UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

ORDER DIRECTING RESPONDENT TO FILE CORRECTED ANSWER:
February 3, 2016

CBCA 4826

JR SERVICES, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Theodore P. Watson and Meghan F. Leemon of Watson & Associates, LLC, Aurora, CO, counsel for Appellant.

Mark G. Machiedo, Office of Regional Counsel, Department of Veterans Affairs, Brooklyn, NY, counsel for Respondent.

LESTER, Board Judge.

Pending before the Board is a document that appellant, JR Services, LLC (JRS), filed on December 11, 2015, in response to the agency's answer in this appeal. Although the document is titled "Reply to Agency Answer and Response to Motion to Dismiss," JRS complains in it about the brevity of respondent's one-page answer to the 383-paragraph complaint that JRS filed, asks for the Board's "intervention" in establishing reasonable "expectations" of respondent in the appeal, and further asks that we deny respondent's request for dismissal of JRS's appeal, which is set forth in the answer's prayer for relief and which JRS considers to constitute an improper motion to dismiss. Despite its title, we consider the language of JRS's filing to constitute a motion seeking affirmative relief, which we address below.

Background

On or about October 23, 2009, respondent, the Department of Veterans Affairs (VA), awarded contract no. VA243-RA-0705 to JRS for window replacement at the Northport VA Medical Center in Northport, New York. On August 7, 2013, and again on March 10, 2014, the VA issued cure notices to JRS, and, on May 21, 2014, issued a show cause notice, all identifying what the VA viewed as deficient work. On April 17, 2015, the VA contracting officer terminated JRS's contract for default. On June 25, 2015, JRS filed its appeal of the termination with the Board.

By order dated July 2, 2015, in accordance with Rule 6(b) (48 CFR 6101.6(b) (2014)) of the Board's rules, the Board required JRS to file a complaint setting forth "appellant's claim or claims in simple, concise, and direct terms" or, in the alternative, to "ask to designate its notice of appeal or any other documents as the complaint." Subsequently, on July 31, 2015, JRS filed a 383-paragraph complaint, in which it identified the jurisdictional basis for the appeal as the VA contracting officer's default termination decision of April 17, 2015. JRS's allegations in the complaint included that the VA awarded the contract at issue on October 23, 2009; that various preconstruction conferences were scheduled for specific dates but then postponed by the agency; that a notice to proceed was issued on March 24, 2010; that the original completion date was March 24, 2011; that JRS provided its first submittals on May 3, 2010; that the VA decided that the mental health unit at the Northport VA hospital needed to review the anticipated windows to be installed under the contract to determine safety and security; that a meeting was held on October 5, 2010, to review the windows; and that the VA made changes to the required windows as a result of that meeting. In the complaint, JRS made numerous factual allegations about additional events that occurred during contract performance, including submittals that JRS made, approvals (or failures to approve) by the VA, and reviews that occurred during performance. It blamed the VA's architect/engineer, which JRS alleged was under the complete control of the VA and not JRS, for problems on the project.

The Board's July 2, 2015, order required the VA to respond to the complaint within thirty days after the complaint was filed, but the Board initially extended that deadline at the VA's request before temporarily staying proceedings at the joint request of the parties to provide them an opportunity to discuss the possibility of an amicable resolution of this appeal. By order dated November 19, 2015, we lifted the stay of proceedings in response to the parties' joint request and ordered the VA to file its answer to JRS's complaint no later than December 2, 2015.

On December 2, 2015, the VA filed a one-page response to JRS's 383-paragraph complaint, which reads in its entirety as follows:

> For its answer to plaintiff's amended complaint, defendant admits, denies, and alleges as follows:
>
> 1. The allegations contained in the entire complaint constitute plaintiff's characterizations of its case, to which no answer is required; to the extent that they may be deemed allegations of fact, they are denied. Defendant denies each and every allegation not previously admitted or otherwise qualified.
>
> WHEREFORE, defendant respectfully requests that the Board dismiss the complaint and that defendant be granted such other and further relief as the Board may deem just and proper.

Subsequently, on December 11, 2015, JRS filed its objection to the VA's answer with the Board. JRS asserted that, even though it had "filed a legally-sufficient complaint containing all facts and evidence to support its case," the VA's answer "did not set forth simple, concise, and direct statements of its defenses to the claim or claims asserted in the Complaint, as well as any affirmative defenses." JRS also asserted that the VA's prayer for relief, in which the VA requested that the Board dismiss the case, was, in reality, a motion to dismiss and was improper because the VA had "failed to gain permission from the Board to file a dispositive motion," as required by Rule 6(c) of the Board's rules. After asking the Board to deny the VA's motion to dismiss, JRS asserted that the VA's answer "demonstrates the lack of seriousness that [the VA] shows to this case."

Discussion

I. Respondent's General Denial of the Allegations in the Complaint

Pursuant to Rule 6(a) of the Board's rules, "[e]xcept as the Board may otherwise order, the Board requires the submission of a complaint and an answer." 48 CFR 6101.6(a). In its complaint, the appellant is required to set forth "its claim or claims in simple, concise, and direct terms" and "should set forth the factual basis of the claim or claims, with appropriate reference to the contract provisions, and should state the amount in controversy, or an estimate thereof, if any and if known." *Id.* 6101.6(b). Nevertheless, "[n]o particular form is prescribed for a complaint, and the Board may designate the notice of appeal, a claim submission, or any other document as the complaint, either on its own initiative or on request of the appellant, if such document sufficiently states the factual basis and amount of the claim." *Id.*

Here, JRS filed a detailed complaint containing numerous factual allegations identifying specific dates that specific events occurred, with additional allegations about a third party who allegedly affected contract performance and about the factual circumstances that led to the filing of this appeal. In response, the respondent was required to "file with the Board an answer setting forth simple, concise, and direct statements of its defenses to the claim or claims asserted in the complaint, as well as any affirmative defenses it chooses to assert." 48 CFR 6101.6(c). Although the language of Rule 6(c) does not require that an answer follow any particular format, it requires (when considered in conjunction with longstanding practice associated with answers to complaints and the guidance of the corresponding Rule 8(b) of the Federal Rules of Civil Procedure) the responding party to admit or deny the allegations contained in the complaint in a manner sufficient to place the opposing party "on notice of the position of its opponent." *Trident Industrial Products Corp.*, DOT BCA 2833, 96-1 BCA ¶ 28,061, at 140,128 (1995); *see Mission Support Alliance, LLC v. Department of Energy*, CBCA 4985, slip op. at 4-5, 6-7 (Jan. 7, 2016); *Quality Interconnect Systems*, DOT BCA 2755, et al., 95-2 BCA ¶ 27,924, at 139,454.

More specifically, the answer generally "should apprise the opponent of those allegations in the complaint that stand admitted and will not be in issue at trial and those that are contested and will require proof to be established to enable the [appellant] to prevail." 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1261, at 526 (3d ed. 2004). As such, "[a] denial must fairly respond to the substance of the allegation." Fed. R. Civ. P. 8(b)(2). The purpose of that requirement, and of an answer in general, "is to advise the opposing party as to what he must establish by proof." *Hass v. United States*, 17 F.2d 894, 895 (8th Cir. 1927) (quoting *Chapman & Dewey Land Co. v. Wilson*, 120 S.W. 391, 393 (Ark. 1909)); *see Pacer v. Rockenbach Chevrolet Sales, Inc.*, No. 07-5173, 2007 WL 4109291, at *1 (N.D. Ill. Nov. 19, 2007) ("a fundamental purpose of federal pleading is to identify which matters are and which are not in dispute").

In the answer that it filed, the VA did not specifically respond to each of the allegations in the complaint's 383 paragraphs, but, instead, issued a one-paragraph denial of the complaint's allegations in their entirety, a type of denial that tribunals typically refer to as a "general denial." Although "[t]he general denial has the tactical advantage of putting the opposing party to his or her proof with regard to all matters on which that party carries the burden of persuasion, and . . . with a minimum expenditure of effort by the responsive pleader," "this form of pleading [has fallen] into disfavor" in numerous arenas "because of its essentially evasive and uninformative quality." 5 Wright & Miller, *supra*, § 1265, at 547.

Our rules do not specifically address when an agency may legitimately respond to a complaint with a general denial, but Rule 8 of the Federal Rules of Civil Procedure does, and "[o]ur rules permit us to 'look[] to' and 'take[] into consideration those Federal Rules of

Civil Procedure which address matters not specifically covered [by the CBCA Rules].'" *Mission Support Alliance*, slip op. at 4 (quoting 48 CFR 6101.1(c), (d)). Under Rule 8 of the Federal Rules, "[a] party that intends in good faith to deny all the allegations of a pleading – including the jurisdictional grounds – may do so by a general denial." Fed. R. Civ. P. 8(b)(3). Nevertheless, if the "party does not intend to deny all the allegations" or cannot in good faith do so, it "must either specifically deny designated allegations or generally deny all except those specifically admitted." *Id.*; *see* Fed. R. Civ. P. 8(b)(4) ("A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.").

"[S]ituations in which the complaint can be completely controverted are quite rare, given the increased complexity of federal litigation and the tendency in recent years to plead in greater detail." 5 Wright & Miller, *supra*, § 1265, at 549. Accordingly, "an answer consisting of a general denial will be available to a party acting in good faith only in the most exceptional cases." *Id.* "It is a breach of counsel's obligation to the [tribunal] to file an answer" that, through reliance on a general denial of all allegations, "creat[es] issues that counsel does not affirmatively believe have a basis." *Arena v. Luckenbach Steamship Co.*, 279 F.2d 186, 189 (1st Cir. 1960). A party's inappropriate reliance upon a general denial is sanctionable, *United States v. Minisee*, 113 F.R.D. 121, 123 (S.D. Ohio 1986), although, depending upon the circumstances, a tribunal may elect merely to require the respondent to replead its answer. *Rodriguez v. Professional Services Assistance, Inc.*, No. 07-006, 2007 WL 667166, at *1 (W.D. Tex. Feb. 16, 2007).

Here, the VA had no basis for denying every allegation in JRS's complaint. Many of the factual allegations in the complaint are supported by documents that are contained in the appeal file that the VA submitted to the Board on August 26, 2015, and relate to actions that the VA itself took. In fact, under a strict application of the VA's general denial, the VA has denied that it even terminated JRS's contract. Yet, we know that this denial is untrue because the VA, in its appeal file, provided the Board with a copy of the VA contracting officer's default termination decision, dated April 17, 2015. In such circumstances, the VA's use of a general denial, without excepting those factual allegations in the complaint that the VA in good faith was required to admit, was completely inappropriate and in violation of the intent underlying the Board's rules.[1]

[1] We recognize that, pursuant to CBCA Rule 6(c), "[i]f no answer is timely filed, the Board may enter a general denial, in which case the respondent may thereafter amend the answer to assert affirmative defenses only by leave of the Board and as otherwise prescribed by paragraph (e) of this section." 48 CFR 6101.6(c). That rule provides the Board with discretion to determine how to proceed and to allow a case to progress, in the interest of

The problems that arise from the VA's general denial are compounded by the fact that the claim at issue here is a default termination. Although, as previously discussed, an answer should identify the factual issues that are actually in dispute so that the appellant will know what specific matters it will need to prove to support its case, the burden of justifying a default termination is upon the Government, not the contractor. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987); *Care One EMS, LLC v. Department of Veterans Affairs*, CBCA 3170, 13 BCA ¶ 35,382, at 173,624. Only because of the unique procedural requirements of the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012), that all appeals to the Board be initiated by the contractor (even if the appeal is from a government claim), *see id.* § 7104, must the party that does not bear the burden of proof have to be the "appellant" in an appeal of a default termination decision. Typically, "[i]f the contractor appeals from a final decision on a government claim, the contractor . . . files a complaint with enough information about the government claim to form a sufficient predicate for the government's answer and allow for adequate framing of the issues." *Highland Al Hujaz Co.*, ASBCA 59746, et al., 15-1 BCA ¶ 36,041, at 176,032. However, "[i]n appropriate cases, the Board may exercise its discretion to direct the government to file the complaint, if doing so will facilitate efficient resolution of the appeal." *BAE Systems Land & Armaments Inc.*, ASBCA 59374, 15-1 BCA ¶ 35,817, at 175,146 (2014); *see Thompson Museum Consulting*, AGBCA 1999-166-1, et al., 1999 WL 642196 (Aug. 23, 1999) (discussing prior order directing Government to file complaint in contractor's appeal of government claim); *Northrop Grumman Corp.*, DOT BCA 4041, 99-1 BCA ¶ 30,191, at 149,413 (1998) ("resolution of this appeal would be facilitated if the Government were to file the initial pleading setting forth the precise basis of its claim"). "Such situations can arise if relevant information concerning the basis for the claim resides with the government, and not the appellant." *BAE Systems*, 15-1 BCA at 175,146.

Although "the fact [that] the appeal involves a government claim alone, is not enough to compel the government to file the complaint," *Highland Al Hujaz*, 15-1 BCA at 176,032, the nature of a default termination lends itself to that type of switch in responsibility. In supporting a default termination decision, the Government can ask the Board to sustain the decision "if justified by circumstances at the time of termination, regardless of whether the Government originally removed the contractor for another reason." *Kelso v. Kirk Brothers Mechanical Contractors, Inc.*, 16 F.3d 1173, 1175 (Fed. Cir. 1994); *see Joseph Morton Co. v. United States*, 757 F.2d 1273, 1277 (Fed. Cir. 1985) ("[I]t is settled law that a party can

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justice, if a respondent agency does not provide any response to a complaint. The fact that our rules grant us discretion to enter a general denial on an agency's behalf in certain circumstances does not entitle an agency, on its own initiative, to file a general denial when such a denial is not warranted.

justify a termination if there existed at the time an adequate cause, even if then unknown." (quoting *Pots Unlimited, Ltd. v. United States*, 600 F.2d 790, 793 (Ct. Cl. 1979))). Accordingly, in appropriate circumstances, the Government may support a default termination before the Board based upon a justification that does not appear in the contracting officer's default termination decision.

In this appeal, it appears from the allegations in its complaint that JRS has a detailed understanding of the basis upon which the VA contracting officer terminated its contract for default. Nevertheless, because the VA has chosen to deny every allegation that JRS placed in its complaint, including the very existence of the default termination, the Board cannot know whether the VA intends to rely upon the justification identified in the contracting officer's final decision to support the default termination or whether it intends to rely upon additional or other grounds not addressed in the decision. In the circumstances here, we elect to require the VA to file a supplemental pleading (containing a new answer) that both appropriately responds to the allegations contained in JRS's complaint and identifies, in the form of a supplemental complaint or an addendum to its answer, any additional grounds not identified in JRS's complaint upon which the VA intends to rely to support the default termination. Our rules permit us to require such a filing from the Government. *See* 48 CFR 6101.1(d) (permitting the Board to "make such rulings and issue such orders and directions as are necessary to secure the just, informal, expeditious, and inexpensive resolution of every case before the Board"). Although our rules do not require the VA to follow any particular format in preparing its answer and supplemental pleading, the VA must address JRS's allegations in a manner sufficient to allow JRS, and the Board, to understand which factual averments and issues are admitted and which are disputed and will require further proof.

II. The Absence of any Pending Dispositive Motion

JRS complains that, in the prayer for relief contained in the VA's answer, the VA improperly included a motion to dismiss this appeal. Under CBCA Rule 6(c), "[a] dispositive motion or a motion for a more definite statement may be filed in lieu of the answer only with the permission of the Board." 48 CFR 6101.6(c). JRS complains that the statement in the VA's prayer for relief violates this rule and that we should deny the motion.

The request in the VA's prayer for relief asking for dismissal of this appeal is not a motion. Pursuant to CBCA Rule 8(a), "[a] written motion shall state the relief sought and, either in the text of the motion or in an accompanying legal memorandum, the grounds therefor." 48 CFR 6101.8(a). The VA has not couched its prayer for relief as a dispositive motion and has not explained "the grounds therefor" either in the text of its answer or in an accompanying legal memorandum. Accordingly, although it would seem more appropriate for the VA to ask in its prayer for relief that we sustain the contracting officer's default

termination, rather than to dismiss the appeal, we do not treat the VA's statement in the prayer for relief as a dispositive motion that either JRS or the Board is now required to address. *See Mullis v. Universal Select, Inc.*, No. 97-1220, 1997 WL 827408, at *1 (M.D. Fla. Dec. 15, 1997) ("'[t]he mere fact that the defendant seeks dismissal in his answer would not, as the plaintiff appears to believe,' constitute a motion to dismiss" (quoting *Armstrong v. Snyder*, 103 F.R.D. 96, 101 (E.D. Wis. 1984))).

Further, contrary to JRS's assertion, there is nothing untoward about a respondent including a prayer for relief in its answer asking the tribunal to dismiss the case. To the contrary, "such a request is characteristic of most answers to complaints . . . and is even envisioned by the Federal Rules of Civil Procedure." *Armstrong*, 103 F.R.D. at 101. In fact, the respondent's "inclusion, in [its] answer, of language asking the [tribunal] to dismiss the complaint with prejudice is little more than a restatement of the defense of failure to state a claim upon which relief can be granted, and that is one of the defenses allowed to be" asserted in the answer. *Crosky v. Ohio Department of Rehabilitation & Corrections*, No. 09-400, 2010 WL 3061816, at *2 (S.D. Ohio Aug. 3, 2010). "Like other defenses asserted in an answer, even affirmative defenses, it does not warrant a response, and without a response, the opposing party is still considered to have denied the validity of the defense." *Id.* The VA did nothing wrong by including a prayer for relief in its answer. To the extent that the VA believes at some future date that a dispositive motion is warranted, we presume that it will file an appropriate motion, titled as such, with the Board.

Decision

For the foregoing reasons, we order the VA to file a corrected answer and supplemental complaint or pleading in this appeal, which satisfies the requirements discussed above, on or before Friday, February 26, 2016. The appellant may file a response to the supplemental complaint or pleading within thirty days after its filing.

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HAROLD D. LESTER, JR.
Board Judge