



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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DISMISSED IN PART FOR LACK OF JURISDICTION: December 15, 2016

CBCA 5395

CB&I AREVA MOX SERVICES, LLC,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Noah M. Hicks II of CB&I AREVA MOX Services, LLC, Aiken, SC, counsel for Appellant.

Matthew Butsick, Office of the General Counsel, National Nuclear Security Administration, Department of Energy, Washington, DC; and Mary-Ellen Noone, Office of the General Counsel, National Nuclear Security Administration, Department of Energy, Aiken, SC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **KULLBERG**, and **SULLIVAN**.

**DANIELS**, Board Judge.

CB&I AREVA MOX Services, LLC (MOX Services) claims that it is entitled to a fee of .25% more than the Department of Energy (DOE) paid, during a specified period of time, for work performed under a contract between the two parties. In its complaint, but not in its claim, MOX Services alleged that DOE's National Nuclear Security Administration (NNSA) failed to negotiate the fee percentage in good faith and that this failure was a material breach of contract. DOE moves the Board to dismiss for lack of jurisdiction this portion of the

complaint. After considering the motion, MOX Services' opposition to it, and DOE's reply, we grant the motion.

### Background

On March 22, 1999, DOE awarded to a predecessor in interest to MOX Services a contract for mixed oxide (MOX) fuel fabrication and reactor irradiation services. The statement of work provided that contract services were to "include but are not limited to" "[a]ll the functions that are necessary to develop a domestic MOX Fuel Fabrication Facility that will be licensed by the Nuclear Regulatory Commission (NRC) and located at a DOE Host Site," as well as "[a]ll the functions that are necessary to permit the irradiation of MOX fuel assemblies in CLWRs [commercial light water reactors] under license from the NRC."

The base contract was for a term of 132 months. The contract gave DOE the unilateral right to extend the term for 48 additional months under option 1, 183 additional months under option 2, and 27 additional months under option 3. The contract provided that MOX Services was to be paid a fee for its work.

On May 20, 2008, DOE's NNSA and MOX Services bilaterally executed contract modification A124, definitizing option 1. The modification includes, in clause B.1, "Items Being Procured," paragraph (o). This paragraph states:

Whereas the Contractor and Government recognize the importance of achieving approval of Contractor's Hot Start Up and AP Start Up Plan; both parties hereby agree to act in good faith to ensure all steps required to add this scope with additional cost, fee, and schedule to the contract will be achieved at the earliest practicable date, as detailed in Clause H.29 paragraph (g).

Clause H.29, "Advance Understandings," includes in paragraph (g):

DOE has determined an early exercise of the hot start-up portion of Option II is in the best interest of the project to ensure that all aspects of the MFFF [MOX fuel fabrication facility] are operational before acceptance of the MFFF. DOE commits to immediate review [sic] all of the issues associated with an early exercise of the hot start-up and begin the process of placing hot start-up on contract. . . . It is agreed that the following parameters shall apply to the early exercise of hot start-up:

- 1) In recognition of the increased performance risk, an increased fee rate of 1 percentage point shall be applied to the negotiated value of

Option 1, plus any fee bearing changes executed prior to definitization of the hot-start scope, thus increasing the total fee to 7%.

NNSA designated the hot start-up scope of work as Early Option II or “EO2” and requested that MOX Services prepare a proposal to define this work. MOX Services complied by submitting a proposal dated January 26, 2009. The parties agree that they then negotiated in good faith, pursuant to clause H.29(g)’s advance understanding, to definitize EO2.

MOX Services submitted an updated EO2 proposal in September 2009 and a second updated EO2 proposal at NNSA’s request in September 2010. NNSA requested a third updated EO2 proposal (incorporating additional work scope and a production objective involving an expedited delivery date for eight fuel cells) in August 2011.

While negotiations were continuing, on September 1, 2011, the parties bilaterally executed contract modification 183 (mod 183). “The purpose of this modification,” mod 183 stated, “is to increase the Option 1 fee amount. . . . The fee will immediately increase to 6.75% with a subsequent increase of .25% occurring with the exercise of Early Option 2 for a total increase in fee from 6% to 7%.” The modification deleted clause H.29(g), as included in contract modification A124, and replaced the portions of it quoted above with the following (with bolded portions in the original):

DOE has determined an early exercise of the hot start-up portion of Option II is in the best interest of the project to ensure that **all** aspects of the MFFF are operational before acceptance of the MFFF. It is agreed that the following parameters shall apply to the early exercise of hot start-up:

- 1) In recognition of the increased performance risk, an increased fee rate of 1 percentage point shall be applied to the negotiated value of Option 1, plus any fee bearing changes executed prior to definitization of the Hot-start scope, thus increasing the total fee to 7%. **Modification 183 incrementally increased the fee percentage for Option 1 to 6.75% in recognition of delays in exercising the Early Option 2 (EO2) scope. The remaining .25% recognizing a total fee rate of 7% will be added to Option 1 with the exercise of EO2.**

MOX Services submitted to NNSA yet another updated EO2 proposal in February 2012. Discussions concerning this update continued for over a year until April 26, 2013. By letter bearing that date, NNSA told MOX Services that “considering the preliminary cost increases and current budget environment, NNSA is beginning to assess alternative

plutonium disposition strategies. As a result, NNSA will slow down the MOX project and activities supporting the current plutonium disposition strategy during the assessment period.” With specific reference to the matters discussed in previous paragraphs of this decision, NNSA said:

NNSA does not intend to continue negotiation of the Early Option II contractor modification proposal, or exercise any portion of Option II at this time. MOX Services need not maintain or otherwise update this proposal for potential future negotiation. NNSA recognizes that at the time it becomes appropriate to add operations to the MOX Services contract, the Early Option II proposal will either be updated as necessary, or a new proposal will be requested.

By letter dated April 1, 2015, MOX Services wrote to NNSA:

It has been almost 24 months since receiving the direction [to cease negotiations regarding EO2], and more than 6 years since submittal of the EO2 proposal. Due to these inordinate delays that were not within MOX Services’ control, MOX Services respectfully requests that the fee percentage for the subject contract be increased from 6.75% to 7.00%.

NNSA did not respond in writing. By letter dated September 2, 2015, MOX Services reiterated its request. Again, NNSA did not respond.

By letter dated February 8, 2016, MOX Services “submit[ted] a certified claim for the increase in previously paid fee from 6.75% to 7% along with an associated claim for payment of Award Fee associated with the increase in fee.” The claim was “for \$6,358,811.00 in additions to CLIN [contract line item number] 0007 and immediate payment of \$702,048 in additional FY13 [fiscal year 2013] Award Fee.” MOX Services said, “This claim requests relief arising under (i) Contract Clause H.29 *Advance Understandings* (increase in fee percentage) and (ii) the Contract Disputes Act (payment of FY13 Award Fee).” The contractor explained:

Using the date of NNSA’s decision not to exercise EO2 (26 April 2013) as determinative for when the fee should have been increased from 6.75% to 7% means that the above fee adjustments would have been issued in FY13. Had that happened, the Award Fee pool for FY13 would have been \$1,231,663.00 greater. Because Award Fee for FY13 already was paid under the existing contract at 57% of the Award Fee pool at that time, MOX Services is claiming the sum certain of \$702,048.00 ( $\$1,231,663 \times 0.57$ ).

The contracting officer denied the claim by letter dated April 19, 2016, concluding that “MOX Services is not entitled to an increased fee pool or immediate payment of award fee.” He maintained that EO2, “if added to the Contract, would have increased scheduling risks due to the interdependent nature of the processes,” and that in 2008, “the parties agreed that, should the Government accept the Contractor’s future EO2 proposal, the Contractor would be compensated for this risk through a one-percent increase to Option 1’s available fee structure of 6.00%.” The contracting officer noted that the fee percentage for Option 1 had been increased in contract modification 183 to 6.75%, with an additional .25% “added to Option 1 *with the exercise of EO2*.” He determined, “The Claim fails to identify why the express, negotiated, bilaterally accepted conditions included in Modification 183 should be set aside. . . . As EO2 was never exercised, it would be illogical and unreasonable for the Government to pay the Contractor for a performance risk that the Contractor never assumed.” Consequently, “any notion that the Contractor would be equitably entitled to additional fee is baseless,” notwithstanding the contractor’s position that it was entitled “to the requested 0.25% fee increase [because] it ‘made a good faith effort’ to add more work to its Contract.”

MOX Services appealed this decision on July 7, 2016.

In its complaint, MOX Services requests that the Board:

- (i) find that NNSA’s failure to negotiate in good faith is a material breach of the MOX Contract;
- (ii) find that MOX Contract Modification 183 giving MOX Services 0.75% of the 1.00% fee increase in compensation for the original delay from January 26, 2009, to September 1, 2011, entitled MOX Services to a fee increase and is grounds for modifying the MOX Contract for the subsequent delay from September 2011, to the present by increasing fee from 6.75% to 7.00%, consistent with MOX Contract Modification A124; [and]
- (iii) award MOX Services \$702,048.00 based on the quantum contract analysis provided in [an exhibit to the complaint].

### Discussion

The Contract Disputes Act (CDA) vests in the Civilian Board of Contract Appeals “jurisdiction to decide any appeal from a decision of a contracting officer of any executive agency (other than [those specified, none of which is DOE]) relative to a contract made by that agency.” 41 U.S.C. § 7105(e)(1)(B) (2012). Because the CDA is a waiver of sovereign immunity, its “strict limits” are a jurisdictional prerequisite to an appeal. *M. Maropakis*

*Carpentry, Inc. v. United States*, 609 F.3d 1323, 1329 (Fed. Cir. 2010). “[T]he jurisdiction over an appeal of a contracting officer’s decision [on a contractor’s claim] is lacking unless the contractor’s claim is first presented to the contracting officer and that officer renders a final decision on the claim.” *England v. Swanson Group, Inc.*, 353 F.3d 1375, 1379 (Fed. Cir. 2004).

A “claim” is “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.” *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc) (citing definition now at 48 CFR 2.101 (2015)). There is “no requirement in the [CDA] that a ‘claim’ must be submitted in any particular form or use any particular wording. All that is required is that the contractor submit in writing to the contracting officer a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim.” *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987). The reference to the contracting officer in the preceding sentence is important; the CDA mandates that the contracting officer must be given an opportunity to receive and pass judgment on every claim. *Ketchikan Indian Community v. Department of Health & Human Services*, CBCA 1053-ISDA, et al., 13 BCA ¶ 35,436, at 173,808 (citing *Scott Timber Co. v. United States*, 333 F.3d 1358, 1366 (Fed. Cir. 2003)).

On appeal to the Board, a contractor “may increase the amount of his claim, but may not raise any *new* claims not presented and certified [if necessary, *see* 41 U.S.C. § 7103(b),] to the contracting officer.” *Santa Fe Engineers, Inc. v. United States*, 818 F.2d 856, 858 (Fed. Cir. 1987) (citations omitted). “When a new claim is asserted that is not directly addressed in the appellant’s original claim submission, the tribunal must examine whether the newly posed claim derives from the same operative facts, seeks essentially the same relief, and, in essence, merely asserts a new legal theory for the recovery originally sought.” *EHR Doctors, Inc. v. Social Security Administration*, CBCA 3522, 14-1 BCA ¶ 35,630, at 174,492 (citing *Scott Timber*, 333 F.3d at 1365). “If the court will have to review the same or related evidence to make its decision, then only one claim exists. . . . On the other hand, if the claims as presented to the [contracting officer] will necessitate a focus on a different or unrelated set of operative facts as to each claim, then separate claims exist.” *Kinetic Builder’s Inc. v. Peters*, 226 F.3d 1307, 1312 (Fed. Cir. 2000) (quoting *Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990)).

The Board must now determine whether MOX Services’ contention that NNSA failed to negotiate the fee percentage in good faith, and that this failure was a material breach of contract, is the same claim that the contractor presented to the contracting officer or a different claim. The claim presented to the contracting officer was that MOX Services was

entitled to “relief arising under (i) Contract Clause H.29 *Advance Understandings* (increase in fee percentage) and (ii) the Contract Disputes Act (payment of FY13 Award Fee).” It is clear that the contention newly-made in the complaint seeks the same relief as the claim presented to the contracting officer. The parties disagree as to whether the operative facts we would have to examine to resolve the two contentions are the same. DOE maintains that to resolve the lack of good faith contention, “the Board may have to review allegations and evidence surrounding, for example: whether [the agency’s] actions amounted to a failure to cooperate; whether actions by [the agency] constituted negligence; and/or the reasonableness of any negotiation delays. In contrast, the basis for the Claim [presented to the contracting officer] . . . requires only an analysis of the plain language of the contract.” MOX Services asserts, to the contrary, that both contentions arise from the same operative facts “because MOX Services referenced its good faith efforts to negotiate with NNSA, as well as the communications and conduct between the parties during negotiations in both its claim and Complaint.”

We side with DOE. The operative facts supporting the claim as presented require only an analysis of the contractual language of clause H.29. Whatever action or actions NNSA may have taken in negotiations, which MOX Services complains were in the absence of good faith, must have occurred after the parties entered into contract modification 183. This is because MOX Services implicitly agreed in signing that modification that prior actions were acceptable to it. The post-mod 183 actions, regarding implementation of clause H.29, are an entirely separate matter from the meaning of that clause. They would require proof that NNSA “act[ed] so as to destroy the *reasonable expectations* of the other party regarding the *fruits of the contract*.” *Metcalf Construction Co. v. United States*, 742 F.3d 984, 991 (Fed. Cir. 2014) (quoting and adding emphases to *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005)). The operative facts as to NNSA’s actions and their impacts are different from the facts relevant to an analysis of the clause itself.

It is true that clause B.1(o) of modification A124 committed NNSA, as well as MOX Services, “to act in good faith to ensure all steps required to add . . . scope with additional cost, fee, and schedule to the contract will be achieved at the earliest practicable date, as detailed in Clause H.29 paragraph (g).” It is also true that MOX Services referenced in its claim its good faith in early negotiations – something to which DOE agrees. But the contractor’s claim does not mention clause B.1(o), nor does it mention a lack of good faith in negotiations. The best that might be said for a connection between the claim’s reference to clause H.29 and clause B.1(o)’s reference to good faith in negotiations is that the former created an inference that the latter was implicated. As the Court of Federal Claims held, however, in a decision brought to our attention by MOX Services, “[T]he Court is not aware of any doctrine requiring contracting officers to interpret claims in such a manner, and in any event this exercise would seem to confirm that the claim as presented failed to provide a

‘clear and unequivocal statement’ that disclosed the ‘basis . . . of the claim.’” *Affiliated Construction Group, Inc. v. United States*, 115 Fed. Cl. 607, 614 (2014) (quoting *Scott Timber*, 333 F.3d at 1365).

This analysis might seem to be at odds with the intention that boards of contract appeals “provide a swift, inexpensive method of resolving contract disputes.” S. Rep. No. 95-1118, at 12 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5235, 5246. This is because the result is to allow the Board to consider MOX Services’ lack of good faith contention only if (a) the contractor files a new certified claim making this contention, (b) the contracting officer decides the claim in a way unsatisfactory to the contractor, (c) the contractor files an appeal of this decision, and (d) the Board consolidates the new appeal with the one now before it. Nevertheless, our analysis is mandated by our understanding of both statute and decisions of the Court of Appeals for the Federal Circuit. Our role is not to make policy, but rather, to follow the commands of these authorities. Consequently, we grant DOE’s motion to dismiss.

#### Decision

Because we would have to examine different operative facts to resolve MOX Services’ lack of good faith contention from the facts we must examine to resolve the contractor’s claim as presented to the contracting officer, we must **DISMISS FOR LACK OF JURISDICTION** the portion of the complaint which makes the lack of good faith contention.

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STEPHEN M. DANIELS  
Board Judge

We concur:

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H. CHUCK KULLBERG  
Board Judge

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MARIAN E. SULLIVAN  
Board Judge