UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO STRIKE DENIED: January 7, 2016

CBCA 4985

MISSION SUPPORT ALLIANCE, LLC,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Kenneth B. Weckstein and Shlomo D. Katz of Brown Rudnick LLP, Washington, DC; and Stanley J. Bensussen, General Counsel of Mission Support Alliance, LLC, Richland, WA, counsel for Appellant.

Paul R. Davis, Office of Chief Counsel, Department of Energy, Richland, WA, counsel for Respondent.

SOMERS, Board Judge.

This matter comes before the Board on appellant's, Mission Support Alliance, LLC's (MSA), motion to strike respondent's, Department of Energy's (DOE), answer as non-responsive. Specifically, MSA asserts that DOE's answer should be stricken because "it fails to set forth in simple, concise and direct statements" DOE's defenses to the claims asserted in the complaint. For the reasons stated below, the Board denies MSA's motion.

Background

In April 2009, DOE entered into a performance-based, cost-plus-award-fee contract with MSA for services to support the environmental clean-up mission at the DOE Hanford (Washington) site. In accordance with the terms of the contract, MSA agreed to provide the personnel, equipment, material, supplies, and services, and "do all things necessary for, or incident to, providing its best efforts to manage, operate, and deliver mission support services."

Subsequent to commencing performance on the contract, MSA applied for a Qualified Anti-Terrorism Technology (QATT) certification from the Department of Homeland Security, pursuant to the Support Anti-Terrorism by Fostering Effective Technologies Act (SAFETY Act). In 2010, upon approval of its application, MSA purchased a "SAFETY Act Homeland Protector Insurance" policy, and paid for the initial premium with its own funds. In September 2011, MSA charged the initial premium to the contract, and continued charging the annual premiums for fiscal year (FY) 2011 to FY 2014 to the contract, for a total charge of $1,364,806.72.

On April 22, 2015, DOE's contracting officer wrote MSA that DOE intended to disallow costs related to MSA's purchase of the homeland insurance policy. After receiving MSA's June 30, 2015, response, the contracting officer issued a six-page, single-spaced final decision on August 24, 2015. In his final decision, the contracting officer described the dispute, set forth a list of undisputed facts, and gave the reasons for his decision disallowing the claimed costs. The contracting officer concluded by informing MSA that it must reimburse DOE in the amount of $1,364,806.72 for unallowable insurance costs, plus applicable interest, and provided MSA with its appeal rights should it disagree with the decision.

MSA appealed to the Board on September 17, 2015, and filed its complaint on October 29, 2015. DOE filed its answer on November 25, 2015. MSA filed its motion to strike DOE's answer on December 4, 2015. DOE filed its response on December 21, 2015, and MSA filed its reply on December 23, 2015.

MSA moves to strike DOE's answer in its entirety and requests that the Board order DOE to file a new answer. The crux of MSA's argument is that DOE failed to comply with CBCA Rule 6(c), 48 CFR 6101.6(c)(2014), which requires simple, concise, and direct responses to the allegations contained in the complaint. As an example of DOE's asserted violations of Rule 6(c), MSA points to paragraph 25 of its complaint. Paragraph 25 states: "[t]he Mission Support Contract includes or incorporates by reference the following standard FAR [Federal Acquisition Regulation] and DEAR [Department of Energy Acquisition

Regulation] clauses, among others," followed by a list of eight separate clauses. In its answer, DOE responded: "Admits to the extent supported by the contract cited, which is the best evidence of its contents. Otherwise denies the allegations contained in Paragraph 25."

MSA complains that DOE's response does nothing to narrow the issues at trial, and that the alleged "non-answer" fails to further the "just, informal, expeditious, and inexpensive resolution of each case" contemplated by CBCA Rule 1(c). Rather, MSA says, DOE should respond to each allegation using language from Rule 8(b) of the Federal Rules of Civil Procedure (FRCP). MSA interprets FRCP Rule 8(b) to require a party to respond to allegations of a complaint using one of three responses: (1) admit, (2) deny, or (3) state that the party is without knowledge or information sufficient to form a belief as to the truth of the averment. While acknowledging that the language of CBCA Rule 6(c) differs from that of FRCP Rule 8, MSA contends that we should construe our rule to be consistent with Rule 8(b). Alternatively, MSA moves to strike paragraphs 2, 3, 6, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 31, 32, 36, 37, 38, 39, 40, 41, 46, 49, 51, 52, 53, 56, 57, 61, 63, and 64 of DOE's answer on the grounds that they are "non-compliant, non-responsive" responses to the allegations set forth in the complaint. MSA asserts that DOE's responses in these paragraphs will lead to increased expense and delay as the parties unnecessarily litigate issues to which there is no dispute.

DOE disagrees with MSA, and states that its answer not only complies with CBCA rules, but also is consistent with past pleading practice. DOE points out that the parties have submitted a proposed joint scheduling order, which calls for the parties to file cross-motions for summary relief. To the extent that factual issues exist regarding the terms of the contract, DOE suggests that the parties could submit a stipulation about the contents of the contract.

Discussion

We begin our analysis with the text of the applicable rules. The Board's jurisdiction is derived from the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012). The Board conducts its proceedings in accordance with the Civilian Board of Contract Appeals Rules of Procedure (CBCA Rules). 48 CFR pt. 6101 (2014). Board Rule 6(c) provides:

> Answer. No later than 30 calendar days after the filing of the complaint or of the Board's designation of a complaint, the respondent shall 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. A dispositive motion or motion for a more definite statement may be filed in lieu of the answer only with the permission of the Board. If 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. The Board will inform the parties when it enters a general denial on behalf of the respondent.

Our 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]." 48 CFR 6101.1(c), (d); *Yates-Desbuild Joint Venture v. Department of* State, CBCA 3350, et al, 15-1 BCA ¶ 36,027, at 175,985 n.2 ("we look to decisions interpreting the Federal rule as guidance in interpreting our own Board rule" (citing *Innovative (PBX) Telephone Services, Inc. v. Department of Veterans Affairs*, CBCA 12, et al., 07-2 BCA ¶ 33,685, at 166,758)). Federal Rule of Civil Procedure (FRCP) 8(b)(1) provides guidance for pleadings in the form of answers and defenses:

> (1) ***In General.*** In responding to a pleading, a party must:
>
> (A) state in short and plain terms the defenses to each claim asserted against it; and
>
> (B) admit or deny the allegations asserted against it by an opposing party.
>
> (2) ***Denials – Responding to the Substance***. A denial must fairly respond to the substance of the allegation.
>
> (3) ***General and Specific Denials***. 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. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.
>
> (4) ***Denying Part of an Allegation***. 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.
>
> (5) ***Lacking Knowledge or Information***. A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.

> (6) ***Effect of Failing to Deny***. An allegation–other than one relating to the amount of damages–is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

Blanket guidance for all pleadings is imparted in FRCP Rule 8(e), Construing Pleadings, which states that "[p]leadings must be construed so as to do justice."

With these principles in mind, we turn to appellant's motion to strike DOE's answer as non-responsive.[1] Our rule governing motions, CBCA Rule 8, identifies potential dispositive motions by type (such as motions to dismiss for lack of jurisdiction and motions for summary relief). Rule 8 does not specifically list "motions to strike." Therefore, in the absence of a rule specifically addressing motions to strike, we look to FRCP Rule 12(f). Rule 12(f) states, in pertinent part, that a court "may strike from any pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter," on its own or on motion made by a party.

Federal courts generally are reluctant to respond favorably to motions to strike:

> The district court possesses considerable discretion in disposing of a Rule 12(f) motion to strike redundant, impertinent, immaterial or scandalous matter. However, because federal judges have made it clear, in numerous opinions they have rendered in many substantive contexts, that Rule 12(f) motions to strike on any of these grounds are not favored, often being considered purely cosmetic or "time wasters," there appears to be general judicial agreement, as reflected in the extensive case law on the subject, that they should be denied unless the challenged allegations have no possible relation or logical connection to the subject matter of the controversy.

5C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1382, at 433-36 (3d ed. 2004) (footnotes omitted); *see Reunion, Inc. v. United States*, 90 Fed. Cl. 576,

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[1] MSA failed to comply with CBCA Rule 8(a), which requires, in part, that with the exception of joint motions by the parties, "all motions must represent that the moving party has attempted to discuss the grounds for the motion with the non-moving party and tried to resolve the matter informally." Here, appellant filed its motion without the required representation that it had attempted to discuss the grounds for its motion with DOE, or that it attempted to resolve it informally.

581 (2009) ("[B]ecause striking a portion of a pleading is a drastic remedy and because it often is sought by the movant simply as a dilatory or harassing tactic, numerous judicial decisions make it clear that motions under Rule 12(f) are . . . infrequently granted."). "If sufficiency of [a] defense depends on disputed issues of fact or questions of law, a motion to strike [that defense] should not be granted." *System Fuels, Inc. v. United States*, 73 Fed. Cl. 206, 216 (2006) (quoting 2 James Wm. Moore, *Moore's Federal Practice* § 12.37[4], at 12–100.5 (3d ed. 2006)).

Thus, "[t]o succeed on a motion to strike, the movant must show 'that the allegations being challenged are so unrelated to plaintiff's claims as to be unworthy of any consideration as a defense and that their presence in the pleading throughout the proceeding will be prejudicial to the moving party'." *United States v. Cushman & Wakefield, Inc.*, 275 F. Supp. 2d 763, 767-8 (N.D. Tex. 2002) (addressing the standard in the context of a motion to strike defenses in an answer (quoting *Federal Deposit Insurance Corp. v. Niblo*, 821 F. Supp. 441, 449 (N.D. Tex. 1993)). "A court must deny a motion to strike a defense if there is any question of law or fact." *Id*. at 768. "A Rule 12(f) motion to strike a defense is proper, however, when the defense is insufficient as a matter of law." *Id*. (citing *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1057 (5th Cir. 1982)). "The granting of a motion to strike is within the discretion of the court." *Id.* (citing *Niblo*, 821 F. Supp. at 449).

Here, appellant complains that DOE's answer fails to narrow the issues because of "DOE's refusal to admit the obvious." We find that the answers, while formulaic, are sufficient for the purpose of notice pleading. As one of our predecessor boards of contract appeals noted:

> Rule 8 of the Federal Rules of Civil Procedure provides that averments in a pleading to which a responsive pleading is required are admitted when not denied. Thus, the requirement for the contents of an Answer is very general. This is in accordance with the liberal rules of pleadings which have been crafted in recent years. *Ducolon Mechanical, Inc.*, 83-3 BCA ¶ 20,951 (DOTBCA 1987). As long as the issues are joined the appeal may move forward. Detailed responses are unnecessary.

Quality Interconnect Systems, DOT BCA 2755, et al., 95-2 BCA ¶ 27,924, at 139,454; *see Trident Industrial Products Corp.*, DOT BCA 2833, 96-1 BCA ¶ 28,061, at 140,128 (1995) ("As long as the opposing party is placed on notice of the position of its opponent, the requirements of the rule are satisfied."); *see also Hickman v. Taylor*, 329 U.S. 495, 500-01 (1947) ("Under the prior federal practice, the pretrial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the

pleadings. . . . The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial"); *Winder v. Erste*, 60 F. Supp. 3d 43 (D.D.C. 2014) (defendant satisfied Rule 8(b) obligations by including defenses to each claim asserted against it in short and plain terms); 8A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1261, at 528 (3d ed. 2004) ("'plain notice' of the issues being raised by the defendant is all that is required at the pleading stage by the federal rules; the parties are provided with adequate discovery and pretrial procedures to develop in detail the facts pertinent to their various claims and defenses and the pleadings are not intended to carry that burden."). This is particularly true in our forum. *N&P Construction Co.*, VABCA 2578, et al., 92-1 BCA ¶ 24,447, at 121,981 (1991) ("While this Board looks to the Federal Rules of Civil Procedure (FRCP) and the Federal Rules of Evidence (FRE) for general guidance, it is not inexorably bound to apply those rules to administrative hearings which are generally of a somewhat less formal nature."); *Space Age Engineering, Inc.*, ASBCA 25761, et al., 83-2 BCA ¶ 16,789, at 83,439 (board "pleadings and practice are much less formal, by necessity and design, than are those of the federal court system"); *see also Trident Industrial*, 96-1 BCA at 140,128 ("The Federal Rules of Civil Procedure do not require that a party go through an inordinate effort in crafting its answer.")

Requiring more specificity in pleadings is particularly unnecessary under the procedural framework for appeals brought under the CDA. Under the CDA, "[e]ach claim by a contractor against the Federal Government shall be submitted to the contracting officer for a decision." 41 U.S.C. § 7103(a)(1). "[T]he Board cannot assume jurisdiction over a contractor's request for monetary relief unless the contractor previously submitted to the agency's contracting officer, in writing, a claim seeking payment of a sum certain and requesting a final decision." *Safe Haven Enterprises, LLC v. Department of State*, CBCA 3871, et al., 15-1 BCA ¶ 35,928, at 175,603 (citing 41 U.S.C. § 7103(a)(1), (2); *Reflectone Inc. v. Dalton*, 60 F.3d 1572, 1575-76 (Fed. Cir. 1995) (en banc)). "The purpose of this requirement is to allow the [contracting officer] to pass judgment on the contractor's. . . claim" before an appeal can be filed. *McAllen Hospitals LP v. Department of Veterans Affairs*, CBCA 2774, et al., 14-1 BCA ¶ 35,758, at 174,971. Should a contractor wish to appeal the contracting officer's final decision, pursuant to CBCA Rule 2(a)(1), that contractor is expressly required to identify the basis of the Board's jurisdiction in its notice of appeal by describing the contracting officer's final decision being appealed "in enough detail to enable the Board to differentiate that decision from any other." In sum, the procedural requirements of the CDA make plain the unique nature of a CDA appeal because the parties do not rely solely upon the pleadings for notice of the claims and defenses. *See generally Beker Industries Corp. v. United States*, 585 F. Supp. 663 (CIT 1984) (discussing the unique nature of the particular review action before the Court of International Trade as relating to the pleadings challenged).

Here, when MSA filed its notice of appeal, it appended to the notice a copy of the contracting officer's final decision, which, as discussed above, provided a lengthy explanation of the Government's reasons for disallowing MSA's costs. Therefore, MSA cannot claim to be completely in the dark about DOE's position regarding the basis for the contracting officer's decision. As long as the opposing party is placed on notice of the position of its opponent, the requirements of Rule 8(b) are satisfied. When combined with the mandate of FRCP Rule 8(e), requiring that we construe all pleadings as to do substantial justice, we see no reason to strike respondent's answer.

Decision

MSA's motion to strike DOE's answer is **DENIED**.

JERI KAYLENE SOMERS
Board Judge