UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND IS BEING RELEASED TO THE PUBLIC IN REDACTED FORM ON MARCH 26, 2014

RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION DENIED; APPELLANT'S MOTION FOR SUMMARY RELIEF DENIED: March 7, 2014

CBCA 3112, 3113, 3318

CB&I FEDERAL SERVICES LLC,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Thomas A. Lemmer, Phillip R. Seckman, and Amy M. Siadak of McKenna Long & Aldridge LLP, Denver, CO, counsel for Appellant.

Audrey H. Liebross, Jeffrey D. Webb, and Jessica Lane Day, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **HYATT**, and **POLLACK**.

SOMERS, Board Judge.

The Federal Emergency Management Agency (FEMA), Department of Homeland Security, moves to dismiss this appeal for lack of subject matter jurisdiction. FEMA

contends that appellant, Shaw Environmental, Inc. (Shaw),[1] changed its claimed theory of recovery in its appeal from the one asserted in its certified claims before the contracting officer. Shaw opposes the motion and moves for summary relief on the ground that it is entitled to legal costs claimed because these costs are allowable direct costs under this cost-type contract. FEMA opposes Shaw's motion for summary relief. For the reasons set forth below, we deny both FEMA's motion to dismiss and Shaw's motion for summary relief.

Background

Under contract HSFEHQ-05-D-0573 and task order 15 (collectively, the contract), Shaw has appealed three contracting officer final decisions on a deemed denial basis, alleging that FEMA has failed to reimburse its properly claimed legal costs. These legal costs resulted from multi-district litigation (MDL) in which several plaintiffs, individually and on behalf of a class of similarly situated persons, sued contractors, including Shaw, for damages as a result of alleged exposure to formaldehyde found in FEMA trailers.[2]

In the past, FEMA has paid Shaw's litigation expenses arising from this litigation. *See, e.g.*, *Shaw Environmental, Inc. v. Department of Homeland Security*, CBCA 2177, et al.,

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[1] By joint motion dated February 24, 2014, the parties seek to change appellant's name to CB&I Federal Services LLC (CFS), advising us that appellant and the Government have recently novated the contract relevant to these appeals, substituting CFS for Shaw as the party to the contract with the Government. We grant this motion and have amended the caption accordingly. However, for the purposes of this decision, we continue to refer to the contractor as Shaw Environmental, Inc. (or Shaw), the name used by the contractor during the relevant events.

[2] As noted in our previous decision, the litigation included a case styled *FEMA Trailer Formaldehyde Products Liability Litigation Multi District Litigation*, No. 07-1873, in the United States District Court for the Eastern District of Louisiana (the MDL litigation). By order dated September 27, 2012, the court granted final certification of the settlement class, approved the proposed settlement between the MDL plaintiffs and the contractors, and dismissed the pending class actions with prejudice. *Shaw Environmental, Inc. v. Department of Homeland Security*, CBCA 2177, et al., 13-1 BCA ¶ 35,188, at 172,666 (2012).

13-1 BCA ¶ 35,188 (2012). Now, however, FEMA has denied payment of Shaw's three most recent certified claims, which requested a combined total of $838,396.23 in legal costs.[3]

In our previous decision, we stated, in part, as follows:

> [T]he contract and task order 15 are "cost-reimbursable," permitting reimbursement for allowable costs under Federal Acquisition Regulation (FAR) 52.216-7. See 48 CFR 52.216-7 (2005) (FAR 52.216-7). The letter contract stated that the contracting officer shall determine allowable costs in accordance with the applicable cost principles in part 31 of the FAR. The contract incorporated by reference FAR 52.230-2, Cost Accounting Standards (Apr. 1998),[1] and FAR 52.230-6, Administration of Cost Accounting Standards (Apr. 2005). The contract included FAR 52.216-26, Payments of Allowable Costs Before Definitization (Dec. 2002).
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> [1] FAR Part 30 establishes procedures to be followed in the administration of contracts subject to the Cost Accounting Standards (CAS). For a discussion of these procedures, see *Sikorsky Aircraft Corp. v. United States*, 105 Fed. Cl. 657, 662-63 (2012).

Shaw Environmental, Inc., 13-1 BCA at 172,665-66.

Shaw incurred legal costs defending itself in these actions. Shaw states that while it allocates typical legal costs as indirect costs, here, Shaw allocated the legal costs incurred in response to the MDL litigation as direct costs because these costs arose from different circumstances than its traditional legal costs. Prior to the MDL litigation, Shaw had not previously incurred legal costs defending itself in a mass-tort litigation predicated on alleged defects in government-furnished property.

During the course of the MDL litigation, Shaw contacted Zurich Insurance Group (Zurich), the company with which Shaw had obtained its general liability insurance, as required by FAR 52.228-7 (Mar. 1996). The way Shaw sees it, under the insurance policy, Zurich should cover all defense costs and liability arising under the MDL once those costs

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[3] Shaw seeks $567,099.27 for a certified claim dated August 21, 2012; $218,994.94 for a certified claim dated October 2, 2012; and $52,302.02 for a certified claim dated January 16, 2013. Shaw appealed each claim to the Board. The docketed claims, CBCA 3112, 3113, and 3318, have been consolidated.

exceed the $750,000 deductible. Zurich apparently disagreed, taking the position that each plaintiff in the MDL constituted a separate occurrence, which requires costs exceeding $750,000 for each plaintiff. Shaw also says that Zurich informed it that the insurance company would not be required to pay any indemnification or defense costs until Shaw fully satisfied all deductibles. Thus, as explained by Shaw, Zurich would not reimburse Shaw for any liability or legal costs relating to the MDL under the insurance policies.

On April 13, 2012, Shaw's counsel informed FEMA's counsel that the district court judge had ordered the parties to engage in mediation. On April 27, 2012, Shaw presented FEMA with the parameters of an agreement, under which Shaw and the other class action defendants reached a tentative settlement with the plaintiffs. ********** ********** and sought FEMA's concurrence. Shaw's counsel stated in an email message:

> ********** ********** ********** **********

On May 1, FEMA informed Shaw's counsel that it would not endorse the settlement but that FEMA would consider the possibility of approval later, "subject to its review of Shaw's determination as it relates to Zurich." ********** ********** **********

On May 25, 2012, Shaw and Zurich entered into a non-public settlement agreement. As detailed by Shaw, pursuant to this agreement, ********** ********** These costs are the same costs for which Shaw seeks reimbursement from FEMA.

Shaw submitted three certified claims to the contracting officer. In each claim Shaw stated, in pertinent part:

> Shaw is entitled to reimbursement of the Legal Costs incurred to date, as well as future costs, as allowable costs under the allowable cost and payment and other provisions of the above contract. Shaw believes that the Legal Costs, as well as any and all costs associated with future invoices related to the same matters, are fully allowable as direct expenses to the Contract and any failure

> to reimburse Shaw for the Invoice is a breach of the Contract. Finally, Shaw notes that, to date, its insurance carrier has not reimbursed it for any of its Legal Costs.

The contracting officer did not issue a final decision on any of these claims. Shaw appealed the three claims on a "deemed denial" basis.

Discussion

I. Motion to Dismiss

Subject matter jurisdiction may be challenged at any time. *United States v. Grumman Aerospace Corp.*, 927 F.2d 575, 580 (Fed. Cir. 1991). Appellant bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). In assessing whether the Board has subject matter jurisdiction, the allegations of the complaint should be construed favorably to the pleader. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Ron Anderson Construction, Inc. v. Department of Veterans Affairs*, CBCA 1884, et al., 10-2 BCA ¶ 34,485. When a motion for lack of subject matter jurisdiction challenges the truth of alleged jurisdictional facts, the Board may consider relevant evidence beyond the pleadings to resolve disputed facts. *Ron Anderson Construction, Inc.*

The Board possesses jurisdiction over appeals from claims submitted in writing to the contracting officer for a decision that were either denied in writing or were deemed denied. *Walsh/Davis Joint Venture v. General Services Administration*, CBCA 1460, 10-2 BCA ¶ 34,479. There is no requirement that a claim be presented in any particular form or use any particular wording, but the submission does need to provide the contracting officer with "a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and the amount of the claim." *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 588 (Fed. Cir. 1987). The reason for this requirement is to allow the contracting officer to receive and pass judgment on the contractor's entire claim. *Scott Timber Co. v. United States*, 333 F.3d 1358, 1366 (Fed. Cir. 2003). Here, Shaw submitted its claims to the contracting officer, and, as permitted by the Contract Disputes Act, Shaw appealed to the Board when the contracting officer did not timely issue a final decision.

FEMA argues that Shaw changed its theory of recovery, noting that, at the claim stage, Shaw sought reimbursement of legal costs as allowable costs under the contract. By contrast, in its amended complaint, Shaw alleges that the costs are both allowable and

reimbursable under the contract, and that FEMA breached the contract by failing to reimburse the amounts sought. Thus, FEMA concludes that by changing its claim from entitlement under various contract provisions to that of breach of contract, Shaw has raised a matter before the Board that it never presented to the contracting officer.

In evaluating respondent's contention that we lack jurisdiction to consider Shaw's claims, we must decide whether the claims originally presented to the contracting officer can reasonably be viewed as encompassing the matters raised in appellant's complaint. This standard does not require rigid adherence to the exact language or structure of the original administrative claim. Rather, when a new claim is asserted that was not directly addressed in the appellant's original claim submission, the tribunal must examine whether the newly presented claim derives from the same operative facts, seeks essentially the same relief, and, in essence, merely asserts a new legal theory for the recovery originally sought. *Scott Timber Co*., 333 F.3d at 1365. "To determine whether two or more separate claims . . . exist[], the court must assess whether . . . the claims are based on a common or related set of operative facts. If the court will have to review the same or related evidence to make its decision, then only one claim exists." *Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990).

Here, Shaw claims that it incurred legal costs defending itself against the MDL, that FEMA is obligated to reimburse it for these costs pursuant to the contract, and that FEMA failed to pay the legal costs following Shaw's submission of invoices under the contract. As FEMA acknowledges, Shaw's claims also expressly inform the contracting officer that Shaw considers any failure to reimburse Shaw for the amounts invoiced to be a breach of the contract. Shaw tells the contracting officer this in so many words, stating in each claim (as noted above):

> Shaw believes that the Legal Costs, as well as any and all costs associated with future invoices related to the same matters, are fully allowable as direct expenses to the Contract and *any failure to reimburse Shaw for the Invoice is a breach of the Contract*.

(Emphasis added.) We find that Shaw's theory of recovery is similar enough to give FEMA adequate notice of the basis of the claims. The cause of action in the complaint arose from the same operative facts and requested relief identical to that asserted in the claims. The claims use the term "breach," as does the complaint. To the extent that the phrasing in the complaint differs slightly from that of the claims, we do not find such variance significant. We possess jurisdiction to entertain these appeals.

II. Motion for Summary Relief

In its motion for summary relief, Shaw asserts that it is entitled to reimbursement of these legal costs from FEMA as allowable direct costs under the contract.

FEMA opposes the motion for summary relief on the ground that material facts remain in dispute. FEMA contends that Shaw's claimed costs are not reimbursable as allowable costs under FAR 52.216-7 and that Shaw has not established the absence of genuine issues of material fact critical to demonstrating that its claimed costs comply with the requirements set forth in FAR 31.201-2. Specifically, FEMA contends that genuine issues of material fact preclude Shaw from establishing that its costs are reasonable, allocable, in accordance with the standards established by the Cost Accounting Standards Board, within the terms of the contract, and within any limitations set forth in FAR part 31. Also, FEMA contends that Shaw has not satisfied the preliminary requirements of FAR 52.228-7, the contract's insurance clause. Finally, FEMA asserts that it needs discovery before it can respond to the motion.

In its reply, Shaw argues that it has established that it is entitled to its legal costs because it has shown that these costs are reasonable, allocable, and properly charged as direct costs under the contract in compliance with the CAS and with Shaw's disclosed accounting practices. Shaw contends that FEMA has failed to identify a genuine issue of material fact, and that the facts identified by FEMA do not reach that standard. To the extent that FEMA has identified any potential issues, Shaw claims the issue of whether the undisputed costs were properly chargeable to the contract is a legal contract interpretation that the Board may decide in a motion for summary relief.

It is well established that summary relief will not be granted if the moving party fails to establish the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). If there are any issues of material fact, then summary relief is not proper. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387 (Fed. Cir. 1987); *6th & E Associates v. General Services Administration*, CBCA 1802, 10-2 BCA ¶ 34,596. The moving party shoulders the burden of proving that no genuine issue of material fact exists. *Patrick C. Sullivan v. General Services Administration*, CBCA 936, 08-1 BCA ¶ 33,820. All justifiable inferences must be drawn in favor of the nonmovant. *Walsh/Davis*.

FEMA argues that Shaw is not entitled to summary relief because it has failed to establish the absence of any issue of material fact. FEMA identified the issues of material fact it believes are in dispute in its statement of genuine issues, but, in addition, FEMA seeks

discovery in order to determine whether additional facts may exist that are relevant in resolution of this dispute.

At this point in the litigation, FEMA has not had the opportunity to engage in discovery. FEMA disputes that the costs claimed by Shaw are reasonable, as required under FAR 31.201-3. Without discovery, FEMA cannot verify that the costs claimed for trial consultants, travel, hourly rates charged by outside counsel, or the number of hours charged are reasonable. Likewise, as to the attorney fees, FEMA contends that Shaw has not provided the terms for the cost-splitting arrangements with its co-defendants. To the extent that Shaw has provided documents to support its claimed costs, FEMA contends that Shaw aggregated allowable and unallowable costs in a way that inhibits FEMA from identifying which costs are properly reimbursable. FEMA argues that Shaw has failed to demonstrate why it needed a trial consultant at all in these cases.

In addition to expressing concerns about its ability to properly respond to Shaw's assertions concerning the legal expenses allegedly incurred, FEMA asserts that a genuine dispute exists as to whether Shaw has established that it is entitled to be reimbursed under FAR 52.228-7. FEMA contends, among other things, that it is entitled to discovery to determine whether Shaw could have been compensated from its insurers, meaning Zurich and other potential insurers, for the costs it seeks in these appeals.

Shaw disagrees. Shaw notes that it has provided the Government with detailed invoices and documentation establishing that the legal costs charged are reasonable. Shaw claims that only the FEMA contracting officer or the contracting officer's representative may raise a challenge to the reasonableness of the costs, and that the contracting officer has not done so. Shaw also relies upon the fact that the contracting officer has reimbursed Shaw for the very same type of legal costs that had been charged under other Shaw invoices. As to FEMA's challenge to the reasonableness of the costs, Shaw says that "even if the Board were to conclude that there are properly disputed facts as to the reasonableness of the amount of Legal Costs, or that certain specific Legal Costs have been properly challenged on the basis of reasonableness, the Board should still decide that Shaw is entitled to partial summary judgment on entitlement to the Legal Costs, and leave the analysis of specific cost items for further proceedings on the issue of quantum." Appellant's Reply to Respondent's Response to Appellant's Motion for Summary Relief at 4-5. To FEMA's argument that Shaw should have provided various documents to support its costs, Shaw says that the contracting officer never requested such documentation.

In light of the fact that FEMA has not yet had the opportunity to engage in discovery, it is premature to grant Shaw's motion for summary relief. Summary relief is only

appropriate after the parties have been given an "opportunity to discover information that is essential to [its] opposition." *Burnside-Ott Aviation Training Center, Inc. v. United States*, 985 F.2d 1574, 1582 (Fed. Cir. 1993) (reversing grant of summary judgment because trial court denied discovery and nonmovant was not permitted with an opportunity to defend its case) (citing *Liberty Lobby, Inc.*, 477 U.S. at 250 n.5).

Decision

Respondent's motion to dismiss for lack of jurisdiction is **DENIED**. Appellant's motion for summary relief is **DENIED**.

JERI KAYLENE SOMERS
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

HOWARD A. POLLACK
Board Judge