

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of - )  
 )  
Monbo Group International ) ASBCA No. 63385  
 )  
Under Contract No. 47QRAA-19-D-0007 )  
Task Order No. N6883620F0132 )

APPEARANCE FOR THE APPELLANT: Ms. Dee Monbo  
President

APPEARANCES FOR THE GOVERNMENT: Craig D. Jensen, Esq.  
Navy Chief Trial Attorney  
Lance P. Fortney, Esq.  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TAYLOR

Monbo Group International (Monbo or appellant) seeks monetary damages in the amount of \$92,000 from the Department of the Navy (Navy or the government) resulting from the Navy's alleged breach of a contract. The contract was for qualified clerical and administrative services. The Navy moves to dismiss the appeal for lack of subject matter jurisdiction pursuant to ASBCA Rule 7(b), contending appellant failed to submit its claim to the contracting officer in accordance with the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109. In the alternative, the Navy moves to dismiss the appeal for failure to state a claim. The Navy's motion to dismiss the appeal for lack of subject matter jurisdiction and failure to state a claim is granted.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

On March 5, 2020, the Navy awarded firm-fixed price Task Order No. N68836-20-F-0132 (the task order) under Contract No. 47QRAA19D0007 (the contract) to Monbo (R4, tab 1). The task order's original total award amount was \$46,000 (*id.* at 0003). The task order required Monbo to provide a qualified secretary/administrative assistant to perform clerical and administrative services for the executive department of the Navy's Center for Explosive Ordnance Disposal unit in Panama City Beach, Florida (*id.* at 0005). The task order's initial period of performance was from March 28, 2020, through March 27, 2021 (*id.*) The task order included one base year and three one-year options, each priced at \$46,000 (*id.* at p 0005-07).

The contract included FAR 52.217-9, OPTION TO EXTEND THE TERM OF THE CONTRACT (MAR 2000) (*id.* at p.0025-26). This clause gave the government

the option to extend the contract terms by written notice for a period not exceeding 48 months. The clause stated:

- (a) The Government may extend the term of this contract by written notice to the Contractor within **5 days** provided that the Government gives the Contractor a preliminary written notice of its intent to extend at least **10 days** before the contract expires. The preliminary notice does not commit the Government to an extension.
- (b) If the Government exercises this option, the extended contract shall be considered to include this option clause.
- (c) The total duration of this contract, including the exercise of any options under this clause, shall not **exceed 48 months**.

(*Id.* at p. 0025-26) (emphasis in original)

On March 25, 2021, the Navy exercised Option Year One via Modification No. P00001 pursuant to FAR 52.217-9, increasing the total contract price from \$46,000 to \$92,000 (R4, tab 3). Option Year One's performance period was from March 28, 2021, to March 27, 2022 (*id.* at 0142).

On or about November 19, 2021, appellant's employee performing the work under the contract resigned from her position (R4, tab 4 at 0160). From on or about November 8, 2021, through March 21, 2022, Monbo provided the resumes for various replacement candidates to the Navy (*id.* at 0160-300). The Navy determined none of the candidates were qualified for the position (R4, tab 5 at 0391). As a result, the position remained unfilled from November 19, 2021, through the end of the contract (R4, tab 4 at 0213).

On March 2, 2022, Mr. Tim Vonderharr, the Navy's Logistics Director at the U.S. Navy, Center for Explosive Ordnance Disposal and Diving, notified appellant via an email that the Navy would not be exercising the next option year on the contract (*id.*). As a result, the contract ended at the end of the Option Year One performance period on March 27, 2022.

On March 17, 2022, appellant sent the Navy contracting officer a letter in which it alleged the Navy had breached the contract (app. supp. R4, tab 10). In that letter, appellant stated:

[T]his letter serves to notify the Navy that the Navy has breached Contract No. 47QRAA19D0007, which states that NAVSUP must accept Administrative Assistant staff furnished by Monbo Group International. We have provided Jeffrey Empson who exceeds all of the Navy's job requirements and the Navy has refused to permit him to work.

The Navy has four days from the date of this letter to cure this breach.

(*Id.*)

Appellant's March 17 letter did not mention the Navy's decision not to exercise the next option year on the contract.

On March 28, 2022, appellant sent a letter entitled "Notice of Claim" to the Navy contracting officer (app. supp. R4, tab 3). The letter indicated it was a "Notice of Claim as authorized by the Contract Disputes Act of 1978" (*id.* at 3). Appellant's claim letter referenced its March 17, 2022, breach of contract notice and indicated the Navy failed to "cure the breach" (*id.*). The letter further stated:

As a result, we are issuing this Notice of Claim as authorized by the Contract Disputes Act of 1978. Monbo Group International is entitled to a claim for \$34,500.00 for the NAVSUP Fleet Logistics Center's breach of the contract dated March 5, 2020, for Administrative Support Services for the Department of Navy/NAVSUP Fleet Logistics Center under RFP N6883620Q0079.

(*Id.*)

The alleged referenced breach appears to be the Navy's failure to approve Monbo's proposed administrative staff candidate, as referenced in its March 17, 2022, letter. The "Notice of Claim" indicated the letter constituted Monbo's demand for payment of its claim in the amount of \$34,500 and requested a contracting officer's final decision (*id.*). Appellant's claim letter included a section entitled "Supporting Calculations for Claim" (*id.* at 4). Appellant calculated its \$34,500 claim based on its alleged "Lost Profits" for the three option years (*id.*). Appellant subsequently filed a corrected claim calculation (*id.* at 5). The corrected claim calculation changed the "Gross Revenue Lost" figure for Option Year 1 but did not change the total claim amount of \$34,500 (*id.*). The Navy did not issue a final decision on the claim.

On April 11, 2022, Monbo submitted its final invoice on the contract in the amount of \$15,400 for the remainder of Option Year 1 (R5, tab 4 at 0324). The Navy paid Monbo for the invoice on April 15, 2022 (*id.* at 0323). Monbo received full payment for its performance under the contract.

On August 22, 2022, appellant appealed the Navy's deemed denial of its claim to the Board. In its complaint, appellant seeks to recover \$92,000 plus interest for breach of contract (compl. ¶ 1). Appellant asserts, "[t]he claim is that NAVY did not exercise Option Year 3 in accordance with the terms of the Contract" (compl. ¶ 3). Appellant also states that the Navy "failed to exercise Option Year 3" in violation of certain contract clauses despite receiving a "Notice to Cure" (compl. ¶ 21). Appellant further asserts in its complaint, "NAVY has refused to exercise the option years under the Contract. Those three option years totaled \$92,000.00" (compl. ¶ 32). Appellant's complaint is unclear whether it seeks recovery for the Navy's failure to exercise Option Year 3 or all three option years. Moreover, appellant's claimed damages of \$92,000 appear to be a compilation of its alleged lost gross revenue under contract option years two and three (app. supp. R4, tab 3 at 5). The complaint does not address nor mention appellant's prior breach allegation that the Navy failed to accept a qualified administrative assistant.

## DECISION

### Lack of Subject Matter Jurisdiction

Appellant bears the burden of establishing the Board's subject matter jurisdiction by a preponderance of the evidence. *K-Con Bldg. Sys., Inc. v. United States*, 778 F.3d 1000, 1004 (Fed. Cir. 2015); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988); *Sweet Star Logistic Serv.*, ASBCA No. 62082, 20-1 BCA ¶ 37,704 at 183,045. In this case, appellant has not met that burden. Accordingly, we do not possess subject matter jurisdiction over this appeal.

The Contract Disputes Act states, "[e]ach claim by a contractor against the Federal Government relating to a contract shall be submitted to the contracting officer for a decision . . . [and] shall be in writing" 41 U.S.C. §§ 7103(a)(1)-(2). Thus, a contractor must first submit a claim to a contracting officer for the Board to have jurisdiction over that claim. *Raytheon Co. v. United States*, 747 F.3d 1341, 1354 (Fed. Cir. 2014). A claim is "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." 48 C.F.R. § 52.233-1 (DISPUTES clause). A claim must provide "a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim." *K-Con Bldg. Sys.*, 778 F.3d at 1005 (quoting *Contract Cleaning Maint., Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987)).

The scope of any subsequent appeal is determined by the claim that was submitted to the contracting officer. *MACH II*, ASBCA No. 56630, 10-1 BCA ¶ 34,357 at 169,673.

The government contends the appeal presents a new claim that was never submitted to the contracting officer (gov't mot. at 4). In its March 28, 2022 "Notice of Claim" letter sent to the contracting officer, appellant asserted a claim for \$34,500 resulting from the Navy's alleged breach of the contract (app. supp. R4, tab 3). The "Notice of Claim" letter does not describe the alleged breach but instead references appellant's prior March 17, 2022 "Notice of Breach of Contract" letter (*id.*). The March 17 letter asserted the alleged breach was the Navy's failure to accept Monbo's proposed administrative staff candidate (app. supp. R4, tab 10). Neither appellant's "Notice of Breach of Contract" nor its "Notice of Claim" letters allege the government breached the contract by failing to exercise the options. Those letters did not put the contracting officer on notice that appellant sought an entitlement based upon the government's decision not to exercise the options. Rather, the alleged breach presented to the contracting officer was the government's failure to accept the proposed administrative staff candidate.

Appellant's complaint, on the other hand, asserts the alleged breach is the Navy's failure to exercise the option years under the contract (compl. ¶¶ 3, 21, 32). The complaint is confusing in that appellant appears to assert the breach is either the Navy's failure to exercise option year three, option years two and three, or possibly all three option years. For example, appellant asserts, "[T]he claim is that NAVY did not exercise Option Year 3 in accordance with the terms of the Contract" (compl. ¶ 3). Appellant later asserts, "NAVY has refused to exercise the option years under the Contract. Those three option years totaled \$92,000.00" (compl. ¶ 32). Appellant's alleged \$92,000 damages calculation, on the other hand, appears to be based upon appellant's "gross revenue lost" for option years two and three (compl. ¶ 40).<sup>1</sup> Regardless of whether the complaint's alleged breach is the Navy's failure to exercise option years one, two, or three, or some combination of those years, the Navy's decision not to exercise the option years was not the basis of appellant's claim to the contracting officer.

Appellant's allegation in its complaint that the government wrongfully failed to exercise the contract options was not previously presented to the contracting officer. Presenting a claim to the contracting officer first is "to create opportunities for informal dispute resolution at the contracting officer level." *Tolliver Grp., Inc. v. United States*, 20 F.4th 771, 776 (Fed. Cir. 2021) (quoting *Raytheon Co.*, 747 F.3d

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<sup>1</sup> While appellant's complaint does not specify how it calculated its \$92,000 damages claim, its supporting calculation included with its March 28, 2022 "Notice of Claim" indicates the claimed "Gross Revenue Lost" for Option Years 2 & 3 is \$92,000 (app. supp. R4, tab 3 at 4).

at 1354). We do not possess jurisdiction over new claims not previously presented to the contracting officer. *Parwan Grp. Co.*, ASBCA No. 60657, 18-1 BCA ¶ 37,082 at 180,495. Here, the contracting officer did not have the opportunity to consider appellant's claim that the government breached the contract by failing to exercise the option years prior to the appeal.

A claim presented to the Board may be considered the same as one previously presented to a contracting officer if it "derives from the same set of common or related operative facts" and "seeks the same or similar relief." *Anthony and Gordon Constr. Co.*, ASBCA No. 61916, 21-1 BCA ¶ 37,887 at 184,001 (quoting *Parwan Grp., Co.* 18-1 BCA ¶ 37,082 at 180,495). In this case, the essential facts underlying the Navy's alleged failure to approve appellant's proposed administrative staff candidates differ from those underlying the Navy's decision not to exercise the contract option years. To establish the government breached the contract by failing to accept a qualified candidate, appellant would first have to show the contract had no such approval requirement, or the proposed candidate was, in fact, qualified, and the government's rejection of that candidate was wrongful. On the other hand, as further discussed below, appellant would have to show the government's decision not to exercise the contract options was somehow motivated by bad faith or was arbitrary and capricious. *Hi-Shear Tech. Corp. v. United States*, 356 F.3d 1372, 1380 (Fed. Cir. 2004). The operative facts underlying the two breach theories are different.

Moreover, appellant's complaint seeks different relief than what it sought in its claim. In its claim, appellant sought breach damages resulting from lost profits for option years one through three. In its appeal, appellant appears to seek its lost gross revenue from option years two and three. Appellant's complaint does not seek the same or similar relief as its claim.

Accordingly, we do not have subject matter jurisdiction over this appeal.

#### Failure to State a Claim

The Navy also moved to dismiss this appeal, in the alternative, due to appellant's failure to state a claim (gov't mot. at 6-8). Dismissal of an appeal for failing to state a claim upon which relief can be granted is appropriate where the asserted facts in the complaint do not entitle the claimant to a legal remedy. *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002); *Halbert Constr. Co.*, ASBCA Nos. 62250, 62251, 21-1 BCA ¶ 37,863 at 183,858. In considering such a motion, "we must assume all well-pled factual allegations are true and indulge in all reasonable inferences in favor of the nonmovant." *Anaheim Gardens v. United States*, 444 F.3d 1309, 1314-15 (Fed. Cir. 2006). The scope of our review is limited to considering the sufficiency of the allegations set forth in the complaint, "matters incorporated by

reference or integral to the claim, items subject to judicial notice, [and] matters of public record.” *A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1147(Fed. Cir. 2014) (citing 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §1357 (3d ed. 2004)). Accordingly, we will look to both the complaint and appellant’s claim in analyzing the motion to dismiss for failure to state a claim upon which relief can be granted. *Halbert Constr. Co.*, 21-1 BCA ¶ 37,863 at 183,858; *Lockheed Martin Integrated Sys., Inc.*, ASBCA Nos. 59508, 59509, 17-1 BCA ¶ 36,597 at 178,281.

In its complaint, appellant alleges the Navy breached the contract by failing to exercise the contract option years two and three.<sup>2</sup> The contract does not require the Navy to exercise any of the option years; instead, it provides the Navy “may” do so. *See Catherine Kurkjian*, ASBCA No. 61154, 20-1 BCA ¶ 37,594 (FAR 52.217-9 found not to require the government to exercise any of its options). As a matter of law, the Navy was under no obligation to exercise the contract options, and its decision to do so is not actionable unless appellant can show the government’s decision is motivated by bad faith or is arbitrary and capricious. *See Hi-Shear Tech. Corp.*, 356 F.3d at 1380 (if the contract is renewable at the government’s option, the government is under no obligation to exercise the option); *see also Smart Way Trans., Servs.*, ASBCA No. 60315, 16-1 BCA ¶ 36,569 at 178,112.

In this case, appellant appears to contend the Navy acted in bad faith in failing to exercise the options because it “continued to be severely short-staffed and continued to need Administrative Assistant services” (compl. ¶¶ 22, 26), the “Navy did not use its best efforts to seek and utilize funding from all sources (compl. ¶¶ 28, 29), and the contracting officer failed to notify appellant that the Navy was not going to exercise the options (compl. ¶ 23). Even if we accept all appellant’s allegations as true, Monbo cannot prevail on its breach claim. *See Kellogg Brown & Root Servs., Inc. v. United States*, 728 F.3d 1348, 1365 (Fed. Cir. 2014) (In deciding a motion to dismiss for failure to state a claim, “the court must accept well-pleaded factual allegations as true and must draw all reasonable inferences in favor of the claimant.”) The Navy had no obligation to exercise option years two and three even if it remained short staffed and had the available funding. Moreover, the contract contained no requirement for the contracting officer to notify Monbo that the contract options would not be exercised.<sup>3</sup>

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<sup>2</sup> In complaint paragraph 32, appellant suggests the Navy failed to exercise any of the option years under the contract. Appellant’s suggestion is incorrect since the Navy exercised option year one (R4, tab 3). We assume appellant contends the Navy breached the contract by its decision not to exercise option years two and three.

<sup>3</sup> The Navy notified Monbo on March 2, 2022, that it was not going to exercise the next option year and that the contract performance period would end on March 27, 2022, albeit that notification came from the Navy’s Logistics Director at the U.S.

Appellant has asserted no facts indicating the government's decision not to exercise the contract options was motivated by bad faith or was arbitrary and capricious. Accordingly, appellant's complaint fails to state a claim upon which relief could be granted and is therefore dismissed.

CONCLUSION

For the reasons set forth above, this appeal is dismissed for lack of jurisdiction and failure to state a claim.

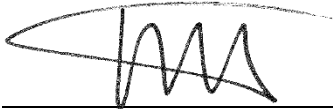
Dated: March 28, 2023



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ARTHUR M. TAYLOR  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur



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RICHARD SHACKLEFORD  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

I concur



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J. REID PROUTY  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

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Navy, Center for Explosive Ordnance Disposal and Diving rather than the contracting officer (R4, tab 4 at 0213).



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. 63385, Appeal of Monbo Group International, rendered in conformance with the Board's Charter.

Dated: March 28, 2023



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PAULLA K. GATES-LEWIS  
Recorder, Armed Services  
Board of Contract Appeals