

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Government Therapy Services, Inc.) ASBCA No. 53972
)
Under Contract No. DAKF40-99-C-0080)

APPEARANCE FOR THE APPELLANT: Ms. Theresa Reyes
President

APPEARANCES FOR THE GOVERNMENT: COL Karl M. Ellcessor III, JA
Chief Trial Attorney
MAJ Gregory Bockin, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY
ON JURISDICTIONAL ISSUES

Government Therapy Services, Inc. (GTS) contracted to provide the Government with occupational therapy services. The contract was terminated for cause, and GTS filed this appeal. At issue are appellant's assertions in the complaint and in response to the Board's 24 January 2003 Order that it is entitled to wage and overtime adjustments and unpaid interest. We treat the Government's response to these assertions as a motion to strike.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. The Government awarded Contract No. DAKF40-99-C-0080 to GTS in March 1999. Under the contract, appellant was to furnish occupational therapy services to students in grades pre-school through 9 at Fort Bragg, North Carolina, and in elementary school at Pope Air Force Base, North Carolina. (R4, tab 1)

2. The contract included a base period of 1 April 1999 through 31 March 2000, and four option years (R4, tab 1 at 3). In March 2002, the contracting officer exercised the third option year (R4, tab 67).

3. During the third option year, the contracting officer became concerned about various aspects of appellant's performance (R4, tabs 70, 74, 78, 80, 87). On 8 August 2002, the contracting officer issued a Show Cause Notice to GTS (R4, tab 91). Following discussions between the parties, the contracting officer terminated the contract for cause under FAR 52.212-4(m) (R4, tab 105).

4. On 10 October 2002, GTS appealed “the decision to Terminate For Default.” Appellant’s complaint appeared to seek affirmative relief in the form of wage determination adjustments and overtime under the Service Contract Act. In its answer, the Government asserted that appellant had not submitted a claim or request for equitable relief for those matters to the contracting officer (answer, ¶¶ 12, 13).

5. By an Order dated 24 January 2003, the Board directed appellant to submit proof that those affirmative claims or requests had been presented to the contracting officer. In a 24 February 2003 response, GTS stated that it had requested wage determination adjustments in tab 99 of the Rule 4 file, and had requested overtime in tab 12 of appellant’s second supplement to the Rule 4 file. Appellant’s response also generally declared that appellant had requested, or was requesting, interest on the late payment of invoices.

6. Tab 99 of the Rule 4 file is a 15 August 2002 letter from appellant’s attorney to the contracting officer discussing a proposed termination for convenience. In part, the letter stated that the proposed termination for convenience will “not affect the rights of GTSI to seek an equitable adjustment under the provisions of the wage determinations issued over the past several years” and represented GTS was preparing such a claim. The letter did not set out the amount of the putative claim. Tab 12 of appellant’s second supplement to the Rule 4 file contained printouts of computer spreadsheet computations. Appellant describes them as “DOL Calculated Therapist Overtime.” There is no indication that any of these computations were provided to the contracting officer.

7. Appellant did not identify a claim document regarding unpaid interest. The record contains correspondence between the parties relating to the timing of the Government’s payments to GTS under the contract (R4, tabs 10, 11, 12, 14). The most recent document is a 13 August 2002 facsimile transmittal cover sheet from appellant’s attorney to the contracting officer in which the attorney stated: “It is important that your office understands that there is a constant breach, by the Government, of the payment terms of the contract. GTSI reserves the right to submit a claim based on those breaches” (R4, tab 95). We do not see such a claim in the record.

8. The documents discussed in Findings 6 and 7 did not invoke the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, *as amended*, or the disputes process. They did not request a contracting officer’s final decision. (R4, tabs 99, 95; second ASR4, tab 12)

9. The Board requested that the Government respond to appellant’s 24 February 2003 letter regarding its “claims.” The Government’s 19 June 2003 letter asserts that no claims for an adjustment as a result of wage determinations, overtime, or unpaid interest have been submitted to the contracting officer.

DISCUSSION

In interpreting the regulation implementing the CDA on submission of claims, FAR 33.201, the United States Court of Appeals for the Federal Circuit has identified three requisites for a valid monetary claim: (1) the contractor must submit the demand or assertion in writing to the contracting officer; (2) the money must be sought as a matter of right; and, (3) the writing must set out a sum certain. *Essex Electro Engineers, Inc. v. United States*, 960 F.2d 1576, 1580 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 953 (1992); *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1565 (Fed. Cir. 1995). No particular form is needed, except that the written demand must give the contracting officer “adequate notice of the basis and amount of the claim.” *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987); *H.L. Smith*, 49 F.3d at 1565.

In addition to contesting the propriety of the termination for cause, GTS seeks affirmative relief relating to wage determination adjustments, overtime, and unpaid interest on late invoices. As to the wage determination adjustments, appellant points to tab 99 of the Rule 4 file. That document is a 15 August 2002 letter from appellant’s attorney to the contracting officer discussing a proposed termination for convenience. In part, the letter states that the proposed termination for convenience will “not affect the rights of GTSI to seek an equitable adjustment under the provisions of the wage determinations issued over the past several years.” It goes on to state that such a claim was being prepared. (Finding 6)

As to the professed overtime claim, GTS relies upon tab 12 of its second supplement to the Rule 4 file. The documents in that tab appear to be printouts of computer spreadsheet computations. Appellant describes them as “DOL Calculated Therapist Overtime.” Appellant did not identify a claim document for the request for unpaid interest. (Findings 6, 7)

Although the standards for finding a claim are not high, appellant has not met them. The 15 August 2002 letter does not assert a claim, it only indicates that a wage determination adjustment claim, in some undetermined amount, might be filed. There is no indication that the spreadsheet calculations, which GTS asserts constituted its “claim” for overtime, included a demand for payment or were ever provided to the contracting officer. (Finding 6)

As to the asserted prompt payment “claim,” the record indicates only that the parties corresponded about the timing of the Government’s payments to GTS under the contract. The last document is a 13 August 2002 facsimile transmittal cover sheet from appellant’s attorney to the contracting officer in which the attorney states: “It is important that your office understands that there is a constant breach, by the Government, of the payment terms of the contract. GTS reserves the right to submit a claim based on those breaches.” We find nothing in the record that would qualify as a claim for interest. (Finding 7)

None of the Rule 4 file documents discussed above invoked the CDA, the disputes process, or requested a contracting officer's final decision (finding 8).

CONCLUSION

Only the propriety of the termination for cause is before the Board in the subject appeal. Accordingly, we strike appellant's requests for affirmative relief from the record without prejudice to appellant's right to file claims with the contracting officer under the disputes provision of the contract and the CDA.

Dated: 9 July 2003

CAROL N. PARK-CONROY
Administrative Judge
Armed Services Board
of Contract Appeals

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. 53972, Appeal of Government Therapy Services, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ

Recorder, Armed Services
Board of Contract Appeals