ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
MACH II	)	ASBCA No. 56630
	)	
Under Contract No. SPO500-01-D-0088	)	

APPEARANCE FOR THE APPELLANT: David F. Chalela, Esq.
Tampa, FL

APPEARANCES FOR THE GOVERNMENT: Daniel K. Poling, Esq.
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OPINION BY ADMINISTRATIVE JUDGE STEMPLER

This appeal comes to us from the denial of the contractor's certified claim for the contract price allegedly owed on a delivery order. The government maintains that the unsigned delivery order was not a binding contract. The government has filed a motion for summary judgment. Relevant to this motion we also have before us: (a) the government's 2 June 2009 Motion to Strike Appellant's Response to the Government's Motion for Summary Judgment; (b) Appellant's 29 June 2009 motion for leave to amend the complaint; and (c) the government's 21 July 2009 motion to dismiss the amended complaint for lack of subject matter jurisdiction.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. On 29 August 2001 the Defense Logistics Agency, specifically the Defense Supply Center Philadelphia (DSCP), awarded Contract No. SPO500-01-D-0088 to appellant, MACH II. The contract required MACH II to supply a range of commercial equipment items in response to individual delivery orders. (R4, tab 7)

2. The contract stated that "[t]his is an indefinite-delivery requirements type contract and does not authorize delivery of any equipment. Delivery shall be made only as authorized by orders issued in accordance with Clause I128 entitled 'ordering' and Clause F027 entitled 'Time of Delivery-FOB Point' as set forth in this contract." (R4, tab 7 at 1a) Clause I128 of the contract reads as follows:

FAR 52.216-18 ORDERING (OCT 1995) (I)

> (a) Any supplies to be furnished under this contract shall be ordered by issuance of delivery orders by the individuals or activities designated in the Schedule. Such orders may be issued
>
> FROM
> [x] The effective date of the award/contract
> THROUGH
> [x] a date exactly (3) calendar years(s) after the effective date of the award/contract.

(R4, tab 7 at 1b)

3. The requirement that performance is authorized only by orders issued in accordance with the Ordering clause is reiterated in the contract in FAR 52.216-21, REQUIREMENTS (OCT 1995), and reads as follows:

> (b) Delivery or performance shall be made only as authorized by orders issued in accordance with the Ordering clause. Subject to any limitations in the Order Limitations clause or elsewhere in this contract, the Contractor shall furnish to the Government all supplies or services specified in the Schedule and called for by orders issued in accordance with the Ordering clause. The Government may issue orders requiring delivery to multiple destinations or performance at multiple locations.

(R4, tab 7 at 16) The contract's Ordering clause, first found at contract clause I128 (*see* SOF ¶ 2), is repeated essentially verbatim as a selected excerpt from FAR 52.216-18 ORDERING (OCT 1995) (I) (R4, tab 7 at 17).

4. Prior to the Delivery Order (DO) in dispute (DO0019), the contracting officer issued 18 DOs.[1] Each of these DOs, with the exception of DOs 0004 and 0005 according to the government, followed this scenario. The contracting officer (CO) would send a proposed DO to the contractor with essentially the same language in the cover letter as quoted below in SOF ¶ 5. The contractor would then accept the DO in writing and the

[1] We have pertinent documents as to all but DO0001 and 0011, which cannot be found.

CO would then sign the DO and provide the contractor a signed copy. (R4, tabs 8-9, 35-48)

5. By date of 8 March 2004, the CO, Catherine Ford, sent a fax to appellant. The transmittal sheet, which includes the CO's signature, states: "HERE IS DELIVERY ORDER 0019. REVIEW – YOU KNOW THE DRILL." The fax includes an 8 March 2004 cover letter signed by the CO. The cover letter states:

> Enclosed is proposed Delivery Order SPO500-01-D-0088-0019, specifying quantities, prices and delivery for NSN 4610-01-366-4640, in accordance with the schedule terms. Subject Delivery order is not an order but is provided for your review and signature. Please complete and return to my attention. Your acceptance is required before an order can be awarded. I will return a signed order upon receipt of your fax. My fax numbers are (215) 737-7269/7554.
> Work performed prior to receipt of a Delivery Order is at the risk of the contractor.[2]

The letter contains a place for the contractor to sign and accept the DO. Appellant signed the letter and it bears the date of 9 March 2004[3]. The fax finally contains proposed DO0019, bearing a date of 12 March 2004. The DO is for six water purification units and associated manuals for a total price of $238,035.42. The DO is unsigned by the CO. (R4, tab 10) The CO never signed the DO. It appears that immediately upon receipt of the 8 March 2004 fax, appellant processed an order for these 6 units, in order to combine them with another order (R4, tab 24 at 3).

6. In correspondence dated 19 April 2004, appellant stated that it was prepared to immediately deliver the six units called for by DO0019, and requested that the CO send it a signed copy of the DO as soon as possible (R4, tab 49).

7. By letter dated 22 June 2005, appellant wrote its U.S. Senator seeking assistance in receiving payment for DO0019 (among other things). The letter attached an undated letter from appellant to the CO seeking such payment. (R4, tab 11) By letter dated 5 July 2005, DSCP answered a 27 May 2005 letter from the Senator. DSCP stated that there was no DO0019 since the DO was issued in draft but never signed by the CO

[2] Fifteen of the seventeen DOs we have records for had transmittals of proposed DOs with this language.

[3] We have no information on when this letter was returned by appellant to the CO.

because of problems that had been encountered with appellant's deliveries under DO0013 (R4, tab 12).[4]

8. By letter dated 23 April 2007, appellant was advised that since DO0019 was not signed by the CO, no valid DO existed (R4, tab 25 at 3).

9. In May of 2008, MACH II shipped six water purification units to the government, allegedly in satisfaction of DO0019. The recipients had not received any paperwork from the contracting officer regarding DO0019 and queried the contracting officer on why they received them (R4, tabs 19, 20).

10. On 3 June 2008, MACH II inquired by e-mail of the government as to the status of the units shipped (R4, tab 21 at 3), and the government again informed the contractor that DO0019 was unsigned and not a valid order. The government also instructed MACH II to make arrangements to pick up the items from DO0019. (R4, tab 21 at 1-2)

11. By e-mail of 4 June 2008, MACH II protested that it never received a cancellation of DO0019 (R4, tab 22). In its reply e-mail of the same date, the government confirmed that MACH II had not received a cancellation because the government never awarded the DO (R4, tab 22).

12. By letter dated 11 June 2008, appellant refused to pick-up the disputed units (R4, tab 24 at 5).

13. By e-mail dated 13 June 2008, the government again insisted that appellant pick-up the units (R4, tab 25 at 1). The units have never been picked-up by appellant.

14. By letter dated 11 July 2008, MACH II submitted a certified claim in the amount of $238,035.42 on DO0019. The claim maintains that the contracting officer habitually returned signed delivery orders late, if at all.[5] Further, as the fax stated "you know the drill," MACH II began processing the delivery order as soon as possible without the contracting officer's signature on the delivery order as it had not been an issue on previous delivery orders received by the government. (R4, tab 27)

[4] A similar exchange of correspondence took place with respect to appellant's letter to its other U.S. Senator (R4, tabs 13, 14).

[5] This assertion was factually incorrect. All the DOs that we have records for, with the exception of DO0019, were signed by the contracting officer (R4, tabs 8-10, 35-48).

15. On 18 August 2008, the contracting officer issued a final decision in which she denied the appellant's claim in its entirety (R4, tab 29). By letter dated 16 September 2008, MACH II filed this timely appeal which was docketed as ASBCA No. 56630. At the time the appeal was docketed, appellant was represented *pro se* by the company president, Mr. Walter Holmich. After the complaint and answer were filed, the government filed a 23 February 2009 motion for summary judgment. Thereafter, appellant retained counsel to represent it before this Board.

16. Appellant's 17 April 2009 response to the government's motion for summary judgment alleged that the government breached the contract and that as a result, MACH II was entitled to reimbursement for losses incurred due to the breach. Specifically, the second sentence of paragraph II reads:

> Under FAR 52.249-2(g), the Appellant is entitled to recover breach of contract damages to include: the contract price for supplies delivered to the government; reasonable costs incurred in the performance of the work terminated by the government, including fair and reasonable profit; and reasonable costs of settlement of work terminated. These losses are currently being calculated by the Appellant and shall be forthcoming upon final determination of losses, which are expected to exceed $238,035.42.

(App. resp. to mot. for summary judgment at 6) We note that while appellant has cited to FAR 52.249-2, TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE), under the contract, FAR 52.212-4(l), CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (MAY 1999), establishes the parties' rights and responsibilities in the event that the government terminates for convenience, not FAR 52.249-2 (R4, tab 7 at 10).

17. The government's 2 June 2009 reply to appellant's response introduced a motion to strike the response on the basis that appellant's allegation of breach of contract and related damages amounted to a new claim which had never been submitted to the contracting officer for a decision therefore the Board is without jurisdiction to hear these allegations (gov't reply br. at 1-4).

18. MACH II filed a 25 June 2009 response to the government's motion to strike. In supporting its opposition to the motion to strike, appellant maintains that the essence of the claim has always been a breach claim, even if the *pro se* appellant did not specifically refer to the government's actions as a breach during early stages of the appeal process. Further, appellant states that it "should never be barred from citing additional law and theory to assert that claim in any motion." (App. resp. to mot. to strike at 1-4)

19. Received and filed at this Board on 29 June 2009 was "Appellant MACH II Aviation, Inc.'s First Amended Complaint."[6] The complaint sets out in Count I that the government breached the contract and "[a]s a direct and proximate result of the Government's actions in breaching contract SPO500-01-D-0088, Appellant has been damaged in an amount not less than $978,709.04, to be more specifically proven at hearing." Attached to the amended complaint is a cost affidavit signed by MACH II's president, Walter Holmich, which itemizes the components of the $978,709.04 as follows:

> The following information is submitted for your review concerning Contract SP500-01-D-0088 [sic].
>
> PO#17 (10) Fuel Tanks @$10,591.25 Total $105,912.50 Plus Interest since 6/2008
>
> PO#19 (6) Water Purification Units @$39,672.57 Total $238,035.42 Plus Interest since 6/2008
>
> Water Purification Units @$39,672.57 Total $634,761.12 Plus Interest since 6/2008

(First amend. compl.)

20. Thereafter, on 14 July 2009, the government filed a reply to appellant's response to the government's motion to strike (gov't reply br. re mot. to strike). The government also filed a motion to dismiss for lack of subject matter jurisdiction dated 21 July 2009 (gov't mot. to dismiss). In both its reply and motion to dismiss, the government maintains that appellant's opposition to the government's motion for summary judgment and amended complaint raise claims for material breach and supporting claims of waiver, constructive change, interference/failure to cooperate, implied acceptance, and abuse of discretion which were not included in its claim on appeal (gov't reply br. re mot. to strike at 2; gov't mot. to dismiss at 2).

21. On 17 August 2009, appellant filed a response to the government's motion to dismiss. Seemingly in recognition that appellant does not have an absolute right to

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[6] Appellant's first amended complaint asserts that in accordance with FED. R. CIV. P. 15(a), "[t]he Government has not filed a responsive pleading, and therefore the Appellant has an absolute right to amend its complaint." However, appellant's assertion is incorrect. The government filed its answer with this Board on 13 January 2009.

amend its complaint, in the response, appellant pleads with this Board for leave to file the first amended complaint. The thrust of the response was that appellant was originally a *pro se* litigant and lacked the legal sophistication to properly plead its appeal, further, to deny the request would cause MACH II even further economic difficulty. (App. response to mot. to dismiss)

DECISION

Motion for Leave to Amend the Complaint

As an initial matter, we grant appellant's motion for leave to amend its complaint. We do this in light of the fact that MACH II was originally a *pro se* litigant and typically *pro se* litigants lack knowledge and experience as to pleadings and justice would not be served if the motion for leave to amend the complaint was denied. We perceive no prejudice to the government.

Motion to Strike Appellant's Response to the Government's Motion for Summary Judgment and Motion to Dismiss for Lack of Subject Matter Jurisdiction

As stated in the facts above, the government maintains that appellant's opposition to the government's motion for summary judgment and amended complaint raise claims for material breach and supporting claims of waiver, constructive change, interference/failure to cooperate, implied acceptance, and abuse of discretion which were not included in its claim; therefore, without first being submitted to the contracting officer for a final decision, the Board lacks jurisdiction over these allegations.

Appellant disputes the government's position, arguing that these are not new claims, but merely additional theories of recovery on the original claim.

The scope of the appeal is determined by the claim originally submitted to the contracting officer for a final decision. The test of whether allegations contained in the complaint were within the scope of the claim is whether or not the pleadings contain operative facts which were first presented to the contracting officer in the claim. If the operative facts presented in the pleadings are essentially the same as those in the claim, we have held that they are within the scope of the appeal. *Contel Advanced Systems, Inc.*, ASBCA No. 49073, 02-1 BCA ¶ 31,809 at 157,149; *Trepte Constr. Co.*, ASBCA No. 38555, 90-1 BCA ¶ 22,595 at 113,385-86. This tenet is equally true in situations where the appellant is advancing a new theory of recovery. We have jurisdiction on the basis that allegations which do not alter the nature of the original claim, but present a new legal theory of recovery based on the same operative facts as the claim, do not constitute a new claim. *See Environmental Safety Consultants, Inc.*, ASBCA No. 47498, 00-1 BCA ¶ 30,826 at 152,146-47.

More recently we have stated:

> We are not limited, in determining the sufficiency of a claim, to the claim document. *General Construction Co., a Div. of Wright Schuchart, Inc.*, ASBCA No. 39983, 01-1 BCA ¶ 23,314 at 116,917. We may examine the totality of the correspondence, as well as the continuing discussions, between the parties. *Id.; Mendenhall v. United States*, 20 Cl. Ct. 78, 83 (1990). Because we may do so to determine the sufficiency of the claim, we may also do so to decide whether [the] complaint goes beyond the scope of its claim.

Vibration and Sound Solutions Limited, ASBCA No. 56240, 09-2 BCA ¶ 34,257 at 169,270.

While neither appellant's claim nor its complaint specifically used the words "material breach," "waiver," "constructive change," "interference/failure to cooperate," "implied acceptance," or "abuse of discretion" to describe the government's actions in administering the contract, the allegations presented paint a picture of contract mismanagement and none of these terms represent new claims. Given the history and subject matter of the correspondence between MACH II and the contracting officer, as well as MACH II's claim, none of these allegations should come as a surprise to the contracting officer. Therefore, as a legal theory of recovery, we find that the operative facts of the appellant's claim on DO0019 have not changed and will allow appellant to pursue its "breach" theory of recovery. This is true only with regard to appellant's claim based on DO0019 in the amount of $238,035.42. However, appellant's response to the government's motion for summary judgment, as well as Count I of the amended complaint contain a new claim to the extent that these filings seek breach of contract damages which are more than the payment of invoices under DO0019. Appellant's allegation of damages "in an amount not less than $978,709.04" together with Mr. Holmich's supporting affidavit containing claims for $105,912.50 on DO0017, and $634,761.12 for miscellaneous water purification units, are indisputably not within the scope of MACH II's 11 July 2008 claim.

In compliance with the Contracts Disputes Act (CDA), "All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision." 41 U.S.C. § 605(a). The CDA does not define the word "claim." FAR 2.101 defines "claim" to mean "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract...." It is well settled that "[t]he linchpin of our

jurisdiction over a contractor claim under the CDA is the submission of the claim to the CO for decision." *Bruce E. Zoeller,* ASBCA No. 55654, 07-1 BCA ¶ 33,581 at 166,347.

The certified claim which launched this appeal was in the sum certain of $238,035.42 believed by MACH II to be owed by the government on DO0019 of this contract. However, appellant's amended complaint now seeks an uncertain sum, described as "not less than $978,709.04." As expressed in appellant's affidavit to the amended complaint, the sum of $978,709.04 includes the sum certain of $238,035.42 related to DO0019. In addition, $105,912.50 is asserted to be owed on DO0017, and $634,761.12 is maintained to be owed on water purification units not specifically linked to a delivery order. These additional sums are not connected to the parties' current dispute over whether or not unsigned DO0019 established a legal obligation between the parties.

Therefore, that portion of MACH II's amended complaint, wherein it alleges breach of contract damages in an amount not less than $978,709.04, together with the accompanying affidavit of Walter Holmich, are stricken from the amended complaint. This is without prejudice to the contractor submitting a claim, or claims, to the contracting officer that comply with the requirements of the CDA, 41 U.S.C. § 605.

Motion for Summary Judgment

The government's argument is straightforward and concise: "[P]roposed delivery order 0019 was never issued as a final, valid delivery order. Appellant, therefore, is not entitled to payment as a matter of law." (Gov't mot. for summary judgment at 4)

Appellant disagrees, asserting its chief argument that "through its course of dealings with Appellant in accepting various shipments without ever signing block 24, the government *sua sponte* waived the requirement. Due to this prior course of dealing, the Appellant reasonably relied upon the government's waiver, and in good faith nonetheless delivered various shipments to the government at great expense to Appellant." (App. resp. to mot. for summary judgment at 3)

In support of its argument in opposition to the government's motion for summary judgment, appellant, through its president, Walter Holmich stated by an unsworn statement that the contracting officer never signed block 24 of the DD Form 1155 for DOs 0007, 0011, 0015, 0016, 0017, 0018, 0019, nevertheless, the government accepted various shipments (app. resp. to mot. for summary judgment at 1-3, 8). As noted in SOF ¶¶ 4, 14, the record contains signed DOs for DOs 0007, 0015, 0016, 0017, and 0018.[7]

[7] The documents for DO0011 have been lost, *see* n.1 *supra*.

Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one that may affect the outcome of the decision. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). The moving party bears the burden of establishing the absence of any genuine issue of material fact and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment. *Mingus Constructors, Inc.*, 812 F.2d at 1390-91.

Appellant cites in its original pleading to the Federal Acquisition Regulation (FAR), Subpart 4.101, entitled CONTRACT EXECUTION, which states: "Only contracting officers shall sign contracts on behalf of the United States. The contracting officer's name and official title shall be typed, stamped, or printed on the contract. The contracting officer normally signs the contract after it has been signed by the contractor.…" In citing the FAR, appellant emphasizes the word "normally" and maintains that the requirements for contract execution have been observed as there is no requirement that delivery orders be signed prior to shipment. (Compl. at 7)

The government counters by pointing to FAR 52.216-21(b) for the instruction that "[d]elivery or performance shall be made only as authorized by orders issued in accordance with the Ordering Clause…" and that the Ordering Clause, found at FAR 52.216-18(a) states: "Any supplies to be furnished under this contract shall be ordered by issuance of delivery orders…." (Gov't mot. for summary judgment at 4-5; SOF ¶¶ 2, 3)

While the contract does not specifically require the contracting officer's signature on delivery orders, we agree with the government that the Ordering Clause requires the issuance of a delivery order, which in the case of DO0019, never occurred. As discussed in SOF ¶ 5, the disputed delivery order was sent to the contractor with the notice that it was a "proposed Delivery Order" and also admonished MACH II that "[w]ork performed prior to receipt of a Delivery Order is at the risk of the contractor." The fax also recited that MACH II's "acceptance is required before an order can be awarded" and that the contracting officer would "return a signed order." Therefore, as the contracting officer never signed the proposed delivery order, DO0019 was never issued. Appellant recognized this fact when on 19 April 2004, it requested that the contracting officer sign DO0019 (SOF ¶ 6).

However, appellant now argues that despite all evidence to the contrary, the contracting officer waived the requirement that the delivery order be signed (app. resp. to mot. for summary judgment at 3-5).

In *General Dynamics C4,* ASBCA No. 54988, 08-1 BCA ¶ 33,779 at 167,192, we discussed the legal theories of waiver and estoppel, as follows:

> "[A] consistent course of . . . waiving otherwise clear contract requirements, knowledge of which may reasonably be imputed to both parties, may nullify such requirements." *Moore Service, Inc*., ASBCA No. 27436, 83-1 BCA ¶ 16,401 at 81,547. Waiver is "an intentional relinquishment of a known right. An intent to waive a contractual right must be manifest in a party's failure to object." *United Technologies Corp*., ASBCA No. 46880 *et al*., 95-1 BCA ¶ 27,592 at 137,482 (citations omitted). To establish estoppel against appellant, the Navy must show that appellant knew the facts; that it intended that its conduct be acted upon or acted such that the Navy had a right to believe it was so intended; the Navy was ignorant of the true facts; and the Navy relied upon appellant's conduct to its injury. *Rel-Reeves, Inc. v. United States*, 534 F.2d 274, 296-97 (Ct. Cl. 1976); *United Technologies Corp*., *supra*, 95-1 BCA at 137,481.

The undisputed facts reveal that at least four years before MACH II delivered the six water purifiers in May of 2008, it was fully aware that a signed delivery order was necessary to effectuate the order and that the government had not waived this requirement. As confirmation that the requirement had not been waived or that it was willing to rely upon a supposed waiver, in MACH II's 19 April 2004 correspondence to the government, the contractor stated that it was prepared to immediately deliver the six units called for by DO0019, and requested that the CO send it a signed copy of the DO as soon as possible. (SOF ¶ 6) Therefore, as MACH II requested the signed delivery order prior to delivery, it cannot now claim that the requirement had been waived and that it relied upon the waiver to its detriment. MACH II's allegation of contract waiver is without merit. Further, under *General Dynamics,* MACH II would also fail under a theory of estoppel against the government based on the fact that MACH II knew of the requirement that the delivery order be signed before it became effective, and it was not ignorant of this fact as demonstrated in its 19 April 2004 correspondence.

CONCLUSION

The government is entitled to judgment as a matter of law. The motion for summary judgment is granted. The appeal is denied.

Dated: 12 January 2010

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 concur

MONROE E. FREEMAN JR.
Administrative Judge
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. 56630, Appeal of MACH II, rendered in conformance with the Board's Charter.

Dated:

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