



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED; DENIED AS TO QUANTUM: May 26, 2011

CBCA 449

NAVIGANT SATOTRAVEL,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

James H. Roberts, III of Van Scoyoc Kelly PLLC, Washington, DC, counsel for Appellant.

Michael J. Noble, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **HYATT**, and **KULLBERG**.

KULLBERG, Board Judge.

Appellant, Navigant SatoTravel (NST)¹, appealed the decision by the General Services Administration's (GSA's) contracting officer (CO) that directed NST to remit industrial funding fee (IFF) payments in connection with an order for travel services issued by the Army Contracting Agency-ITEC4 (DoD) for Defense Travel Region 6 (DTR6). The

¹ NST was acquired by Carlson Wagonlit Travel and is now referred to as either Carlson SatoTravel or CWTSato Travel. Transcript at 35.

proceedings in this appeal were bifurcated. Board's Conference Memorandum and Order (Mar. 8, 2007) at 3. In the entitlement phase of this appeal, the Board conducted a hearing and issued a decision that denied the appeal as to entitlement; the Board subsequently denied NST's motion for reconsideration. *Navigant SatoTravel v. General Services Administration*, CBCA 449, 09-1 BCA ¶ 34,098, *reconsideration denied*, 09-2 BCA ¶ 34,207.² The Board's decision as to entitlement held that NST was responsible for paying IFF to GSA for certain transactions under DoD's order for travel services. Only the issue of quantum, the amount of IFF to be remitted, is before the Board. A hearing in the quantum phase of this appeal was held on November 30, 2010. Both parties submitted briefs after the hearing.

On June 28, 2010, appellant filed a motion to dismiss this appeal for lack of jurisdiction. The Board deferred issuing a decision on appellant's motion, and a ruling on appellant's motion is included with this decision. Board's Conference Memorandum and Order (July 7, 2010) at 2. For the reasons set forth below, we deny appellant's motion to dismiss this appeal. We deny this appeal as to quantum and find that NST is liable for payment of IFF to GSA in the amount of \$302,881.50, plus interest.

Facts

On March 24, 2004, the Federal Supply Service (FSS) of GSA issued solicitation number FBGT-RK-040001-B (solicitation), Travel Services Solutions. Appeal File, Exhibit 28.³ The types of services to be provided under the solicitation were classified by special item numbers (SINs). *Id.* at 6. Those travel-related services under the statement of work relevant to this appeal included: travel agent services/travel management center services (SIN 599-2), new products/services (SIN 599-99), and contract support items (SIN 599-1000). *Id.* at 7-20. The contract performance period was for five years from the date of award with three option periods of five years each. *Id.* at 1.

Paragraph C.19 of the solicitation, General Services Administration Regulation (GSAR) 552.238-74, Industrial Funding Fee and Sales Reporting (JUL 2003) (48 CFR 552.238-74 (2003)), required the contractor to "accurately report the dollar value, in U.S. dollars and rounded to the nearest whole dollar, of all sales under this contract by calendar

² The Board previously denied NST's motion for summary relief during the entitlement phase of this appeal. *Navigant SatoTravel v. General Services Administration*, CBCA 449, 08-1 BCA ¶ 33,821. NST's second motion for summary relief during the quantum phase of this appeal was also denied. *Navigant SatoTravel v. General Services Administration*, CBCA 449, 10-1 BCA ¶ 34,462.

³ All exhibits are found in the appeal file, unless otherwise noted.

quarter.” Exhibit 28 at 35. The contractor was required to pay IFF to GSA at a rate set for each type of reported sale by remitting “IFF to FSS in U.S. dollars within 30 calendar days after the end of the reporting quarter; final payment shall be remitted within 30 days after physical completion of the last outstanding task order or delivery order of the contract.” *Id.* at 36. Paragraph C.19 at subparagraph (d) further provided:

Failure to remit the full amount of the IFF within 30 calendar days after the end of the applicable reporting period constitutes a contract debt to the United States Government under the terms of FAR Subpart 32.6. The Government may exercise all rights under the Debt Collection Improvement Act of 1996, including withholding or setting off payments and interest on the debt (see FAR clause 52.232-17. Interest). Should the Contractor fail to submit the required sales reports, falsify them, or fail to timely pay the IFF, this is sufficient cause for the Government to terminate the contract for cause.

Id. at 36-37. Paragraph C.20 of the solicitation stated that the IFF for travel agent and travel management services under SIN 599-2 was \$1.50 per transaction. *Id.* at 37. The solicitation also incorporated by reference Federal Acquisition Regulation (FAR) clause 52.232-17 (48 CFR 52.232-19 (2003)), Interest (JUN 1996). *Id.* at 57.

On May 5, 2004, GSA awarded to NST contract GS-33F-0020-P (FSS contract) under the solicitation. Exhibit 29. NST agreed to provide services under SINs 599-2, 599-9, and 599-1000. *Id.* at 2. NST’s IFF rate for services under SIN 599-2 was \$1.50 per transaction. *Id.*

On September 2, 2004, DoD issued request for quotations W91QUZ-04-T-0016 for DTR6 travel services. Exhibit 1. Subsequently, DoD issued to NST order number W91QUZ-05-F-0005 (order) for DTR6 travel services on October 29, 2004. Exhibit 2. Under that order, NST provided travel services that included automated services through the Defense Travel System (DTS) web portal, DTS services in which assistance was provided (DTS “touched”), and services by “traditional” methods. *Id.* at 45. Each of those types of travel services was priced by NST under contract line items (CLINs) and sub-CLINs for a base period (November 29, 2004, to March 31, 2005) and two option periods (April 1 to September 30, 2005, and October 1 to November 28, 2005). Exhibit 1 at 2-46. DTS, DTS “touched,” and “traditional” travel services were provided under CLINs 0001-0003 for the base period, CLINs 0016-0018 for the first option period, and CLINs and 0031-0033 for the second option period. Exhibit 2 at 3-8, 18-21, 32-35. The performance period for the DTR6 order was ultimately extended to March 31, 2006. Exhibit 7; Transcript at 21.

On October 19, 2005, GSA informed NST that it would conduct a “contractor assistant visit” to ensure that sales were being reported and that IFF was being remitted. Exhibit 3. GSA subsequently determined that DoD had issued to NST its order for DTR6 travel services under NST’s FSS contract, but NST had failed to remit IFF as required under the terms of its FSS contract with GSA. Exhibits 4-7. In an electronic mail message dated January 23, 2006, NST advised GSA that it will “be disputing GSA’s position through the proper channels and will not report or remit anything pertaining to the DTR6 contract until SatoTravel has exhausted any and all legal remedies and a formal determination is made.” Exhibit 6.

On March 21, 2006, GSA’s CO issued a decision that directed NST to pay IFF in the amount of \$292,609.50 for SIN 599-2 transactions (DTS, DTS “touched,” and “traditional” travel services) under DoD’s order for DTR6 travel services during the period from November 29, 2004, through January 31, 2006. Exhibit 8. The CO determined the amount of IFF by multiplying the IFF rate, \$1.50 per transaction, times the number of SIN 599-2 transactions, 195,073, which was based upon information in a document that DoD had obtained from NST. *Id.* ; Transcript at 20-22, 47. At the time the decision was issued, the CO had no information as to the number of SIN 599-2 transactions after January 31, 2006. Transcript at 20-21. The CO’s decision also advised NST that the demand for payment represented “only known sales at this time [and] [a]dditional demands may be made which represent the IFF on sales later learned of and/or reported.” Exhibit 8 at 2.

In response to written discovery from the Government, NST represented that the number of SIN 599-2 transactions (DTS, DTS “touched,” and “traditional” travel services) under DoD’s order for DTR6 travel services for the period from November 29, 2004, through January 31, 2006, was 189,446. Exhibits 200, 201. In order to respond to GSA’s discovery, NST stated that it did the following:

The answers regarding transaction counts were based upon extract reports we ran from the data in the back office database called SatoStar [where] the DTR 6 contract (and other government contracts . . . were handled by SatoTravel). We ran these reports for the purpose of responding to the interrogatories. We do not have hard copies.

The invoice documents were produced from the SatoStar database. The invoices for ancillary services would have been entered into SatoStar at the time of creation by our accounts receivable department that existed at the time for SatoTravel, but the department no longer exists as it did at the time the

invoices were created. [A CWTSato Travel employee] then researched the SatoStar database to determine if payments against the invoices were posted. He then produced a screen shot of the applicable payment as shown in SatoStar. Any checks issued by the Government or bank statements to prove a wire transfer into the applicable bank accounts to reflect actual payments made by the Department of Defense would be in storage files stored at Iron Mountain.

Exhibit 200 at 11. GSA does not dispute that the number of SIN 599-2 transactions from November 29, 2004, through January 31, 2006, was 189,446 instead of 195,073, which was set forth in the CO's March 21, 2006, decision. Exhibits 8, 204; Transcript at 32. Additionally, NST represented, in response to GSA's written discovery, that the number of SIN 599-2 transactions for the period from February 1, 2006, to the end of the order was 12,475. Exhibit 205. Mr. Marc Stec, an NST vice president, testified that the number of transactions represented in NST's responses to GSA's written discovery was accurate. Transcript at 36-41. DoD, as a customer, was not required to document such transactions under the DTR6 order. *Id.* at 32.

Discussion

The Board's decision on entitlement stated the following:

The only work under the order for DTR6 travel services for which GSA seeks IFF are DTS, DTS "touched," and "traditional" travel agent services, which are under CLINs 0001, 0002, and 0003 for the base period and the corresponding CLINs for the option periods. . . . NST is responsible for paying IFF at the rate set forth under SIN [599]-2 of its FSS contract, \$1.50 per transaction, for those transactions under DTR6 that include DTS, DTS "touched," and "traditional" travel services.

Navigant SatoTravel, 09-1 BCA at 168,605. GSA contends that it is entitled to recover IFF at a rate of \$1.50 per transaction for 189,446 SIN 599-2 transactions for the period from November 4, 2004, through January 31, 2006, and for 12,475 SIN 599-2 transactions for the period from February 1, 2006, to the end of the DTR-6 order. GSA is also claiming interest on the amount of IFF due.

Before the hearing of this appeal, NST moved to dismiss for lack of jurisdiction on the grounds that GSA's claim was not certified and lacked complete and supporting data.

In its posthearing brief, NST argues that the Board lacks jurisdiction in this appeal in that the CO's decision, dated March 21, 2006, was issued before the performance period for the DTR6 order ended, which was March 31, 2006, and the CO's decision was also issued before the due-date of May 1, 2006, for reporting IFF for the last quarter of the order, January 1 to March 31, 2006. Even if the Board finds that it has jurisdiction in this appeal, NST argues that GSA should recover no IFF because GSA has produced no documentation from DoD in support of its claim.

In its motion to dismiss, NST argued that GSA did not certify its claim, and the Board should dismiss this appeal for lack of jurisdiction by finding that the requirement for certification applies to the Government as well as contractors. The Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (as codified by Pub. L. No. 111-350, 124 Stat. 3677, 3816-26 (2011)), states the following:

- (1) REQUIREMENT GENERALLY.— For claims of more than \$100,000 made by a contractor, the contractor shall certify that—
 - (A) the claim is made in good faith;
 - (B) the supporting data are accurate and complete to the best of the contractor's knowledge and belief;
 - (C) the amount requested accurately reflects the contract adjustment for which the contractor believes the Federal Government is liable; and
 - (D) the certifier is authorized to certify the claim on behalf of the contractor.

Id. § 7103(b). The CDA requirement for the certification of claims applies only to claims brought by contractors, and the Government is not required under the CDA to certify its claims against a contractor. *See Tecom, Inc. v. United States*, 732 F.2d 935, 937 (Fed. Cir. 1984); *Mutual Maintenance Co.*, GSBCA 7496, 85-2 BCA ¶ 18,098, at 90,857. NST errs in arguing that the Board should require GSA to certify its claim in this appeal in order for this Board to have jurisdiction, and its motion to dismiss for lack of jurisdiction for this reason is denied.

NST argues in its posthearing brief that the Board lacks jurisdiction in this appeal because the CO's March 21, 2006, decision was premature and speculative in that it was

issued before the end of the DTR6 order, March 31, 2006, and before the due date of May 1, 2006, for reporting IFF transactions for the last quarter of the DTR6 order, January 1 to March 31, 2006. Appellant's Brief at 2, 9. Whether a CO's decision as it relates to a claim against a contractor is premature requires an inquiry into "whether the underlying facts in the case have been sufficiently developed; and whether a dispute existed between the parties before the final decision of the contracting officer was rendered and whether such a dispute is necessary under the CDA for a valid claim to exist." *Job Line Construction, Inc.*, EBCA C-9408177, 95-1 BCA ¶ 27,429, at 136,692 (1994). NST's electronic mail message dated January 23, 2006, advised GSA that it would not report or pay IFF until it had exhausted its legal remedies, so payment of IFF was a matter in dispute at the time the CO issued her March 21, 2006, decision. The CO's decision sought IFF for SIN 599-2 transactions on the basis of information that had been provided by NST to DoD. The facts necessary to support the CO's decision were sufficiently developed at the time the CO's decision was issued such that the Board has jurisdiction in this case, and the Board finds no merit in NST's argument that the CO's decision was premature or speculative.

GSA seeks to recover IFF for SIN 599-2 transactions under the DTR6 order for the periods from November 4, 2004, through January 31, 2006, and from February 1, 2006, to the end of the DTR-6 order, March 31, 2006, even though the CO's decision only claimed IFF for transactions through January 31, 2006. The CDA states that "[e]ach claim by the Federal Government against a contractor relating to a contract shall be the subject of a written decision by the contracting officer." 41 U.S.C. § 7103(a)(3). In the case of a government claim, generally, this Board's jurisdiction requires a claim by the Government, a CO's decision, and an appeal of that decision. *M.G.C. Co.*, DOT CAB 1553, 85-1 BCA ¶ 17,777, at 88,781 (1984). This Board, however, has recognized that "[w]hether a matter placed before a board of contract appeals is a new claim or part of the claim which was presented to the contracting officer turns on whether the matter raised before the Board differs from the essential nature or basic operative facts of the original claim." *Walsh/Davis Joint Venture v. General Services Administration*, CBCA 1460, 10-2 BCA ¶ 34,479, at 170,056-57, *reconsideration denied*, 10-2 BCA ¶ 34,498 (Board was not deprived of its jurisdiction to determine costs for supplying precast concrete face mix for the three buildings not mentioned in appellant's claim where the analysis was the same with regard to those buildings that were set forth in appellant's claim).

GSA's claim for IFF for the period from February 1 to March 31, 2006, arises from the same set of facts as the claim asserted in the CO's decision for IFF for the period from November 4, 2004, through January 31, 2006. The Board has already determined that NST is required to pay IFF for SIN 599-2 transactions under the DTR6 order for DTS, DTS "touched," and "traditional" travel agent services, and the Board's decision as to entitlement is equally applicable to the period from February 1 to March 31, 2006. As discussed above,

there is no dispute as to the number of SIN 599-2 transactions for which IFF is due under the DTR6 order, including the period from February 1, 2006, to the end of the order. Under such circumstances, a determination of the amount of IFF to be paid for the last two months of the DTR6 order is based upon the same analysis that the Board applied to the rest of that order, and a determination of quantum for IFF due for the period from February 1 to March 31, 2006, is within this Board's jurisdiction.

GSA is entitled to recover IFF for SIN 599-2 transactions under the entire performance period of the DTR6 order for DTS, DTS "touched," and "traditional" travel services, and the only remaining issue is the amount of IFF that NST is required to pay. As the party asserting the claim, GSA has the burden of proof in this case. *See Southwest Welding & Manufacturing Co. v. United States*, 413 F.2d 1167, 1176 n.7 (Ct. Cl. 1969); *Flooring Co.*, GSBCA 8297, 89-3 BCA ¶ 22,167, at 111,548; *Mutual Maintenance Co.*, 85-2 BCA at 90,857. In order to meet its burden of proof the Government must prove each element of its claim by a preponderance of evidence. *Bay Shipbuilding Co. v. Department of Homeland Security*, CBCA 54, et al., 07-2 BCA ¶ 33,678, at 166,740. It has been recognized that a party asserting a claim has met its burden of proof by presenting corroborating evidence in support of that claim. *See Singleton Contracting Corp.*, IBCA 1838, 87-3 BCA ¶ 19,967, at 101,091.

There is no dispute that during the DTR6 order there were 189,446 SIN 599-2 transactions from November 4, 2004, through January 31, 2006, and 12,475 SIN 599-2 transactions from February 1 to March 31, 2006, which is a total of 201,921 transactions. In response to GSA's written discovery, NST disclosed the number of SIN 599-2 transactions during the DTR6 order, and that number of transactions was corroborated through the testimony of Mr. Stec during the hearing. At an IFF rate of \$1.50 per transaction, GSA is entitled to recover IFF in the amount of \$302,881.50.

Additionally, GSA contends that it is entitled to recover interest on the amount of IFF that is due. With regard to the collection of interest by the Government on a debt related to a contract, the following has been recognized:

We note that generally, Government contracts include a clause which mandates that the contractor pay interest on amounts due to the Government at rates established under the Contract Disputes Act of 1978. 48 CFR 32.614-1(a), 52.232-17. Where this clause is included in the contract, the clause—and not the Debt Collection Act—is the authority for the Government to assess and collect interest due.

Advanced Injection Molding, Inc. v. General Services Administration, GSBCA 16504-R, et al., 05-2 BCA ¶ 33,097, at 164,064 (citing *Westchester Fire Insurance Co. v. United States*, 52 Fed. Cl. 567, 584-87 (2002)). In this case, paragraphs C.19 and C.20 of the FSS contract set forth the requirements for an FSS contractor to report and remit IFF on a quarterly basis. Paragraph C.19 further provided that failure to pay IFF within thirty calendar days at the end of the applicable reporting period would result in a debt to the Government, and interest would run on the amount of that debt. The FSS contract also incorporated by reference FAR 52.232-17. Under that clause, a debt would bear simple interest at the rate established under the CDA, 41 U.S.C. § 7109, “from the date due until paid unless paid within 30 days of becoming due.” FAR 52.232-17(a). Accordingly, the recovery of interest on those amounts of IFF due is subject to the terms of NST’s FSS contract with GSA.

Finally, NST contends that the Board should award zero quantum because no documentary evidence in support of GSA’s claim has been provided from DoD, and GSA relies only upon information produced by NST. Appellant’s Brief at 15-18. NST’s argument ignores the fact that its FSS contract required it to report its sales and pay IFF on the basis of those sales, and there was no corresponding requirement for DoD to document such sales. The Board has no reason to question NST’s representation as to the number of SIN 599-2 transactions relevant to the issue of quantum in this appeal. As discussed above, NST has represented through discovery that the number of SIN 599-2 transactions for the entire DTR6 order was 201,921, and that information was obtained as a result of extensive research on NST’s part in order to respond to GSA’s discovery request. NST’s vice president, Mr. Stec, testified under oath at the hearing as to the accuracy of that number of transactions. GSA has not disputed that number. Finally, NST offers no explanation as to how additional supporting data from DoD, assuming such data existed, would change the result in this appeal. For those reasons, GSA has met its burden of proof, and NST has no grounds for objecting to the fact that GSA has proven quantum based upon evidence obtained through discovery. *See Shostak Construction Corp.*, VABCA 3671, et al., 94-2 BCA ¶ 26,791, at 133,250-51.

Decision

Appellant's **MOTION TO DISMISS** for lack of jurisdiction is **DENIED**. The appeal is **DENIED AS TO QUANTUM**. Appellant shall pay the Government the amount of \$302,881.50 plus interest for SIN 599-2 transactions under the DTR6 order for DTS, DTS "touched," and "traditional" travel services.

H. CHUCK KULLBERG
Board Judge

We concur:

ANTHONY S. BORWICK
Board Judge

CATHERINE B. HYATT
Board Judge