UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: February 15, 2013

CBCA 3053

JRS MANAGEMENT,

Appellant,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Jacqueline Sims, Owner of JRS Management, Lawrenceville, GA, appearing for Appellant.

William D. Robinson and Nihar H. Vora, Office of General Counsel, Federal Bureau of Prisons, Department of Justice, Washington, DC, counsel for Respondent.

Before Board Judges **VERGILIO**, **GOODMAN**, and **ZISCHKAU**.

GOODMAN, Board Judge.

On October 16, 2012, appellant, JRS Management, filed this appeal pursuant to the Contract Disputes Act. Appellant alleged that the contracting officer of respondent, the Federal Bureau of Prisons, had failed to issue a final decision in response to appellant's claim submitted on August 15, 2012. Appellant therefore treated its claim as deemed denied by the contracting officer and appealed. Respondent has filed a motion to dismiss, asserting that the Board lacks jurisdiction as the appeal is untimely. We find that the appeal was not timely filed, as appellant did not timely appeal a contracting officer decision on an earlier version of the claim. We grant respondent's motion and dismiss the appeal for lack of jurisdiction.

Background

On July 15, 2009, respondent awarded a parenting instructor services contract (the contract) to appellant. The contract was for a total amount of $81,432; it did not exceed the simplified acquisition threshold of $150,000. Respondent prepared contractor performance evaluations with regard to appellant's performance during the contract's base year and one option year.

On March 27, 2012, appellant submitted a claim (claim 1) to the contracting officer. The claim stated in relevant part:

> [T]he contract did not contain any terms authorizing the preparation and release of Contractor Performance Reports. Moreover, the reports were flawed erroneous, and inaccurate.

Claim 1 alleged two counts. The first count was entitled "Unilateral Adjustment of Contract Terms - Performance Evaluations not Authorized by Contract." In this count, appellant maintained that Federal Acquisition Regulation (FAR) 42.1502 only requires federal agencies to prepare performance evaluations for contracts that exceed the simplified acquisition threshold of $150,000. Appellant further maintained that, as the contract did not exceed this threshold, respondent's preparation of performance evaluations breached the contract, and respondent's actions in releasing the performance evaluations to government officials for source selection purposes, without first obtaining appellant's permission pursuant to FAR 52.212-4(c), was arbitrary and capricious.

The second count was entitled "The Performance Evaluation was Flawed/Inaccurate - The Contract was Legally Unenforceable." In this count, appellant maintained that even if respondent had the right to issue performance evaluations, the performance evaluations were flawed, erroneous, and inaccurate. Additionally, appellant argued that the contract was legally unenforceable and was only enforceable to the extent it was performed. Appellant also argued that respondent breached its "implied contractual duty of good faith and fair dealing."

Claim 1 sought an equitable adjustment of $1500 as compensation for the unilateral modification of contract terms, and a modification of the performance evaluations prepared by respondent to delete comments that appellant found to be inaccurate.

The contracting officer issued a decision on May 24, 2012, denying claim 1 in its entirety. The decision stated: "Although per FAR 42.1502(b), Federal agencies are only required to prepare evaluations of contractor performance for a contract that exceeds the

simplified acquisition threshold, Contracting Officers are not prohibited from utilizing this resource for contracts not exceeding the simplified threshold." The decision included additional statements by the contracting officer with regard to the legal and factual allegations raised in claim 1, and stated appeal rights to this Board and the Court of Federal Claims. Appellant received the decision on May 29, 2012. Appellant did not file a notice of appeal of this decision within ninety days of receiving the decision, or any time thereafter.

On August 15, 2012, appellant submitted another claim (claim 2) to respondent. Claim 2 alleged three counts. The first count was entitled "Agency Exceeded its Statutory Authority and Violated Regulations by Preparing a Past Performance Evaluation Report." This count made essentially the same assertions as the first count of claim 1, with regard to the requirements and alleged violations of FAR 42.1502 and 52.212-4(c).

The second and third counts were entitled "Agency Preparation of Past Performance Evaluation Report Constituted a Constructive, Unilateral Change that Materially Breached the Terms of the Contract, and Breached the Covenant of Good Faith and Fair Dealing" and "The Performance Evaluation was Flawed, Inaccurate, Erroneous, Arbitrary, Capricious, and An Abuse of Discretion." These counts contain arguments similar to those made in the first and second counts of claim 1, i.e., breach of FAR 52.212-4 and the covenant of good faith and fair dealing.

The relief requested in claim 2 was similar to that in claim 1. The first count requested an interpretation of the contract that performance evaluations were not authorized and therefore a breach. The second count requested monetary damage allegedly arising from the breach consisting of actual damages of $1218.21 - the alleged cost of appellant for reviewing the performance evaluations, researching case law and the FAR, and preparing the claim; and consequential damages of $4071.60 - calculated as 5% of the contract value as compensation for "loss of the substantive contractual right to negotiate in advance any proposed changes". The third count requested additional interpretations that the contract was legally unenforceable and that respondent did not have the right to unilaterally change the contract, and demanded revisions in the performance evaluations.

The contracting officer issued a response to claim 2 by letter dated October 12, 2012. That letter stated that "the allegations made stem from the same set of operative facts as the original claim, and are substantially the same as, the original claim." Additionally, the contracting officer stated that claim 2 was properly addressed in the decision of May 24, 2012.

Appellant filed this appeal on October 16, 2012, with regard to claim 2, alleging that the contracting officer failed to issue a final decision in response to claim 2 as required by the Contract Disputes Act.

Discussion

Respondent has filed a motion to dismiss, asserting that this Board lacks jurisdiction to entertain this appeal. Respondent asserts that claim 1 and claim 2 arise from the same operative facts, the issuance of performance evaluations, and are therefore the same claim. Since appellant did not timely appeal the decision issued in response to claim 1, that decision can no longer be appealed to this Board. Therefore, respondent maintains that the appeal of claim 2 as a deemed denial of that claim is actually an untimely appeal of the decision denying claim 1. Thus, respondent moves to dismiss the instant appeal as an untimely appeal of claim 1.

In *Battley v. Social Security Administration*, CBCA 1063, 08-2 BCA ¶ 33,896, this Board stated:

> The established test for what constitutes a "new" claim is whether "claims are based on a common or related set of operative facts. If the court will have to review the same or related evidence to make its decision, then only one claim exists." *Environmental Safety Consultants, Inc.*, ASBCA 54995, 06-1 BCA ¶ 33,230, at 164,666 (citing *Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990)).

08-2 BCA at 167,768.

In *Battley*, the Board found that the appellant's two claims arose from the same operative facts and were the same claim. As the appellant had failed to timely appeal the decision denying the first claim, the appeal of the alleged deemed denial of the second claim was dismissed as an untimely appeal of the first claim.

We have the same situation in the instant appeal. Appellant's two claims arise from the same operative fact that respondent issued performance evaluations. Both claims allege that respondent had no basis to issue the performance evaluations and that the performance evaluations as issued were detrimental to appellant. The claims allege in substance the same legal theories. The relief sought in claim 2 is substantially the same as that sought in claim 1 with some additional relief sought. Claim 2 is not a new claim.

In this case, the evidence we would review to reach the merits of the appeal would be the performance evaluations and the contract. The introduction of additional facts that do not alter the nature of the original claim, a dollar increase in the amount claimed, or the assertion of a new legal theory of recovery, when based on the same operative facts as included in the original claim, do not constitute new claims. *Trepte Construction Co.*, ASBCA 38555, 90-1 BCA ¶ 22,595. The fact that appellant asserts differing legal theories and seeks greater relief does not convert claim 2 into a new claim, as it arose from the same operative facts as those in claim 1, i.e., the issuance of the performance evaluation.

As appellant failed to timely appeal the decision in response to claim 1, the appeal of claim 2 as an alleged deemed denial is untimely and must be dismissed. As we stated in *Battley*:

> The CDA [Contract Disputes Act], which governs the Board's review of contracting officer decisions, requires that an appeal of such decision be filed "[w]ithin ninety days from the date of receipt of [the] decision." 41 U.S.C. § 606 (2000). The plain language of the CDA clearly confers finality and unreviewability of a contracting officer's decision that is not properly appealed within the statutory period provided. That finality is not limited to the contracting officer's authority to issue such a decision or the validity of the contracting officer's decision. *See, e.g.*, *United States v. Kasler Electric Co.*, 123 F.3d 341, 346 (6th Cir. 1997). The statute affords the opportunity to challenge the authority and/or validity of the decision, provided the challenge is made within the statutory period. If a challenge is not made within the statutory period, section 605(b) mandates that the contracting officer's decision "be final and conclusive and not subject to review." 41 U.S.C. § 605(b). This deadline for filing has been strictly construed by the Court of Appeals for the Federal Circuit because the authorization to make the filing is a waiver of sovereign immunity. A late filing divests the Board of jurisdiction to consider the case on its merits.

08-2 BCA at 167,768.[1]

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[1] The referenced provisions of the Contract Disputes Act have be recodified as follows: The ninety-day limitation formerly found at § 606 is now in § 7104(a). The finality of an unappealed contracting officer decision is now stated at § 7103(g), rather than § 605(b).

Decision

Respondent's motion to dismiss is granted. The appeal is untimely and therefore **DISMISSED FOR LACK OF JURISDICTION**.

ALLAN H. GOODMAN
Board Judge

We concur:

JOSEPH A. VERGILIO
Board Judge

JONATHAN D. ZISCHKAU
Board Judge