

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

MOTION TO DISMISS CLAIM FOR DAMAGES IN GSBCA 16333-SSA
AND 16448-SSA GRANTED;
MOTION TO DISMISS GSBCA 16742-SSA DENIED;
MOTION FOR CONSOLIDATION GRANTED: July 25, 2006

GSBCA 16333-SSA, 16448-SSA, 16742-SSA

CASSANDRA POWELL d/b/a TRAINING SOLUTIONS,

Appellant,

v.

SOCIAL SECURITY ADMINISTRATION,

Respondent.

Gregory T. Mitchell, Homewood, IL, counsel for Appellant.

Seth Binstock, John A. Carlo, Andrew J. Seff, and Melody E. McGrath, Office of the General Counsel, Social Security Administration, Baltimore, MD, counsel for Respondent.

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

GOODMAN, Board Judge.

Cassandra Powell d/b/a Training Solutions (appellant) has appealed three final decisions issued by a Social Security Administration (SSA or respondent) contracting officer with regard to a contract entered into between appellant and respondent. Various motions have been filed by the parties in these appeals. The Board deferred ruling on these motions while the parties engaged in settlement discussions and an alternative dispute resolution proceeding. As the parties have not settled these appeals, the Board rules on all pending motions.

Background

On September 26, 2002, respondent awarded appellant a contract for file assembly services to be performed at SSA's Office of Hearings and Appeals in Chicago, Illinois. On July 23, 2003, SSA's contracting officer issued appellant a final decision terminating the contract for cause, alleging appellant's failure to perform the file assembly services at the required level of quality, as specified in the contract's paragraph (7), entitled "Work Quality." Appeal File, Exhibits 1 at 4; 11. The basis for the termination was respondent's discovery that appellant's employees allegedly improperly discarded documents from SSA's claimants' files rather than placing those documents in the case files.

On September 15, 2003, appellant filed a notice of appeal with the Board challenging the termination for cause. In its complaint, appellant stated that the "amount of money in controversy is \$18,000 and attorney fees." Appeal File, Exhibit 12. The Board docketed this appeal as GSBCA 16333-SSA.

On May 27, 2004, respondent's contracting officer issued a second final decision, stating that appellant owed respondent damages in the nature of termination costs in the amount of \$10,217.42. Appeal File, Exhibit 16. On June 30, 2004, appellant filed a notice of appeal of the May 27, 2004, final decision. The Board docketed the appeal as GSBCA 16448-SSA. In its notice of appeal, appellant stated that it had not been paid \$18,000 for work it properly completed. Appeal File, Exhibit 17. Respondent asserts that this was the first clear indication that appellant intended to assert a claim of its own, but this claim had not been submitted to the contracting officer.

On July 12, 2004, this Board granted respondent's unopposed motion for consolidation of GSBCA 16333-SSA with GSBCA 16448-SSA.

Thereafter, in response to respondent's interrogatories concerning appellant's claim for amounts due, appellant stated that it was seeking compensation in the amount of \$20,737.11 for non-payment of four invoices dated May 12, 2003, that it alleged were forwarded to respondent for payment. Respondent filed a motion to dismiss, for lack of jurisdiction, appellant's claim for damages in the consolidated appeals. Respondent attached a declaration from the contracting officer, stating that the alleged unpaid invoices had not been received by respondent and had never been properly submitted to respondent. Accordingly, at that time the contracting officer had not issued a final decision with regard to appellant's claim for payment of the invoices.

On July 1, 2005, respondent's contracting officer issued an amended final decision¹ which contained additional grounds for termination of the contract, a determination as to the amounts owed on the four invoices for which appellant had previously alleged non-payment, and a determination as to whether appellant was entitled to be paid for every case to which appellant had asserted entitlement to payment. The amended final decision stated that respondent was revoking acceptance of 124 case files for which appellant had been previously paid, as the result of the alleged discovery by respondent that appellant had improperly discarded records from these case files.

The amended final decision determined that, as a result of erroneous payments made by respondent and damages suffered by respondent as a result of appellant's alleged breach of contract, appellant owed respondent \$63,468.04 (\$43,707.06 in employee time, \$4616.32 for cases where acceptance was revoked, \$74.46 for cases paid twice by respondent, and \$15,070 in hearing costs). The amended final decision concluded that appellant was owed \$3387.93 by respondent for work performed under the contract for which it was not paid. After offsetting the \$3387.93, the net amount of damages owed to respondent by appellant was \$60,080.11. Appeal File, Exhibit 18.

On September 29, 2005, appellant filed a notice of appeal of respondent's amended final decision. Appeal File, Exhibit 19. The Board docketed this appeal as GSBCA 16742-SSA.

Discussion

Respondent's Motion to Dismiss Appellant's Claim for Damages in GSBCA 16333-SSA and GSBCA 16448-SSA

Before issuing its amended final decision, respondent moved the Board to dismiss for lack of jurisdiction appellant's claim for damages in GSBCA 16333-SSA and 16448-SSA,

¹ While the agency's Motion for Consolidation of all three appeals states that the amended final decision "supercedes all prior contracting officer decisions," Motion for Consolidation at 2, the amended final decision does not contain any language revoking or withdrawing the previous final decisions. Rather, the decision amends the two previous final decisions whose appeals were consolidated, stating that it "serves as an amended notification that [the contract] is terminated" and increasing the damages sought by the respondent.

since at that time appellant had not submitted its claim for money due under the contract to the contracting officer for a final decision. Appellant did not rebut this allegation.²

Under the Contract Disputes Act of 1978 (CDA), “all claims by a contractor against the Government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision.” 41 U.S.C. §605(a) (2000). In order for the Board to have jurisdiction over appellant’s monetary claim, appellant must have submitted a written demand for that amount to the contracting officer. The reason for this requirement is to allow the contracting officer to receive and pass judgment on the contractor’s entire claim. *Gildersleeve Electric, Inc. v. General Services Administration*, GSBCA 16404 (June 8, 2006); *Scott Timber Co. v. United States*, 333 F.3d 1358, 1366 (Fed. Cir. 2003) (citing *Croman v. United States*, 44 Fed. Cl. 796, 801-02 (1999)).

As the claim had not been submitted to the contracting officer at the time the motion was filed and was not the subject of either of the two final decisions which were the subject of the pending appeals, the Board has no jurisdiction in these two appeals to consider appellant’s claim for damages. We grant respondent’s motion and dismiss appellant’s claim for damages in GSBCA 16333-SSA and 16448-SSA. However, as the contracting officer addressed appellant’s claim for non-payment of the invoices in the amended final decision, the Board has jurisdiction over appellant’s monetary claim in GSBCA 16742-SSA.

Appellant’s Motion to Dismiss GSBCA 16742-SSA

In opposition to respondent’s motion to consolidate GSBCA 16742-SSA with the two previous appeals, appellant has filed a motion to dismiss this latter appeal. Appellant’s grounds for dismissal are more properly asserted as grounds for summary relief. Summary relief is appropriately granted when there is no genuine issue of material fact and the moving party is clearly entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *US Ecology, Inc. v. United States*, 245 F.3d 1352, 1355 (Fed. Cir. 2001); *Olympus Corp. v. United States*, 98 F.3d 1314, 1316 (Fed. Cir. 1996). As discussed below, claimant has not demonstrated that it is entitled to judgment as a matter of law, as appellant misinterprets the Board’s Rules, ignores various contract provisions, and fails to establish that issues of material fact are not in dispute.

² Appellant did not file a response to this motion, as the parties were engaged in settlement discussions.

Appellant first asserts that the Board's rules preclude respondent's contracting officer from issuing the amended final decision. In making this assertion, appellant misinterprets Board Rule 107(f), which applies to amendments to pleadings and reads in part:

(f) Amendment of pleadings. Each party to an appeal may amend its pleadings once without leave of the Board at any time before a responsive pleading is filed; if the pleading is one to which no responsive pleading is permitted, such amendment may be made at any time within 20 calendar days after it is served.

A contracting officer's final decision is not a pleading. It is a decision by the contracting officer by which the Government grants or denies a contractor's claim or asserts a claim against the contractor, and is a jurisdictional prerequisite for the appeal process. *Gildersleeve Electric*. The amended final decision states additional grounds for termination of the contract; denies appellant's claim for damages, which respondent received after issuing the first two final decisions; and increases the amount of damages the Government claims as a result of alleged improper performance. The issuance of an amended final decision is not precluded by the Board's Rules.

Appellant asserts further that respondent did not have the contractual right to terminate the contract. Appellant fails to consider the clause upon which respondent relied in the initial notice of termination, dated July 23, 2003, and the amended final decision. That clause allows termination under the following circumstances:

Work Quality - Completed work must be at an acceptable level of quality as determined by the Government Project Officer. . . . Failure to meet adequate quality standards in five or more cases may lead to termination of the contract by the contracting officer.

Appeal File, Exhibit 1 at 4.

Additionally, Federal Acquisition Regulation (FAR) 52.212-4, incorporated by reference in the contract, states:

(m) Termination for cause. The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government

improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

Appeal File, Exhibit 1 at 16.

The presence of these clauses give the Government the right to terminate under the circumstances alleged by the Government. While the merits of the Government's claim for termination remain to be proved, issues of material facts remain in dispute as to these circumstances.

Appellant also cites FAR 52.212-4(p) as a basis for dismissal, alleging that respondent has "officially accepted" all deliverables and the damages alleged by respondent are in the nature of consequential damages. That clause provides:

Limitation of liability. Except as otherwise provided by an express warranty, the Contractor will not be liable to the Government for consequential damages resulting from any defect or deficiencies in accepted items.

If the appellant intends to rely upon this clause as a defense to the Government's actions regarding termination and claim for damages, issues of material fact remain in dispute as to the propriety of the termination, whether the damages claimed by respondent are consequential in nature,³ and whether there were defects and deficiencies in "accepted items." These issues cannot be resolved on the record before the Board. Accordingly, appellant's motion for summary relief, submitted as a motion to dismiss, is denied.

³ Consequential damages are damages that are not recoverable because they are not viewed as natural and probable consequences of the breach and are not damages which, in the light of the facts of which the parties had knowledge, were in the contemplation of the parties. *San Carlos Irrigation and Drainage District v. United States*, 111 F.3d 1557 (Fed. Cir. 1997). We note that the contract between the parties contains the following provision: "In the event the contract is terminated for cause, the contractor may be liable for administrative costs incurred by the Government for reprourement of the services, if reprourement is necessary." Appeal File, Exhibit 11 at 6.

Respondent's Motion to Consolidate

Respondent has moved to consolidate the previously consolidated appeals GSBCA 16333-SSA and 16448-SSA with GSBCA 16742-SSA.

Board Rule 126 states in relevant part:

(a) Consolidation. When cases involving common questions of law or fact are pending, the Board may:

- (1) Order a joint hearing of any or all of the matters at issue in the cases;
- (2) Order the cases consolidated; or
- (3) Make such other orders concerning the proceedings therein as are intended to avoid unnecessary costs or delay.

These three appeals clearly involve common questions of law and fact, as the amended final decision adds additional grounds for termination and expands the respondent's claim for damages. Under such circumstances, consolidation of appeals is appropriate. *See, e.g., Bildon Inc., ASBCA 46937, et al., 95-1 BCA ¶ 27,562.*

The motion for consolidation is granted.

Decision

Respondent's motion to dismiss appellant's claim for damages in GSBCA 16333-SSA and 16448-SSA is **GRANTED**. Appellant's motion to dismiss GSBCA 16742-SSA is **DENIED**. Respondent's motion to consolidate the three appeals is **GRANTED**.

ALLAN H. GOODMAN
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

MARTHA H. DeGRAFF
Board Judge