readily calculate \$4,097. In response to a Government motion for a more definite statement during litigation, the contractor provided the list of MSR job orders and 40,977 hours incurred thereunder. The Board held that it had CDA jurisdiction of the claim. 84-1 BCA at 84,611. *Dillingham* is distinguishable from this appeal, since there is no evidence that the CO on 11 June or 6 August 2002 knew the contract numbers and amounts of state income taxes allocated to each of ECC’s contracts and subcontract. The undated DCAA reports mentioned in SOF ¶ 7 do not show that the CO knew of ECC’s contracts and state income tax amounts on 6 August 2002.

A decision whose facts are more analogous to those in the instant appeal is *T.J.D. Services, Inc. v. United States, supra*. The contractor performed three sequential contracts and submitted an uncertified claim for \$200,000 without designating to which contract or contracts the claim pertained or the amounts allocated to each contract. The court stated that a letter demanding damages, absent any identification upon which contract the damages arise, cannot constitute a valid written claim under the CDA, and dismissed the suit without prejudice, for lack of jurisdiction. The contractor's belated identification of the exact dollar amounts under each of the three contracts in its brief opposing the Government's motion to dismiss did not cure the invalid claim.

Accordingly, we grant the Government's motion to dismiss for lack of jurisdiction, without prejudice to ECC's right to submit a valid CDA claim to the contracting officer.

Dated: 29 April 2003

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

ROBERT T. PEACOCK
Administrative Judge
Acting 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. 53958, Appeal of Environmental Chemical Corp., rendered in conformance with the Board's Charter.

Dated:

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