ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
The Boeing Company	)	ASBCA No. 58587
	)	
Under Contract No. F33657-02-D-0009	)	

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OPINION BY ADMINISTRATIVE JUDGE MELNICK
ON APPELLANT'S MOTION TO DISMISS AND RESPONDENT'S MOTION
TO SUBSTITUTE CONTRACT NUMBER

This appeal involves a government claim against The Boeing Company in which it contends that the method used by Boeing to allocate its corporate costs for the procurement of non-production goods is inconsistent with the Cost Accounting Standards (CAS). The government's decision identified one representative contract, which in fact was not a contract with Boeing. Boeing appealed from the contracting officer's decision, but now seeks the dismissal of its appeal on the ground that the claim's failure to specifically identify a contract with Boeing dictates that it is invalid. The government opposes and requests that we substitute another contract number as a representative contract between it and Boeing. We deny Boeing's request for dismissal and grant the government's motion to substitute.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. Boeing and the government are parties to numerous contracts (compl. and answer ¶ 3). Boeing is organized into two primary business units. One is its commercial airplane business and the other is its defense, space, and security business. (Compl. and answer ¶ 7) The entire corporation is supported by an internal unit known as the Shared Services Group (SSG), which provides non-production goods and services to the company (compl. ¶¶ 7-8; gov't br. at 2-3). Beginning in 2003, SSG used a "workforce

served" base to allocate its costs related to the procurement of non-production goods (compl. and answer ¶ 10).

2. At some point in time, the Defense Contract Audit Agency (DCAA) issued a draft Statement of Condition and Recommendation finding that SSG's workforce served allocation base was inconsistent with CAS 418-40(c) which requires that "Pooled costs shall be allocated to cost objectives in reasonable proportion to the beneficial or causal relationship of the pooled costs to cost objectives" resulting in Boeing over-allocating SSG's costs to its defense business units. SSG responded to that draft on 5 October 2006. (Compl. ¶ 19; R4, tab 2; app. supp. R4, tab 34) DCAA issued an audit report on 6 December 2006 finalizing its prior draft's conclusions (compl. ¶ 21; R4, tab 3). On 14 December 2006, the divisional administrative contracting officer (DACO) provided SSG with a copy of the audit report, and notified it of his initial determination that the practice cited in the report did not comply with CAS 418. He requested comments about the report and the materiality of any cost impact. (Compl. ¶ 26; app. supp. R4, tab 35)

3. Various communications followed between SSG and the government related to SSG's CAS compliance (compl. ¶¶ 27-32; R4, tab 4). On 23 April 2008, the DACO issued a final determination that SSG's workforce served allocation was not in compliance with CAS 418 (compl. ¶ 33; R4, tab 4). On 20 June 2008, the DACO requested SSG to provide a General Dollar Magnitude (GDM) cost impact of the workforce served allocation, "requir[ing] SSG to calculate the cost impact for every CAS covered contract and subcontract" (R4, tab 5). More communications about the matter followed between 2008 and 2010, with SSG proposing revisions in its practices and providing GDMs of the cost impact of a change upon Boeing's government contracts (compl. ¶¶ 34-37, 39; R4, tabs 6-12; app. supp. R4, tabs 47-48).

4. On 18 December 2012, the corporate administrative contracting officer issued a final decision, asserting a claim against Boeing resulting from SSG's workforce served allocation of costs. The decision refers to DCAA's 6 December 2006 audit, the DACO determination of 23 April 2008, and Boeing's GDMs. It reiterates the finding that SSG was not in compliance with CAS 418. It increased the principal amount at issue from approximately $16 million discussed in Boeing's GDMs to $17,080,820. With interest the claim totals $21,370,072. (R4, tab 16) The decision states that a "representative contract affected by the CAS noncompliance is Contract Number F33657-02-D-0009" (*id.* at 3).

5. On 15 March 2013, Boeing appealed the government's decision to this Board. Boeing's 17 April 2013 complaint alleges that it is a party to Contract No. F33657-02-D-0009 (compl. ¶ 3). However, the government denied that allegation in its answer (answer ¶ 3). The parties now agree that Boeing is not a party to that contract. Boeing therefore moves to dismiss the appeal for lack of jurisdiction, arguing that the

final decision's failure to identify a contract between Boeing and the government invalidates it.

DECISION

Under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109, a government claim such as this must be "against a contractor relating to a contract." 41 U.S.C. § 7103(a)(3); *see also Admiralty Constr., Inc. v. Dalton*, 156 F.3d 1217, 1220 (Fed. Cir. 1998). The government's claim is against Boeing, but the one contract the decision identifies as a "representative contract" is not between the government and Boeing. For this reason, Boeing contends the decision is invalid.

Boeing cites heavily to *Environmental Chemical Corp.*, ASBCA No. 53958, 03-1 BCA ¶ 32,254 at 159,497, where the Board said that "a CDA claim must identify the contract, contracts, or test contract under which the dispute arises." In that appeal, appellant had corresponded with DCAA about whether a subchapter S corporation's state income taxes were allowable costs. Appellant then sought a final decision on the subject, which the contracting officer refused to issue because appellant had not identified any contracts. After appellant forwarded its notice of appeal to this Board on a deemed denial basis, DCAA notified it that reimbursement of state income taxes was disapproved for certain contracts. In dismissing the appeal for lack of jurisdiction due to the claim's failure to identify any contracts, the Board distinguished the matter from "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." *Id.*

The government's claim here does not purport to relate to a single contract with Boeing. It relates to Boeing's method of allocating costs between its business units, and therefore the propriety of costs it charged to all of its defense contracts subject to CAS 418. Boeing does not contend otherwise. Nor does Boeing suggest that it has not identified the relevant contracts. Indeed, Boeing communicated for years with the government about SSG's cost allocation and impact upon its government contracts, providing the government with GDMs regarding those impacts, without indicating it had any difficulty identifying the relevant contracts.

It is irrelevant that the one contract number the government cited in its claim is not with Boeing. Nothing in the CDA requires the government's claim to identify any contract by number, only that the claim relate to a contract. This claim clearly relates to contracts with Boeing, and it is also clear that Boeing knows what they are. Here, Boeing had prior or concurrent information about the government's claim, the contracts affected, and knowledge of the sums at issue, though the government has marginally increased the claim above Boeing's own estimates. For these reasons, this appeal is less like *Environmental Chemical Corp.*, and much more like *Bath Iron Works,* ASBCA No. 32770, 88-1 BCA ¶ 20,438 at 103,357-58. There, the Board permitted a contractor to

appeal a denial of its claim regarding the allocability of certain indirect costs to all of the contractor's flexibly priced contracts "as a claim relating to those contracts," when it was clear the government could address the matter without receiving a list of the relevant contracts. *See also Sparks v. United States,* 36 Fed. Cl. 488, 491 (1996) (denying a government motion to dismiss for failing to accurately identify contracts when their identity could be determined and the government "failed to show that it ever questioned either the existence of...contracts or the identity of the particular contracts involved in [the] claim"). Because the government's claim relates to contracts with Boeing, and Boeing either knows or can identify the contracts the claim relates to, the claim is valid. This approach comports with the CDA's goal of providing expeditious resolution of disputes. *See Kinetic Builder's Inc. v. Peters,* 226 F.3d 1307, 1314 (Fed. Cir. 2000).

Given that the parties agree that Contract No. F33657-02-D-0009 is not a contract between Boeing and the government, the government requests that we substitute Contract No. N00019-04-C-3146 as the representative contract for the appeal. Boeing does not deny that it is a party to that contract and therefore the government's request is granted.

CONCLUSION

Boeing's motion to dismiss for lack of jurisdiction is denied. The government's motion to substitute Contract No. N00019-04-C-3146 is granted. From now on the appeal's caption shall contain that contract number.

Dated: 3 December 2013

MARK A. MELNICK
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

OWEN C. WILSON
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. 58587, Appeal of The Boeing Company, rendered in conformance with the Board's Charter.

Dated:

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