



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

**THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND
IS BEING PUBLICLY RELEASED IN ITS ENTIRETY ON OCTOBER 5, 2023**

RESPONDENT'S MOTION TO DISMISS GRANTED;
APPELLANT'S REQUEST FOR DECLARATORY RELIEF DENIED:
September 22, 2023

CBCA 7661

FRAMACO INTERNATIONAL INC.,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Douglas L. Patin and Erik M. Coon of Bradley Arant Boult Cummings LLP, Washington, DC; and Sam Z. Gdanski and Abraham S. Gdanski of Gdanski Law PC, Teaneck, NJ, counsel for Appellant.

Thomas D. Dinackus, Office of the Legal Adviser, Buildings and Acquisitions, Department of State, Washington, DC, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **RUSSELL**, and **O'ROURKE**.

RUSSELL, Board Judge.

Appellant, Framaco International Inc. (Framaco), has filed 119 appeals with the Board (twenty-three of which are consolidated), based on its contract with respondent, Department of State (State), Bureau of Overseas Building Operations (OBO), to construct an embassy compound in Port Moresby, Papua New Guinea. This appeal (CBCA 7661)

results from State's denial of Framaco's claim that requested a contracting officer's final decision (COFD) declaring that the agency breached the parties' contract (1) by the contracting officer (CO) failing to issue a decision, favorable to Framaco, on one of Framaco's claims and (2) by the CO failing to exercise personal and independent judgment in issuing decisions under the contract. Framaco asserts that a favorable decision in this appeal "will eliminate the need for the parties to litigate, and for this Board to decide, all the other . . . pending appeals given the breach of contract damages Framaco would be entitled to recover under well-established authority." Appellant's Reply to Respondent's Opposition to Appellant's Motion to Expedite CBCA 7661 and Stay Related Proceedings and Opposition to Respondent's Motion to Dismiss (Appellant's Reply) at 3.

State has moved to dismiss this appeal, arguing that the appeal is essentially one for monetary relief for which Framaco, in its underlying claim before the agency, provided neither a sum certain nor the certification required by the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018). Alternatively, State moves to dismiss this appeal on prudential grounds for a number of reasons, including that the CDA would adequately provide Framaco with any relief to which it is entitled assuming a finding of liability.

On September 13, 2023, the Board held a hearing on Framaco's non-consolidated or small claims appeals. For reasons stated at that hearing and below, we decline to grant declaratory relief to Framaco and dismiss the appeal.

Background

A. The Contract

In July 2015, State awarded Framaco a firm-fixed-price contract, initially valued at \$96,875,381, to construct the New Embassy Compound (NEC) in Port Moresby, Papua New Guinea. Appeal File (CBCA 6997, et al.), Exhibit 1 at DOS-PTMO-00982321.¹ The project was originally designed in 2010 as a "Standard Secure mini-Compound" (SSmC) with a scope including a lock-and-leave new office building, a perimeter security wall and fence, a main compound entry pavilion (MCAP), and a service entry/utility building and support annex. Exhibit 2 at DOS-PTMO-00982414. Construction of the facility began in 2012, but in 2013, after forty percent of the project was completed, a future marine detachment was planned for Port Moresby and the embassy staffing requirement was increased. *Id.* State therefore descoped the work under the 2012 contract and closed out that contract. The project was redesigned under an expanded NEC, incorporating the completed portions of the

¹ All exhibits are found in the appeal file of CBCA 6997, et al., which concerns the same contract, unless otherwise noted.

SSmC project as well as surplus equipment and materials, where appropriate. *Id.* The redesigned project included the perimeter security wall and fence, the MCAP, a new service compound entry pavilion, a new four-story office building, a marine service guard residence, a service entry/utility building, an enlarged support annex, and a new recreation facility. *Id.*

Government-furnished surplus materials and equipment (GFE) from the 2012 project were made available to Framaco for incorporation into the expanded NEC project, with certain limitations. Exhibit 2 at DOS-PTMO-00982418. The NEC project contract provided:

B.5 GOVERNMENT FURNISHED PROPERTY/EQUIPMENT

....

B.5.1 In accordance with referenced clauses, the following Government Furnished Equipment and materials will be provided for incorporation into the work by the contractor. With the exception of GFE Surplus Equipment and Materials (see below) the equipment, systems components and parts will be furnished in sufficient quantities and in sufficient time to allow the contractor to complete the construction work as scheduled.

B.5.2 Reference C.2.4.2; GFE Surplus Equipment and Materials from the previous project are being made available to the Contractor for incorporation into the NEC project subject to the limitations defined in Section C.3.2.

See Section C.2.5

Exhibit 1 at DOS-PTMO-00982322.

Section C.2.5 of the SOW listed various equipment from the previous project (e.g., servers, printers, telephones, monitors, keyboards, CPUs) that could be used for work under the expanded NEC contract, to also include GFE subject to section C.3.2 of the SOW. Exhibit 2 at DOS-PTMO-00982420.

Section C.2.4 of the Statement of Work (SOW), which was part of the contract, stated:

C.2.4 Government Furnished Items

C.2.4.1 Government Furnished Items. Refer to C.2.5 GFE Matrix Table for requirements for:

Government Furnished Government Installed (GFGI) items

Government Furnished Contractor Installed (GFCI) items

C.2.4.2 GFE Surplus Materials and Equipment from the previous project are being made available to the Contractor for incorporation into the NEC project subject to the limitations defined in Section C.3.2. A list of the available material and their location is provided in Attachment J.3.2.3 Regardless of the quantity of equipment and materials stated in Attachment J.3.2.3, the Contractor remains responsible for providing the total quantity of equipment and materials required to complete the work.

Exhibit 2 at DOS-PTMO-00982418.

Section C.3.2 states, in part:

C.3.2.1 It shall be the responsibility of the Contractor for determining the GFE Surplus Materials and Equipment that will be incorporated in to the construction. Any GFE Surplus Material or Equipment not incorporated into the construction shall be properly disposed of by the Contractor.

C.3.2.2 The Contractor shall inspect all surplus equipment and materials for suitability. Any piece of equipment or material found to be damaged, excessively rusted or corroded, containing mold/mildew or otherwise degraded shall be discarded and disposed of by the Contractor. Any item in question, shall be brought to the attention of the [Contracting Officer's Representative (COR)] for a final determination of usability.

Exhibit 2 at DOS-PTMO-00982421.

B. The Parties' Disputes

Almost two years after contract award, in or around April 2017, Framaco provided State with a 234-page document, the "Material Assessment Report" (MAR), the "main purpose" of which, as explained in the MAR, was "to explain the problems identified and quantities of missing materials [determined] during the Site Assessment [which took place between January 20 and March 10, 2017,]" with "[d]etailed information about the existing conditions of the Surplus Materials . . . provided where necessary." Exhibit 138 at DOS-PTMO-01513794.

By letter dated April 24, 2017, the CO responded to the MAR, stating:

I acknowledge the completion of Framaco's Material Assessment and the receipt of their report submitted to the Government on 03 April 2017. Nevertheless, the report failed to identify the quantity of materials suitable for use. During the out-briefing, the Assessment Team confirmed to OBO that 90% of the materials found at the site were deemed in good condition and usable. To reinforce this fact[,] your office is already incorporating surplus materials from different disciplines into the submittals for the future work.

Attachment J.3.2.3, provided to Framaco as part of PORT MORESBY NEC SAQMMA-15-R-0110 Solicitation, provided information on the type and quantity of surplus equipment and materials being made available to the Contractor based upon information provided to OBO at the time of project suspension. . . .

The bid documents . . . stated that: "regardless of the quantity of equipment and materials stated in Attachment J.3.2.3, the Contractor remains responsible for providing the total quantity of equipment and materials required to complete the work."

Exhibit 142 at DOS-PTMO-01903251.

Over the next two years or so, the parties exchanged multiple communications regarding their respective positions as relates to their obligations under the GFE provisions of the contract. In May 2018, State issued a unilateral modification to the contract directing Framaco to, among other tasks, "replace damaged GF surplus equipment and materials identified with specific set quantifiable qualities that in accordance with the contract are suitable for use on the project up to the specific quantity identified in the GF equipment and material items" and "replace missing GF surplus equipment and materials that in accordance

with the contract are suitable for use on the project up to the specific quantity identified in the GF equipment and materials items lists.” Exhibit 94 at DOS-PTMO-01896711. The modification also stated that funding would be available for this directed performance and that Framaco should submit a proposal within thirty days of the modification. *Id.* The parties did not resolve their dispute over GFE through this modification.

In July 2018, Framaco submitted a request for a COFD as relates to the MAR. In its request, Framaco asserted that its price proposal considered that “all GFE Surplus equipment and material [would] be used in the project regardless of their compliance with current design and specifications.” Exhibit 409 at DOS-PTMO-01512694. Thus, “OBO was clearly notified by Framaco before the award of the Contract that Framaco’s price was calculated based on the assumption that all equipment and material listed in the GFE surplus list would be used in the project.” *Id.* However, according to Framaco, certain equipment and materials listed in contract section J.3.2.3 were missing, damaged, required testing, or did not comply with contract design. *Id.* at DOS-PTMO-01512691–93. Framaco alleges that “OBO [had] the responsibility as defined in the contract to provide Government Furnished Equipment and Material to Framaco in proper condition and committed quantity.” *Id.* at DOS-PTMO-01512689. Framaco requested reimbursement of \$16,318,788.91 for costs associated with all “missing,” “need to be tested,” “damaged,” and “non-compliant” GFE and a resulting 569-day delay impact from OBO’s alleged failure to provide contractually-compliant GFE. *Id.* at DOS-PTMO-01512696.

In April 2019, Framaco brought suit at the Court of Federal Claims on a “deemed denial” basis. However, in communications after that date (through July 2019), the parties continued to dispute their respective obligations under the GFE provisions of the contract, with Framaco alleging that the Government was responsible for providing usable GFE for the project and the Government – as reflected in a second unilateral modification effective July 9, 2019, that directed Framaco “to acquire the necessary materials and equipment required to replace missing, damaged, and/or unsuitable/incompatible Surplus Materials provided under the contract and required to complete the construction project,” Exhibit 103 at DOS-PTMO-01900268 – asserting that Framaco was responsible for acquiring the necessary materials to replace the missing, damaged, or otherwise unsuitable GFE to complete the project.

C. Framaco’s Appeals Before the Board

Between December 2020 and June 2021, Framaco filed three appeals at the Board (CBCA 6997, 6998, and 7112). Also in June 2021, Framaco’s suit at the Court of Federal Claims was transferred to the Board (CBCA 7152) and consolidated with the previously-filed appeals, and, in March 2022, the Court of Federal Claims transferred another suit filed by

Framaco to the Board (CBCA 7354). The appeals cover a range of issues, including Framaco's requests for compensation for alleged additional work directed by the CO which was outside of the scope of the contract and for alleged increased costs related to differing site conditions and Government-caused delay. These cases were consolidated along with other appeals subsequently filed by Framaco with the Board. To date, twenty-three of Framaco's 119 appeals have been consolidated (CBCA 6997, 6998, 7112, 7152, 7354, 7440, 7441, 7446, 7656, 7663, 7701, 7702, 7703, 7713, 7745, 7749, 7757, 7796, 7797, 7798, 7799, 7851, and 7861).

On February 3, 2023, Framaco filed this appeal (CBCA 7661). In the underlying claim before the agency (identified as claim 111), Framaco alleged that the CO did not exercise the appropriate independent judgment on the merits of Framaco's claim – specifically, that internal State communications demonstrate that the CO was attempting to negotiate modifications to resolve Framaco's MAR claim submitted in July 2018 in the company's favor but that the CO's position was undermined by OBO legal counsel and the COR on the project. As relief, Framaco requested a COFD “determining that the government fundamentally breached the contract by (1) failing to exercise the Contracting Officer's statutory duty to issue a COFD in response to [Framaco's MAR claim submitted in July 2018] and (2) by the Contracting Officer's failure to exercise personal and independent judgment in issuing final decisions under the contract.” In its complaint before the Board, docketed on February 23, 2023, Framaco requested that the Board “issue a declaratory judgment” for these same reasons. Complaint ¶ 140. On May 4, 2023, four days before filing its opposition to respondent's motion to dismiss, Framaco filed an amendment to its claim 111 before the agency to add “another/alternative ground for relief for monetary damages resulting from the Government's material breaches of contract described in Claim 111.” Appellant's Reply, Exhibit 27 at 1. In this amended claim, Framaco stated, “in addition to, and as an alternative to the declaratory relief requested by Framaco in its Claim 111. . . , Framaco also requests a COFD that Framaco is entitled to \$65,665,736.97 in breach of contract damages because of the Government's breaches.”² *Id.* at 2.

² On June 26, 2023, the CO issued a final decision denying Framaco's amended claim, and, on that same day, Framaco appealed that decision to the Board, which was docketed as CBCA 7804. This decision only addresses CBCA 7661, which is the subject of State's motion to dismiss, not CBCA 7804. However, at the hearing on September 13, 2023, on Framaco's non-consolidated or small claims appeals, the Board stated that it was disinclined to issue a declaratory judgment in CBCA 7804 for reasons similar to those stated herein. The Board did not address Framaco's request for monetary damages based on breach of contract raised in CBCA 7804 at that hearing.

State has moved to dismiss CBCA 7661 as essentially a claim for monetary relief for which no sum certain was provided in the underlying claim to the CO. Alternatively, State moves to dismiss this appeal on prudential grounds because monetary, not equitable, relief is the appropriate remedy for any damages that Framaco may have sustained resulting from the Government's actions and, further, providing an equitable remedy would not resolve many of the appeals pending before the Board. Although Framaco asserts that this appeal is one for declaratory relief, it also states that if it is successful in proving its breach claim as set forth in the appeal, it would be entitled to receive breach of contract damages which would affect its other claims. *See* Appellant's Motion to Expedite CBCA 7661 and Stay Related Proceedings Pending Resolution of CBCA 7661 at 10.

Discussion

The CDA provides that “[e]ach claim by a contractor against the Federal Government relating to a contract [shall be in writing and] shall be submitted to the contracting officer for a decision.” 41 U.S.C. § 7103(a)(1). The Federal Acquisition Regulation (FAR) defines “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 the contract.” 48 CFR 2.101 (2022).

We find that State's arguments in support of its motion urging the Board not to grant declaratory relief in this appeal have merit. As an initial matter, appeals before the Board are *de novo*. *CI-Pond Solutions JV, LLC v. Department of Justice*, CBCA 7233, 22-1 BCA ¶ 38,077, at 184,912. Once a dispute is before the Board, the parties start with a “clean slate.” *Wilner v. United States*, 24 F.3d 1397, 1402 (Fed. Cir. 1994) (en banc); *CompuCraft, Inc. v. General Services Administration*, CBCA 5516, 17-1 BCA ¶ 36,662, at 178,540. This means we afford no special deference or acceptance to a CO's determination on appeal. *Id.* Any specific findings of fact that the CO made, or was considering making during negotiations, favorable or otherwise to Framaco as to issues related to the MAR, are not binding on the Board.

Next, although the Board has authority to grant declaratory relief under the CDA, the Court of Appeals for the Federal Circuit has observed that, in deciding whether declaratory relief is warranted, the tribunal should keep in mind “the appropriateness of declaratory relief, including whether the claim involves a live dispute between the parties, whether a declaration will resolve that dispute, and whether the legal remedies available to the parties would be adequate to protect the parties' interests.” *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1271 (Fed. Cir. 1999). Here, a declaration on the facts presented in this appeal would serve little purpose.

State is correct that a declaration would not resolve this dispute because it would not provide Framaco the monetary damages that it clearly seeks. As explained by the Board in *Duke University v. Department of Health and Human Services*, “[t]he Federal Circuit held that, if a claim, ‘although styled as one for declaratory relief, would — if granted — yield only one significant consequence,’ which would be to ‘entitle [the contractor] to recover money damages from the government,’ the claim could only be pursued as a monetary claim, stated in a sum certain.” CBCA 5992, 18-1 BCA ¶ 37,023, at 180,290-91 (quoting *Securiforce International America, LLC v. United States*, 879 F.3d 1354, 1360 (Fed. Cir. 2018)). Here, Framaco seeks declaratory relief based upon State’s alleged breach of their contract. However, as held by a predecessor Board, “[i]f a claim purports to seek nonmonetary relief, but nonetheless is based upon breach of contract, then money damages are the appropriate remedy and they must be alleged and the claim certified, if required.” *Thomas Creek Lumber & Log Co.*, IBCA 4020-1999, 00-2 BCA ¶ 31,077, at 153,435. Accordingly, the Board declines to exercise its discretion to grant declaratory relief when the CDA provides Framaco with an adequate remedy for its breach claim.

Our decision here is buttressed by Framaco’s filing of a subsequent appeal to this one (CBCA 7804) with the exact same claim as the one serving as the basis for this appeal (CBCA 7661), with the addition of a request for monetary relief. We cannot find that Framaco’s rights are somehow foreclosed by our decision not to grant declaratory relief in this particular appeal.³ To the contrary, based on Framaco’s own assertions, the legal remedy of monetary relief available under the CDA will be an adequate remedy to redress any damages sustained by Framaco, assuming a finding of entitlement.

³ Further, although Framaco requests that the Board provide declaratory relief based on the CO’s failure to issue a COFD, a remedy for such an omission is already provided in the CDA itself which allows a contractor to file an action at the Boards or the Court of Federal Claims based on the CO’s “deemed denial” of the contractor’s claim. *See* 41 U.S.C. 7103(f)(5) (“Failure by a contracting officer to issue a decision on a claim within the required time period is deemed to be a decision by the contracting officer denying the claim and authorizes an appeal or action on the claim.”). And as far as Framaco’s request for declaratory relief based on its allegation that the CO failed to “exercise personal and independent judgment,” our precedent clearly establishes that a CO need not function in a vacuum and may seek legal and expert guidance when considering complex matters. *See, e.g., Washington Development Group-JWB, LLC v. General Services Administration*, GSBCA 15137, et al., 03-2 BCA ¶ 32,319, at 159,885 (“It is well established that the contractor is entitled to a decision that has been independently rendered by the contracting officer [Nevertheless,] regulations and case law anticipate that the contracting officer, particularly in complex matters, will seek and consider advice of counsel and experts as an integral part of the process of formulating a final decision.”).

Decision

The Board declines to exercise its authority to grant declaratory relief for the reasons stated herein, including that the issues presented in this appeal are subsumed in CBCA 7804, rendering this appeal moot. Accordingly, this appeal is **DISMISSED**.

Beverly M. Russell

BEVERLY M. RUSSELL
Board Judge

We concur:

Erica S. Beardsley

ERICA S. BEARDSLEY
Board Judge

Kathleen J. O'Rourke

KATHLEEN J. O'ROURKE
Board Judge