ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeal of -- | ) | |
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| Alenia North America, Inc. | ) | ASBCA No. 57935 |
| | ) | |
| Under Contract No. FA8504-08-C-0007 | ) | |

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APPEARANCES FOR THE GOVERNMENT: Alan R. Caramella, Esq.
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OPINION BY ADMINISTRATIVE JUDGE GRANT
ON APPELLANT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

Appellant Alenia North America, Inc. (Alenia) has moved to dismiss the appeal without prejudice for lack of jurisdiction, on the basis that Alenia never filed a claim as to the technical data rights which are the subject of this appeal. The government opposes the motion, asserting that correspondence from Alenia does constitute a claim under the Contract Disputes Act (CDA) of 1978, 41 U.S.C. §§ 7101-7109, and 10 U.S.C. § 2321 (Section 2321), Validation of Proprietary Data Restrictions. In response to supplemental briefing requested by the Board, the government also asserts that the Board has jurisdiction because a government letter entitled "PCO Final Decision" constituted a government claim, from which Alenia timely appealed. Alenia denies that the purported final decision constitutes a government claim. For the reasons stated below, Alenia's motion is denied.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 29 September 2008, the United States Air Force (USAF or government) and Alenia entered into letter Contract No. FA8504-08-C-0007 for Alenia to provide eighteen refurbished non-commercial G222 aircraft and sustainment support to the Afghanistan National Army Air Corps (ANAAC). The letter contract was definitized as Contract No. FA8504-08-C-0007-PZ0001 on 23 April 2009. (R4, tabs 1, 3, 6)

2. Neither the letter contract nor the definitized contract contained any FAR or DFARS data rights clauses (R4, tabs 1, 3). The letter contract did include FAR clause 52.233-1, DISPUTES (JUL 2002), which remained in effect for the definitized contract. That clause contained the standard FAR definition of "claim" as "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 this contract." (R4, tab 1 at 39, tab 3 at 126)

3. Contract Line Item No. (CLIN) 0006 of the contracts, entitled TECHNICAL SUPPORT (PUBLICATIONS AND MANUALS), required delivery of a set of technical publications with each aircraft, as specified in the Statement of Work (SOW) (R4, tabs 1, 3, 6 at 15 § 1.1.2.15.1). Section 1.1.2.15.1 of the SOW established these publications as item A004 of the Contract Data Requirements List (CDRL) (R4, tab 6 at 15). For both the letter contract and the definitized contract, CDRL item A004, Block 9, "DIST STATEMENT" (Distribution Statement) was marked "C", with the additional note that distribution was to be "as described in the DI-TMSS-81670A" (R4, tab 2 at 46, tab 4 at 132). As reflected on other CDRL items, distribution under Distribution Statement C is "authorized to US Government agencies and their contractors" (*see* R4, tab 2 *passim*, tab 4, *passim*).

4. According to Alenia, the first aircraft and accompanying publication were delivered in September 2009, and as of April 2012, 17 additional aircraft, each with a set of technical publications, had been delivered (compl. ¶ 16). Each publication contained the following restrictive marking:

> The content of this publication is intellectual property of Alenia Aeronautica S.p.A., a Finmeccanica Company. It must not be used for any purpose other than for which it is supplied. It must not be disclosed to unauthorized persons or reproduced without written authorization from the owner of the copyright. C 2009 Alenia Aeronautica S.p.A. – A Finmeccanica Company. All rights reserved.

(Compl. and answer ¶ 14)

5. On 20 April 2011, approximately a year and a half after Alenia's delivery of the first aircraft and technical publication, the government sent Alenia a letter objecting to the restrictive markings. The letter stated that it "serves to advise ANA [Alenia] that the USAF asserts Government Purpose Rights to technical data." The letter also stated that "[s]hould ANA [Alenia] choose to challenge the USAF claim of Government Purpose Rights, the specific grounds for asserting rights to uphold restrictive markings, along with supporting documentation, must be submitted to the Contracting Officer within sixty days of the date of this letter." (R4, tab 27)

6. Alenia replied to this letter on 23 May 2011. (The letter is actually undated but is referred to by both parties by a 23 May 2011 date, adopted here.) Alenia stated it did not agree with the government's assertion of Government Purpose Rights, and provided background and supporting facts and argument for its view that "there is no basis by which the USAF can claim Government Purpose Rights." Alenia concluded by asserting that the restrictive legend was "fully consistent" with the contract. (R4, tab 28 at 623, 628)

7. In July and August of 2011, the government advised Alenia that it needed additional time to "deliver a final PCO decision in the matter" (R4, tabs 29, 30). Alenia responded on 29 August 2011 noting that, given the government's challenge to Alenia's data rights assertion and Alenia's disagreement with that position, "the propriety of the Alenia data markings are in dispute" and asking the government not to destroy files or documents relating to the "contract and disputed data" (R4, tab 31).

8. On 21 October 2011, the contracting officer (CO) issued a "PCO Final Decision," stating that the decision was in accordance with DFARS clause 252.227-7037(g)(2)(ii) (VALIDATION OF RESTRICTIVE MARKINGS ON TECHNICAL DATA). The CO noted that reference to the DFARS clause was appropriate even if it was not in the contract, pursuant to the Christian Doctrine. The "PCO Final Decision" stated that it served as a final decision, argued that the government was buying data rights, not just technical publications, asserted that Alenia never identified restrictive data in its proposal, and reminded Alenia that the contract attachments specified that "Distribution Statement C" would be applied to all deliverables (allowing the government to distribute publications to other agencies and contractors). The final decision asserted that the government had unlimited data rights to the technical manuals, and directed Alenia to remove the restrictive statement within 90 days. The final decision directed Alenia to notify the government within 90 days if Alenia intended to file suit in court:

> Should Alenia North America choose to challenge this PCO final decision in the United States Claims Court [sic], they must notify the Government PCO within 90 calendar days of their intent to file a claim. If Alenia North America fails to appeal, file suit, or provide a notice of intent to file suit to the Contracting Officer within the 90 calendar day period, the Government may cancel or ignore the restrictive markings, and the failure of Alenia North America to take the required action constitutes agreement with the above Government action.

(R4, tab 32)

9. On 2 November 2011, Alenia provided the government with its Notice of Intent to Appeal PCO Final Decision, citing FAR 33.211 (R4, tab 33). On 13 January 2012, Alenia appealed the 21 October 2011 final decision to the ASBCA, stating the decision was factually and legally incorrect.

## THE PARTIES' ARGUMENTS

Alenia's motion raises the issue of whether there is either a contractor claim or a government claim, or both. Alenia asserts there is no claim of either type, and thus the Board lacks jurisdiction (app. mot. at 3; app. supp. br. at 14). The government asserts that there is both a valid contractor claim, or alternatively, a valid government claim and thus the Board has jurisdiction (gov't opp'n at 1-2; gov't supp. br. at 12). We address the latter issue first, as it is dispositive.

Alenia argues that the final decision is not a government claim because there was no dispute as of that date as to the government's assertion of *unlimited* data rights (as opposed to *government purpose* data rights). Citing two decisions issued before *Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995) (en banc), Alenia asserts that, because there was no pre-existing dispute on this point, the final decision was premature and thus does not constitute a valid government claim. (App. supp. br. at 13-16; app. supp. reply br. at 10) Alenia also argues that Section 2321 and DFARS 252.227-7037(e)(3) (though not in the contract) treat disputes as to restrictions on technical data as *contractor* claims, not *government* claims. (App. supp. br. at 12, 16 n.11; app. supp. reply br. at 11 n.5) The government contends that the CO's final decision is a government claim, because it meets the FAR definition of "claim." The government argues that the issue of *what type* of rights the government had in the technical data *was* clearly in dispute at this point, but that in any event, there is no "in dispute" requirement for non-routine assertions as to contract adjustments or interpretations or other relief relating to the contract. (Gov't reply br. at 12-14; gov't supp. reply br. at 9-10)

## DECISION

The CDA requires that government claims be the subject of a CO's final decision. 41 U.S.C. § 7103(a)(3) (government claims "shall be the subject of a written decision by the contracting officer"); *Hanley Industries, Inc.*, ASBCA No. 56976, 10-1 BCA ¶ 34,425 at 169,929. The CO issued what she styled as a "PCO Final Decision" (SOF ¶ 8). The question for resolution here is whether that letter constitutes a valid government claim and final decision. For the reasons stated below, it does.

The definition of a "claim" is the starting point in this analysis. The CDA does not define the term; rather, the definition is contained in the FAR:

> Claim means 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.

FAR 2.101. This same definition was also included in the Disputes clause, contained in the parties' contracts (SOF ¶ 2). It clearly allows government claims in all three categories—monetary claims, the adjustment or interpretation of contract terms, or other relief arising under or relating to a contract—if there is a written demand or assertion to that effect as a matter of right.

The Federal Circuit has held that the FAR definition of claim should be read broadly. *Todd Construction, L.P. v. United States*, 656 F.3d 1306, 1311 (Fed. Cir. 2011) ("the broad language of the...FAR provision supports a broad reading of the term 'claim'"). The Court also noted that the legislative history of the CDA supports a broad reading of the term "claim." Further, the Court noted that the "relating to" language of the third part of the FAR definition "itself is a term of substantial breadth." *Id.* at 1312. A claim is "related to" a contract if it has "some relationship to the terms or performance of a government contract." *Id.* at 1312 (citing *Applied Cos. v. United States*, 144 F.3d 1470, 1478 (Fed. Cir. 1998)).

In this case, the "PCO Final Decision" is a written statement asserting unlimited data rights, and explaining the government's rationale for that position. The decision identified the contract attachments containing Distribution Statement C that address future distribution and use; the contract also contained a specific CLIN for the technical publications (SOF ¶ 3). Whether and what technical data rights were included as part of that CLIN is a matter of contract interpretation of that CLIN, thereby making the government's assertion of unlimited data rights a claim. Alternatively, if the focus is on the government's direction to remove restrictive markings, the matter would certainly be something "related to" the performance of this contract. *Todd*, 656 F.3d at 1314 (a "claim need not be based on the contract itself (or a regulation that can be read into the contract) as long as it relates to" performance under the contract); *see also Garrett v. General Electric Co.*, 987 F.2d 747, 749 (Fed. Cir. 1993) (a government directive to the contractor to correct or replace defective engines pursuant to the Inspection clause "constitutes 'other relief' within the FAR's third category of 'claims'"). The government's assertion in the PCO's final decision that it had unlimited data rights in the technical manuals constitutes a nonmonetary claim over which the Board has jurisdiction.

The conclusion that this CO's final decision is a government claim is bolstered by other case law more specifically concerning data rights that parallels and supports this result. In *General Electric Automated Systems Division,* ASBCA No. 36214, 89-1 BCA ¶ 21,195, the contractor appealed from a CO's decision ordering the contractor to remove

restrictive legends from technical data. The government moved to dismiss for lack of jurisdiction, asserting that no money was yet at issue and the relief sought was effectively in the form of a declaratory judgment or injunction. The Board denied the government's motion and took jurisdiction of the appeal.

Admittedly, the CO's final decision in the present case did not cite to the CDA or the Disputes clause, and did not contain the CDA notice of appeal rights (contrary to the government's argument, gov't supp. br. at 14). Rather, it simply directed the contractor to advise the CO if the contractor planned to appeal to the "Claims Court." (SOF ¶ 8) However, this appeal rights omission does not negate the otherwise valid final decision, and Alenia did in fact file a timely appeal to this Board. *Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990) ("The decision is no less final because it failed to include boilerplate language usually present for the protection of the contractor."); *see Decker & Co. v. West*, 76 F.3d 1573, 1579-80 (Fed. Cir. 1996) (failure to include appeal rights in final decision is immaterial when contractor's determination concerning appeal is unaffected by that defect).

Alenia's argument that there is no government claim because there was no dispute as to the *specific type* of data rights involved is not persuasive. First, there definitely was a dispute about data rights at the time of the final decision, even if the exact type of data rights in question was still undetermined (SOF ¶¶ 5, 6, 7, 8). Second, even if there had not been a dispute, the government is correct that the Board would still have jurisdiction over the government's claim anyway. An "in dispute" requirement only applies to routine requests for payment, not *non-routine* requests for payment or other matters. *Reflectone,* 60 F.3d at 1583; *TRW, Inc.,* ASBCA Nos. 51172, 51530, 99-2 BCA ¶ 30,407 at 150,331 ("A pre-existing dispute is not a prerequisite for a request for contract interpretation to constitute a claim."). The cases Alenia cites to the contrary pre-date this precedent and in any event are distinguishable (app. supp. br. at 13).

Finally, there is no basis to conclude that this data rights dispute is premature or would involve unnecessary intrusion by the Board into matters of contract administration. The matter contested here involves "actual, non-academic consequences for the parties" and thus the Board has jurisdiction. *Donald M. Lake, d/b/a/ Shady Cove Resort & Marina*, ASBCA No. 54422, 05-1 BCA ¶ 32,920 at 163,072; *see Hanley Industries,* 10-1 BCA ¶ 34,425 at 169,930.

We have carefully considered the arguments made by Alenia as to Section 2321(h) and DFARS 252.227-7037(e)(3) (app. supp. br. at 12, 16 n.11; app. supp. reply br. at 10-11), and do not find anything controverting the CDA provisions concerning government claims. Both Section 2321(h) and DFARS 252.227-7037(e)(3) address contractor claims; neither precludes the government from filing its own claim, as allowed by the CDA.

Because the CO's final decision constitutes a government claim over which the Board has jurisdiction, there is no need to address whether Alenia submitted a claim, or address the government's alternative arguments if Alenia's motion were granted (dismissal for lack of jurisdiction with prejudice, or dismissal without prejudice but with re-instatement required within 90 days).

CONCLUSION

For the reasons stated above, Alenia's motion to dismiss for lack of jurisdiction is denied.

Dated: 26 March 2013

Elizabeth M. Grant

ELIZABETH M. GRANT
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

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. 57935, Appeal of Alenia North America, Inc., rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals