ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Lockheed Martin Aircraft Center	)	ASBCA No. 55164
	)	
Under Contract No. N00019-00-D-0279	)	

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OPINION BY ADMINISTRATIVE JUDGE SCOTT
ON GOVERNMENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION AND APPELLANT'S MOTION TO AMEND THE COMPLAINT

The government has moved to dismiss this appeal for lack of jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, on the ground that the claim is not in a sum certain. Appellant Lockheed Martin Aircraft Center (LMAC) asserts that its claim is in a sum certain and suffices to confer jurisdiction. Additionally, appellant has moved pursuant to Board Rule 7 to amend its complaint to include allegations of the government's bad faith and breach of its duty of good faith and fair dealing. The government opposes on the ground that the proposed amendments are based upon operative facts not alleged in appellant's claim and that the Board would therefore lack jurisdiction over the new allegations. For the reasons stated below, we deny the government's motion to dismiss and grant appellant's motion to amend.

FINDINGS OF FACT FOR PURPOSES OF THE MOTIONS

On 4 May 2000, effective 1 August 2000, the Navy awarded requirements Contract No. N00019-00-D-0279 to LMAC for standard depot level maintenance, periodic depot maintenance (PDM), mid-term inspection (MTI), and over and above (O&A) work on U.S. Navy, U.S. Air Force, and U.S. Marine Corps C-9 Series aircraft. The contract included a two-month base period from 1 August 2000 through 30 September 2000 and six options, covering fiscal years (FY) 2001 through 2006, which the Navy exercised. (R4, tab 1 at GOV 9, *see*, *e.g.*, tab 1 at GOV 53-55, 58, 78, tabs 1E, 2A, 2B, 2E, 2K, 2N, 2S)

The contract incorporated the following clauses by reference, among others: FAR 52.216-21, REQUIREMENTS (OCT 1995); FAR 52.233-1, DISPUTES (DEC 1998)-ALTERNATE I (DEC 1991); FAR 52.243-1, CHANGES-FIXED-PRICE (AUG 1987); FAR 52.249-2, TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (SEP 1996); and DFARS 252.243-7002, REQUESTS FOR EQUITABLE ADJUSTMENT (MAR 1998) (R4, tab 1 at GOV 116, 118-119, 122).

On 30 November 2004, LMAC filed a request for equitable adjustment with the contracting officer (CO) seeking a "Claim Grand Total" of $17,763,627 in costs incurred through FY 2004 due to the government's alleged diversion and elimination of maintenance requirements for the Air Force's C-9A aircraft. The total amount sought included $1,432,400 in excess program management and support costs, $14,156,118 in unabsorbed production indirect costs, $1,045,027 in unabsorbed hangar costs, $917,287 in profit impact on claimed costs, and $212,795 in proposal preparation costs. (R4, tab 3A at GOV 415, 445-446, tab 3AA at GOV 454) On 15 June 2005, LMAC certified its request, without change, as a CDA claim, pursuant to 41 U.S.C. § 605(c)(1), and sought a CO's decision (app. supp. R4, tab 7).

LMAC's claim, which incorporated prior communications beginning in March 2003, alleged that the government diverted work from its requirements contract by performing MTI itself, constituting a breach of contract. It further alleged that, after contract award, the Air Force decided to retire all but one of its C-9A aircraft, but rather than disclosing this decision to LMAC promptly, and despite its negotiation with LMAC of schedules for induction of aircraft, the Air Force began to drop C-9A models from the schedule for induction for PDM and MTI, which also resulted in the elimination of O&A maintenance on the aircraft. At the same time, the government was instructing LMAC to disregard information suggesting that the Air Force planned to retire the fleet. LMAC was not officially notified of the retirement until many months after the government planned it and thus was forced to continue to be ready to meet its contractual obligations and was prevented from mitigating its damages. The contractor contended that the government's actions constituted a deductive change compensable under the contract's

Changes clause, or, alternatively, a constructive partial termination for convenience. (R4, tab 3A at GOV 418, 420-422, 429-430, 435-445, 454-461)

The CO did not issue a decision on LMAC's claim and, on 19 September 2005, it appealed to the Board from the deemed denial of its claim.

Count I of appellant's complaint covered the government's alleged diversion of all MTI requirements and sought "an amount to be determined at trial, but in the aggregate with other claims in excess of $17,763,627" (compl. at 18, ¶ 49 E). Count II pertained to the alleged deductive change due to the government's retirement of the Air Force C-9A aircraft and sought $17,763,627 (*id.* at 20, ¶ 56 D). Count III alleged the constructive partial termination for convenience and again sought $17,763,627 (*id.* at 22, ¶ 62 B).

On 6 April 2006, the government filed a motion for summary judgment on Counts II and III of the complaint, supported by declarations. Thereafter, appellant filed its motion for leave to amend its complaint, along with its "FIRST AMENDED COMPLAINT." Appellant alleges that the amended complaint expands upon and clarifies facts originally pled that demonstrate the government's bad faith and breach of its duty of good faith and fair dealing; adds those theories of recovery in support of appellant's constructive change allegations; and adds evidence in support of its Changes claim that was derived from the government's motion for partial summary judgment, in particular the declarations of the government's personnel. Appellant explains that the information provided in the summary judgment motion suggests that the government issued waivers that allowed aircraft to fly in excess of time periods normally requiring that the aircraft undergo PDM and MTI—that is, it authorized overflying—rather than submit the aircraft for such contract services, while at the same time it was encouraging, instructing, and even requiring LMAC to continue to be ready to perform.

In its Statement of Facts, the amended complaint expands upon the description of the solicitation and contract; includes more specific information concerning the government's alleged diversion of MTI in-house or to another contractor; includes more alleged facts concerning the retirement of the C-9A aircraft and the directions to LMAC to continue to be ready to perform; and adds the alleged information concerning the waivers and overflying. The latter allegations, and the contention that the government constructively changed the contract by violating its duty of good faith and fair dealing and acting in bad faith, are reflected in an augmented Count II. Counts I and III of the amended complaint remain essentially the same as in the original complaint. Appellant continues to seek the same amount under each count as in the original complaint.

DISCUSSION

Motion to Dismiss for Lack of Jurisdiction

While acknowledging that appellant "seeks $17,763,627 as a lump sum equitable adjustment to the contract price," the government nevertheless contends that appellant's claim does not meet the jurisdictional requirement that a claim state a sum certain because it does not give adequate notice of the amount sought (mot. at 12). The government maintains that the CO "cannot compute the sum certain due from the information provided in the claim documents" because the claim fails to: (a) include direct costs; (b) show how costs are to be spread or allocated among various types of line items; (c) demonstrate how costs are to be allocated over option years; and, (d) explain whether new prices should apply to all line items or to selected ones (mot. at 15). The government alleges that the claim's lack of specificity contravenes the requirements of the CDA and implementing regulations and of the contract's Disputes, Changes, Termination for Convenience, Requests for Equitable Adjustment, and other clauses (mot. at 12-16; rebuttal at 1, 4, 6). Appellant responds, *inter alia*, that the CO has had ample notice of the basis and amount of its claim over extended communications; the claim is in a sum certain; although its claim includes direct costs, there is no need to claim direct costs to state a sum certain; and a detailed breakdown, separation, or allocation of costs is not necessary. (Opp'n at 7-14)

The CDA's implementing regulation, FAR 33.201, defines "claim", in part, as a written demand or assertion "seeking, as a matter of right, the payment of money in a sum certain." A contractor's money claim does not qualify as a CDA claim unless it is submitted to the CO in a sum certain. *Essex Electro Engineers, Inc. v. United States*, 960 F.2d 1576, 1581-82 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 953 (1992). However, the Federal Circuit has interpreted the sum certain requirement broadly, stating that:

> A contractor must submit in writing "a clear and unequivocal statement that gives 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). But the contractor need not include a detailed breakdown of costs. The contractor may supply adequate notice of the basis and amount of the claim without accounting for each cost component.

H.L. Smith, Inc. v. Dalton, 49 F.3d 1563, 1565 (Fed. Cir. 1995). *See also Valco Construction Co.*, ASBCA Nos. 47909, 48313, 96-2 BCA ¶ 28,344 at 141,552.

The parties have not raised the fact that appellant prays in Count I of its original and amended complaints for an amount to be determined at trial, but "in excess of $17,763,627." However, appellant's claim, which forms the basis for our jurisdiction, sought exactly that amount, without the qualifier added in the complaint. Moreover, an increase on appeal in the amount claimed is allowed if it is reasonably based upon further information developed in litigation before the Board, which remains to be determined. *Todd Pacific Shipyards Corp*., ASBCA No. 55126, 06-2 BCA ¶ 33,421.

Appellant's claim is in the sum certain amount of $17,763,627 and we have jurisdiction to entertain it. Since we have jurisdiction pursuant to the CDA, we need not discuss the government's contentions relating to the various contract clauses.

Motion to Amend Complaint

The government opposes appellant's motion to amend its complaint on the ground that the new allegations concerning the government's bad faith and breach of its duty of good faith and fair dealing are not based upon the same operative facts contained in appellant's claim and the Board lacks jurisdiction to consider them. Appellant responds that the amended allegations do not differ from the essential nature of or operative facts in its claim and that the Board's jurisdiction is not affected by the proposed changes.

Board Rule 7 allows amendments to the pleadings, within the proper scope of the appeal, in the Board's discretion. The scope of the appeal, and our jurisdiction, are determined "by the parameters of the claim, the [CO's] decision thereon, and the contractor's appeal therefrom." *Stencel Aero Engineering Corp.*, ASBCA No. 28654, 84-1 BCA ¶ 16,951 at 84,315. As we have stated:

> Under the CDA the Board has jurisdiction over disputes based upon claims that a contractor has first submitted to the CO for decision. 41 U.S.C. §§ 605(a), 606. We lack jurisdiction over claims raised for the first time on appeal, in a complaint or otherwise. *D.L. Braughler Co., Inc. v. West*, . . . 127 F.3d 1476, 1480 (Fed. Cir. 1997); *Consolidated Defense Corp*., ASBCA No. 52315, 03-1 BCA ¶ 32,099. Whether a claim before the Board is new or essentially the same as that presented to the CO depends upon whether the claims derive from common or related operative facts. *Contel Advanced Systems, Inc.*, ASBCA No. 49073, 02-1 BCA ¶ 31,809 at 157,149; *Trepte Construction Co., Inc*., ASBCA No. 38555, 90-1 BCA ¶ 22,595 at 113,385-86; *see also Placeway Construction Corp. v. United States*, . . . 920 F.2d 903, 908 (Fed. Cir. 1990). The assertion of a new

> legal theory of recovery, when based upon the same operative facts as the original claim, does not constitute a new claim. *Trepte*, *id*.

Dawkins General Contractors & Supply, Inc., ASBCA No. 48535, 03-2 BCA ¶ 32,305 at 159,844. *See also Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003) (rigid adherence to exact language or structure of original claim is not required when contractor's allegations in court arose from same operative facts, claimed essentially the same relief, and merely asserted differing legal theories of recovery).

The Board has denied motions to dismiss for lack of jurisdiction when new or modified allegations in an amended complaint did not change the essential nature of or operative facts of the contractor's claim to the CO. In *Lockheed Martin Librascope Corp*., ASBCA No. 50508, 00-1 BCA ¶ 30,635, as a result of discovery and interviews of involved personnel, the appellant changed its legal position in its amended complaint and reduced the amount of its claim. The Board held that the CO had notice of the contractor's assertions and that they did not constitute a change in the essential nature or operative facts of its claim. *Id*. at 151,249-50. In *Dual, Inc*., ASBCA No. 53827, 04-2 BCA ¶ 32,636, the appellant's complaint and amended complaint presented more details of government misconduct than in its claim, including alleged government bad faith and deliberate delay. The Board held that these were not new claims because the contractor's termination settlement proposal, which had ripened into a claim, had given the termination contracting officer adequate notice of the basis of the contractor's claim. *Id*. at 161,493-94. *See also Environmental Safety Consultants, Inc*., ASBCA No. 47498, 00-1 BCA ¶ 30,826 at 152,146-52 (Board assumed jurisdiction over appellant's new allegation in amended complaint of government bad faith on ground it was new legal theory that did not alter nature of original claim).

Appellant's claim, while not employing the words "bad faith" or alleging breach of the duty of good faith and fair dealing, nonetheless alleged, in effect, unfair and deceptive treatment by the government. The amended complaint merely articulates those allegations more clearly and adds alleged facts in support derived from information supplied by the government. The government cannot reasonably claim to have lacked notice of the matters alleged and they do not differ materially from the essential nature of and operative facts in appellant's claim to the CO. The amended complaint is not tantamount to a new claim.

DECISION

We deny the government's motion to dismiss for lack of jurisdiction. We grant appellant's motion to amend its complaint.

Dated: 11 January 2007

CHERYL L. SCOTT
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. 55164, Appeal of Lockheed Martin Aircraft Center, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals