

Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

DISMISSED IN PART FOR LACK OF JURISDICTION: August 22, 2002

GSBCA 15634-TD

THE WRITING COMPANY,

Appellant,

v.

DEPARTMENT OF THE TREASURY,

Respondent.

Jerrold M. Sanders, President and CEO of The Writing Company, Clayton, MO, appearing for Appellant.

Donald M. Suica and Beth B. Sturgess, General Legal Services, Internal Revenue Service, Department of the Treasury, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **BORWICK**, and **HYATT**.

DANIELS, Board Judge.

The Writing Company appeals from an Internal Revenue Service (IRS) contracting officer's decision which imposed a settlement of a termination for convenience claim made by the contractor. The Writing Company's notice of appeal, which has subsequently been designated its complaint, states, "The Writing Company is seeking about \$276,000 in settlement costs, plus compensation for interest, taxes, and penalties that have accrued on the firm's account as a result of IRS's withholding settlement funds for more than two years and engaging in abusive and hostile actions. We are also seeking damages." The Department of the Treasury, of which the IRS is a part, moves us to dismiss for lack of jurisdiction the contractor's request for "interest, taxes, and penalties" and "damages."

Background

On March 3, 1998, IRS awarded a contract to the Small Business Administration, with Jireh Consulting, Inc., doing business as The Writing Company, designated as subcontractor under the program authorized by section 8(a) of the Small Business Act, 15 U.S.C. § 637(a)

(1994). Appeal File, Exhibit 1 at 3. The contract was a time-and-materials contract for "assistance in rewriting, redesigning and testing [IRS's] CP [Computer Paragraph] Notices." Id. at 18, 48.

An IRS contracting officer terminated the contract for the convenience of the Government on February 24, 1999. Appeal File, Exhibit 5 at 1.

The Writing Company submitted to the IRS a termination settlement proposal dated December 23, 1999. The proposal was in the amount of \$526,802.07. Appeal File, Exhibit 2 at 3.

This proposal was accompanied by a cover letter, also dated December 23, 1999, which states, "The Writing Company **intends to submit** additional settlement claims as noted below." Among the additional claims listed are "Compensation for all penalties and interest that accrued on outstanding debts . . . Claim Amount Estimate \$70,000" and "Damages for widespread slander of The Writing Company's performance, as stated in The Writing Company's dispute dated January 28, 1999, and in other documentation. Damages include profit on anticipatory sales; punitive damages; economic impact; and other. . . . Claim Amount Estimate \$200 million." Appeal File, Exhibit 2 at 1.

By contract modification dated March 3, 2000, IRS agreed to make partial payment of \$189,350 on the settlement proposal. Appeal File, Exhibit 1 at 100-01.

By contract modification dated May 7, 2001, the contracting officer made a unilateral "settlement by determination" that an additional \$74,434.87 was due to The Writing Company as final payment for the termination of the contract. Appeal File, Exhibit 1 at 103-04.

The contracting officer's statement which is attached to this contract modification includes the following paragraph:

It should also be noted that on February 24, 2000, following conclusion of settlement negotiations, TWC [The Writing Company] submitted a letter listing "claims intended to survive the settlement." The claims alleged in this letter included . . . compensation estimated at \$70,000 for all penalties and interest incurred by TWC for nonpayment of its debts following termination; . . . [and] damages from slander and other economic torts in the estimated amount of \$200,000,000 These claims are not properly part of a termination settlement claim. Therefore, they will not be further addressed here.

Appeal File, Exhibit 1 at 107.

Discussion

The agency asserts in its motion that The Writing Company has never submitted to the contracting officer a claim for either of the two matters raised in the notice of appeal as to which the motion to dismiss is directed – "interest, taxes, and penalties" and "damages."

The evidence of record suggests that this assertion is correct. In December 1999, The Writing Company said that it intended to submit claims as to these matters. The contracting officer's "settlement by determination" statement says that in February 2000, The Writing Company told her that such claims were "intended to survive the settlement." This statement does not say that such claims were ever filed, however. Furthermore, even if they had been made, they would not be "claims," as that term is understood in matters falling under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (2000), because they were in estimated amounts, not sums certain. Writing Co., GSBCA 15097-TD, 00-1 BCA ¶ 30,840, at 152,220-21. Although we authorized The Writing Company to respond to the motion, and have made numerous telephonic attempts to remind the firm of this opportunity, The Writing Company has not filed a response. It thus has not contested the agency's assertion. We conclude that the appellant has not submitted a claim for either "interest, taxes, and penalties" or "damages," as those terms are used in the notice of appeal.

This conclusion is fatal to the contractor's effort to have the Board address the substance of these matters. As we have previously explained:

The Contract Disputes Act of 1978 prescribes the procedure which a contractor must follow in order to put one of its claims before a board of contract appeals. First, the contractor must submit the claim in writing to the agency's contracting officer. Then the contracting officer must issue a decision on the claim (or fail to issue a decision within a fixed period of time, in which case a decision denying the claim will be deemed to have been made). Only then may the contractor place the matter before the appropriate contract appeals board.

Executive Construction, Inc. v. General Services Administration, GSBCA 15224, 00-2 BCA ¶ 30,977, at 152,867; see 41 U.S.C. §§ 605, 606. "Presentation of a claim to a contracting officer is a jurisdictional prerequisite to proceeding at the Board." Raytheon STX Corp. v. Department of Commerce, GSBCA 14296-COM, 00-1 BCA ¶ 30,632, at 151,236 (1999). "The scope of our jurisdiction is limited by [the] claim and we have the power to resolve only the issues raised in the notice of appeal that were also presented to the contracting officer in the claim." Willie Clarence Logan v. Department of State, GSBCA 15691-ST (June 7, 2002).

We note additionally that even if The Writing Company had submitted to the contracting officer claims regarding the matters raised in the motion, we would not necessarily have jurisdiction to resolve them. The demand for "damages" is in an amount greater than \$100,000, so unless it is accompanied by the kind of certification prescribed in the Contract Disputes Act, 41 U.S.C. § 605(c)(1), the contracting officer would have no obligation to issue a decision on it and the Board would not have jurisdiction to review any decision she might render. Golub-Wegco Kansas City I, LLC v. General Services Administration, GSBCA 15387, 01-2 BCA ¶ 31,553; TGMI/Contractors, Inc. v. General Services Administration, GSBCA 14488, 98-2 BCA ¶ 29,890. Both the demand for "damages" and the demand for "interest, taxes, and penalties" appear to stem from alleged tortious actions, rather than contract actions, by the agency. "We do not have jurisdiction to consider claims that sound in tort, unless there is a direct connection between the Government's alleged tortious conduct and the Government's express or implied contractual

obligations." Thomas D. McCloskey v. General Services Administration, GSBCA 15901 (Aug. 14, 2002); see also H.H.O., Inc. v. United States, 7 Cl. Ct. 703 (1985); Asfaltos Panamenos, S.A., ASBCA 39425, 91-1 BCA ¶ 23,315 (1990). Furthermore, punitive damages may not be awarded against the United States absent express consent of Congress, and because Congress has not given approval to a suit for such damages in this forum, we have no jurisdiction to consider a claim for them. Erold A. Crutcher v. General Services Administration, GSBCA 15586, 02-1 BCA ¶ 31,763, at 156,878; Schrager Auction Galleries, Ltd. v. Department of the Treasury, GSBCA 15658-TD, 02-1 BCA ¶ 31,710 (2001).

Decision

The Department of the Treasury's motion is **GRANTED**. The portions of The Writing Company's notice of appeal/complaint which seek "compensation for interest, taxes, and penalties that have accrued on the firm's account as a result of IRS's withholding settlement funds for more than two years and engaging in abusive and hostile actions" and "damages" are **DISMISSED FOR LACK OF JURISDICTION**.

STEPHEN M. DANIELS
Board Judge

We concur:

ANTHONY S. BORWICK
Board Judge

CATHERINE B. HYATT
Board Judge