



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: November 28, 2011

CBCA 1945

HERITAGE OF AMERICA, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Hilary S. Cairnie, Dena S. Kessler, and Udyogi A. Hangawatte of Baker & Hostetler, LLP, Washington, DC, counsel for Appellant.

William R. Korth, Philip Kauffman, Dennis Foley, L.T. Burleson, and Carrie Parish, Office of the General Counsel, Department of Veterans Affairs, Washington, DC, counsel for Respondent.

Before Board Judges **STERN**, **BORWICK**, and **VERGILIO**.

VERGILIO, Board Judge.

On March 24, 2010, the Board received from Heritage of America, LLC (contractor or HOA) a notice of appeal concerning its contract, VA101(049A3)-V-0329, with the Department of Veterans Affairs (agency), under which the contractor provided vocational rehabilitation and employment services. The appeal was filed based upon a deemed denial, the contracting officer having failed within sixty days of receipt of a claim to issue a decision or indicate the period of time within which a decision would be issued. The agency filed a motion to dismiss “regarding matters either not properly before the Board or which have been mooted, waived, or implicitly resolved via accord and satisfaction[.]” The Board denies the agency’s motion.

The claim

In its certified claim (dated November 19, 2009) to the contracting officer, the contractor raises various theories of relief. Citing various examples, it asserts that the agency impeded the contractor's performance, failed to pay amounts due, and caused increases to the contractor's costs of performance. The claim prefaces the quantum section with two paragraphs:

HOA provides estimates in this section of the amounts to which it is entitled for the claims set forth above. Some of these costs, such as unpaid invoices and interest, change on a daily basis by their very nature.

The amounts are separately stated, and at the point VA considers the actual payment of specific claim items, HOA will work cooperatively with VA to identify any overlap.

Appeal File, Exhibit 7.1 at 31 (exhibits are in the appeal file). The claim enumerates nine categories for (or elements of) payment.

One: Regarding unpaid invoices, the claim states,

VA owes HOA for unpaid invoices in the amount of \$687,597.13, as of November 12, 2009. The exhibit referenced in the claim specifies a balance for invoices identified by date, invoice number, name, and class. This claim is for a sum certain, albeit a sum that could vary if the contractor receives payment from the agency. Exhibit I.A.1.1.

Exhibit 7.2 at 31 (and referenced Exhibit I.A.1.1).

Two: The claim seeks interest as required under the Prompt Payment Act, 31 U.S.C. § 3902(b) (2006), for invoices paid late. Further, the claim specifies:

This interest is estimated to be \$48,925 as of the end of September, 2009. In addition, VA is liable for penalties due on unpaid interest on late payments made, in an amount to be determined. Finally, VA is also liable for Prompt Payment Act interest on unpaid invoices to the date of this claim, and for Contract Disputes Act interest thereafter, to the date of payment.

Exhibit 7.2 at 31. With the exception of the unspecified penalties, these amounts the contractor seeks can be calculated as certain sums, if payments indeed are late and interest

triggering events identified. The claim indicates no penalty that the contractor has incurred for which it seeks reimbursement.

Three: The claim asserts entitlement to payment for orders placed under two service groups. An exhibit lists

the amounts that VA should have paid, but has not paid, for these orders, because of its erroneous interpretation of the contract price tables. As of September 25, 2009, this amount is \$50,540.76. Moreover, VA's material breach, by virtue of nonpayment, means that HOA and its subcontractors have been unable to bring these cases to completion, and so together they are losing revenue in the amount of \$227,423.05, as calculated on the same Exhibit on those cases. In addition, that same material breach means that HOA and its subcontractors have been unable to bring case management cases of 12 months and shorter duration to completion, and so they are together losing revenue in the amount of \$1,055,544.41 on those cases. See Exhibit II.2. These sums constitute additional damages for breach of contract. Finally, HOA had to incur additional administrative costs in revising and submitting monthly invoices because they were divided by 12 months, rather than some other, larger number of months as designated by the regional office. An estimate of these costs, in the amount of \$37,602.17 is set forth at Exhibit II.3.

Exhibit 7.2 at 31-32. The referenced claim exhibit II.2 does not make apparent the basis for the identified claim amounts. The referenced claim exhibit II.3 identifies five individuals, and for each the percentage of time over a given period spent on counselor billing corrections for case management and a dollar amount sought.

Four: The contractor asserts that start-up was delayed for approximately four months (from mid-September to mid-January). It maintains that continuing overhead costs incurred during that period could not be fully recovered through the priced contract work. "These cases are estimated on Exhibit II.4. They amounted to \$556,390.69 computed for the period September 1 through December 31, 2008." The referenced supporting exhibit specifies costs for various offices as well as operating costs, with costs summing to the claimed amount. Exhibit 7.2 at 32 (and referenced Exhibit II.4).

Five: As a separate item of its claim, identified as costs for a rapid response team, the contractor states that the agency caused delays to the contractor in obtaining counselor approvals, and that the contractor incurred additional costs because of the delays. "These costs, estimated to be \$38,022.72, are set forth in Exhibit II.5." In support of this amount,

the submission identifies costs for travel, hotels, per diems, and parking, as well as for tips, a subcontractor fee, and a salary. Exhibit 7.2 at 32 (and referenced Exhibit II.5).

Six: The contractor claims that it incurred costs of \$98,493.54 for temporary labor to process counselor approvals. While the contractor claims that an estimated 30% of those costs are related to the normal processing costs, it seeks \$68,948.48 (an exact amount, stated to be an estimated 70% of the incurred costs) as costs incurred beyond those anticipated under the contract because of various agency activities in one location. The claim references no supporting documentation for this item. Exhibit 7.2 at 32.

Seven: The contractor seeks \$10,591.96 for what it describes as additional testing costs. That is, the contractor maintains that agency individuals in the New England area imposed additional and unnecessary tests for which the contractor incurred the stated costs of subcontractors, itemized in an exhibit. The contractor expressly “reserves the right to amend this amount as additional claims for additional tests are received.” Exhibit 7.2 at 32 (and referenced Exhibit II.6). To date, the contractor has not indicated that it has amended its claim relating to this specific quantum claim element or the more broadly worded aspects of its claim that allege agency interference with its ability to perform under the contract.

Eight: The contractor contends that the agency failed to order some guaranteed minimums. The claim itemizes the shortfalls, associated dollar amounts, and bases for the calculations. The contractor seeks \$71,515 for this item. Exhibit 7.2 at 32.

Nine: The contractor seeks compensation for “additional financing costs” described as interest incurred to finance amounts paid late by the agency. The claim computes the amount at \$38,759.29, for receivables over thirty days unpaid as of October 31, 2009, while stating that the amount due under this claim should be net of Prompt Payment Act interest. Exhibit 7.2 at 33 (and referenced Exhibit II.7).

Motion to Dismiss

The agency identifies various “points and authorities/arguments” in support of its motion to dismiss.

Sum certain

Asserting that a proper claim for relief must involve a sum certain, the agency states: “All the Complaint’s allegations supported by estimations, approximations, and guesswork, despite having figures assigned, must fail as not being properly before the Board, including

Delayed Start-Up Costs, Rapid Response Team, and Additional Testing Costs.” Agency Motion at 6.

Contrary to the broad assertions of the agency, each element of the claim identifies specific amounts for relief. The claim seeks a sum certain. An exception is the reference in claim element two to penalties in an amount to be determined. Without an asserted factual or legal basis or a sum certain for this element, this is not a proper element under the existing claim. But for this item, this claim is properly before the Board.

Waiver

In seeking to dismiss portions of the claim, the agency relies upon waiver: “In negotiating and accepting payments for past invoices and interests over the past year, Appellant has waived any defaults or defects in the invoices, interest, or payment.” The agency focuses this allegation upon unpaid invoices. However, the agency has provided neither basic factual support nor legal analysis that permits this assertion of waiver to be sustained.

Accord and satisfaction

As a basis in its motion to dismiss, the agency raises accord and satisfaction “as the Appellant agreed to negotiate over the invoices/billings past due and unpaid and has explicitly accepted both the Government’s payments as well as the Government’s overtures and efforts to reduce that quantum further, far below what the Complaint originally alleged.” Factually and legally, this assertion by the agency remains ill-supported. Without specifics, it is unclear which claim elements or portions of the claim the agency deems to be resolved.

Limiting claims to contract line items (CLINS)

The agency attempts to limit the contractor’s claim: “Appellant cannot present claims outside of the contract CLINS; the Appellant, as any contractor, may not unilaterally create or modify the contract to add equipment, labor, or related charges in addition to the line items and obligate the Government to provide compensation.” While the agency is correct that a contractor may not unilaterally create or modify a contract, this contractor is claiming that the agency unilaterally breached or modified the contract. Under theories of breach and constructive change, the contractor asserts entitlement to costs it incurred as a result of the agency’s actions which were not contemplated under the terms and conditions of the contract. Factually and legally, the agency has not demonstrated that these causes of action must fail.

Anti-Deficiency Act

Finally, the agency posits that there are no Anti-Deficiency Act, 31 U.S.C. § 1341, issues when the Government provides and has appropriated funds to pay for obligations. The contractor alludes to the Anti-Deficiency Act in support of its interpretation of the underlying contract. In particular, the contractor contends that the agency could not be obtaining services over multiple fiscal years without appropriate authorization and funding. Further, the contractor relies upon its reading of the Act to bolster its interpretation of the contract that services were priced and to be paid for in increments of at most twelve months, not periods in excess of one year as the agency maintains. Because the claim does not raise the Act as an element of the claim, but only as a factor in contract interpretation, the agency's motion is misplaced.

Decision

The Board **DENIES** the agency's motion to dismiss. The present case is focused upon the elements of the underlying claim; there is not an amended claim (or contracting officer decision) or an amended complaint. The request for unspecified penalties in an unspecified amount in claim element two is premature, given that the claim fails to specify any penalty that the contractor has incurred or will incur for which it seeks compensation.

JOSEPH A. VERGILIO
Board Judge

We concur:

JAMES L. STERN
Board Judge

ANTHONY S. BORWICK
Board Judge