



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GOVERNMENT MOTION TO AMEND ANSWER DENIED:

November 2, 2016

CBCA 2952

OPTIMUS TECHNOLOGY, INC.,

Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

Christopher R. Shiplett of Randolph Law, PLLC, Falls Church, VA, counsel for Appellant.

Austin Fulk, Office of the General Counsel, Office of Personnel Management, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **VERGILIO**, and **O'ROURKE**.

VERGILIO, Board Judge.

In this appeal, Optimus Technology, Inc. (contractor) seeks payment from the Office of Personnel Management (agency) on invoices under task orders placed under a contract between the parties. The agency has moved to amend its answer to include a Government counterclaim in which the agency asserts that the contractor has overcharged the agency for particular services regarding a different invoice and that the agency is entitled to recover. Because the agency cannot elect a forum for the contractor regarding an invoice not in dispute in the underlying appeal, the Board denies the motion to include the counterclaim.

The agency's motion to amend its answer to assert a counterclaim relies upon particular facts. The underlying appeal concerns the contractor's claim seeking additional payment under three invoices. The agency has determined that it has overpaid the contractor

on a separate invoice under the same contract; it seeks to recoup its overpayment offset by any relief found due the contractor. The contracting officer styled a document as a final decision raising a Government claim pertaining to the invoice. The document is addressed to agency counsel and contains no notice of appeal rights, although the contractor (through counsel) obtained a copy of the decision as part of the agency's submission in this case.

The contractor opposes the motion. It asserts that the decision is invalid because it was not preceded by a demand sufficient to inform the contractor of the dispute or provided to the contractor prior to filing the motion with the Board. Further, it maintains that the decision does not comply with regulatory requirements that the decision include a description of the claim, reference pertinent contract terms, or include a statement of factual areas of agreement and disagreement. 48 CFR 33.211(a) (2015). Those particulars need not be addressed here.

The Board **DENIES** the agency's motion to assert the counterclaim in this proceeding. Factually and legally, the matter now raised by the agency does not relate to the invoices at issue in the contractor's claim. Even if the contractor had sufficient notice of the particulars of the Government claim, and might seek to pursue the appeal at this Board, despite the failure in the decision to inform the contractor of appeal rights, 41 U.S.C. § 7103 (2012), it is the contractor, not the agency, which statute endows with the ability to select a forum to dispute a Government claim. 41 U.S.C. § 7104. The agency cannot elect this forum to resolve a Government claim.

The denial of the motion neither precludes the contractor from filing an appeal at this Board concerning a Government claim relating to the separate invoice and consolidating the cases, if appropriate, nor resolves whether such a Government claim, said to be based upon an invoice submitted in January 2010, is timely (the agency references an intervening bankruptcy proceeding filed in August 2015 and dismissed in August 2016), given that more than six years have elapsed from the date of the invoice submission.

JOSEPH A. VERGILIO
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

KATHLEEN J. O'ROURKE
Board Judge