

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

MOTION TO DISMISS GRANTED IN PART: December 12, 2003

GSBCA 16174

JAMES CONSTRUCTION,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Shawn M. Stevenson of Stevenson & Cohen, LLC, Pittsburgh, PA, counsel for Appellant.

Amanda Wood, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **NEILL**, **HYATT**, and **DeGRAFF**.

DeGRAFF, Board Judge.

Pending is the agency's motion to dismiss this appeal for lack of jurisdiction, to which appellant did not respond. The motion is granted in part, because appellant never submitted a claim to the contracting officer for a decision. It is possible, however, the agency's direction to appellant constitutes a Government claim over which we have jurisdiction.

Background

On July 25, 2002, the General Services Administration (GSA) awarded a contract to James Construction for the renovation of part of the Kinneary United States Courthouse in Columbus, Ohio. Among other things, the contract required James to install aluminum window trim. Exhibit 1.

The contract contained the Payments clause found at Federal Acquisition Regulation (FAR) 52.232-5 (May 1997), which explained the procedure for requesting progress payments for work accomplished in accordance with the standards of quality established in the contract. It contained the Disputes clause found at FAR 52.233-1 (Dec. 1998), which required James to proceed diligently with performance pending the final resolution of any dispute. Exhibit 1.

In February 2003, GSA told James the finish on the window trim appeared to be damaged or defective, and James attempted to repair the finish. Appellant's Exhibits 9 - 12, 16, 20. GSA made its final inspection of James's work on March 20, 2003. During the inspection, GSA told James the window trim had imperfections and said it considered the trim to be defective. Exhibit 2.

On March 28, 2003, James submitted progress payment request number 9 to GSA's architect-engineer (AE), and said it had completed the work required by the contract with one exception not relevant to this appeal. Appellant's Exhibit 23. On April 1, the AE sent James an electronic mail message stating it would not approve James's payment request and also saying it would not approve the window trim due to the defective finish. Appellant's Exhibit 24. The same day, the GSA contracting officer sent a letter to James reiterating the problems with the window trim and directing James to replace the trim at no cost to GSA. Exhibit 2. In a telephone conversation on April 1, the contracting officer told James he might not approve payment request number 9, due to the outstanding issue regarding the window trim. Exhibit 4.

On April 10, James responded to the contracting officer's April 1 letter. James disavowed responsibility for the problems with the window trim, said it would replace the trim as directed by GSA, and said it would make a claim for the additional costs it incurred as a result of replacing the trim. Exhibit 3.

On April 11, James wrote to the contracting officer about payment request number 9. James said it had not received any response to the payment request and asked the contracting officer to provide the status of payment request number 9. Exhibit 4. The contracting officer responded by referring James to the AE's April 1 electronic mail message. Exhibit 5.

On April 24, the contracting officer responded to James's April 10 letter. The contracting officer continued to maintain James was responsible for the problem with the window trim, and he explained the basis for his opinion. Near the end of the letter, the contracting officer directed James to replace the window trim and said, "This is the Final Decision of the Contracting Officer." Exhibit 6.

On May 2, James told the contracting officer it would replace the window trim, even though it disagreed with the contracting officer's conclusion regarding the problem with the trim. Appellant's Exhibit 30. On May 14, James asked the contracting officer for a "written dispute resolution as it relates to this matter." Exhibit 7. On May 22, the contracting officer responded by telling James it had not submitted a claim, and he repeated his direction to replace the defective window trim. Exhibit 8.

On June 27, James filed this appeal from the contracting officer's April 24 letter. James said it wanted to pursue the appeal before it complied with GSA's directive to replace the window trim. It also said it intended to seek the cost of replacing the trim and payment of the amount it requested in progress payment request number 9. Notice of Appeal. Despite the suggestion contained in its notice of appeal that it would not comply with GSA's directive, James did so and finished replacing the window trim in August 2003. Appellant's Exhibit 59. When James filed its complaint in this appeal, the only relief it requested was the payment of progress payment request number 9. Complaint at 3.

Discussion

We have jurisdiction to decide this appeal if the contracting officer issued a decision in response to a claim made by James, or if the contracting officer issued a decision upon a Government claim made against James. 41 U.S.C. §§ 605, 607 (2000). The Disputes clause incorporated into the contract defines a 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. A claim arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding \$100,000 is not a claim under the [Contract Disputes] Act until certified as required by . . . this clause. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act. The submission may be converted to a claim under the Act, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

48 CFR 52.233-1 (2001).

Neither party made a written demand or assertion seeking, as a matter of right, either the payment of money in a sum certain or the adjustment or interpretation of contract terms. The issue presented by GSA's motion is whether James's progress payment request number 9 constitutes a claim.

According to the contract's Disputes clause, progress payment request number 9 constitutes a claim if it was in dispute when James submitted it to GSA or if James subsequently converted the payment request to a claim. Progress payment request number 9 appears to have been a routine request for payment for contract work performed by James,

made in accordance with the contract's provision for requesting progress payments. Subsequently, on April 1, the AE told James the payment request was not approved and the contracting officer told James he might not make the requested payment. On April 11, James asked the contracting officer about the status of the payment request. So far as we know, this is the only communication James sent to the contracting officer regarding progress payment request number 9 after GSA disputed its liability for the amount requested and before James filed this appeal. James did not, for example, submit a claim to GSA alleging GSA's withholding of the progress payment amount to a breach of contract and requesting breach damages, or do anything else to demand payment. We know of no definitive test for determining whether a contractor has converted a routine request for payment into a claim. We are satisfied, however, that a bare inquiry regarding the status of a progress payment request is not sufficient to accomplish such a conversion. Thus, we conclude progress payment request number 9 does not constitute a claim.

GSA's motion to dismiss does not address whether GSA's direction to replace the window trim constitutes a claim. According to the disputes clause, GSA's direction to replace the window trim constitutes a claim if it was a demand or assertion for other relief arising under or relating to the contract. An agency's direction might constitute an agency claim regardless of whether the contractor can perform the work as directed and then submit a monetary claim. Alliant Techsystems, Inc. v. United States, 178 F.3d 1260 (Fed. Cir. 1999); Garrett v. General Electric Co., 987 F.2d 747 (Fed. Cir. 1993). Whether GSA's direction to replace the window trim constitutes a claim is an issue we will not resolve at this time. Instead, we will wait until the parties brief the issue, should they choose to do so.

Decision

The motion to dismiss is **GRANTED IN PART**. We lack jurisdiction to consider a money claim by James, either for the amount it requested in progress payment request number 9 or for the cost of replacing the window trim. We do not determine at this time, however, whether GSA's direction to replace the window trim constitutes a Government claim over which we have jurisdiction.

MARTHA H. DeGRAFF
Board Judge

We concur:

EDWIN B. NEILL
Board Judge

CATHERINE B. HYATT
Board Judge