



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

ORDER DESIGNATING CLAIM AS COMPLAINT
AND ALLOWING RESPONDENT TO DESIGNATE
CONTRACTING OFFICER'S DECISION AS ANSWER:
April 11, 2018

CBCA 6072

K.O.O. CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS

Respondent.

Herman M. Braude of Braude Law Group, P.C., Rockville, MD, counsel for Appellant.

David G. Fagan, Office of General Counsel, Department of Veterans Affairs, Portland, OR; and Donald C. Mobly, Office of General Counsel, Department of Veterans Affairs, Denver, CO, counsel for Respondent.

LESTER, Board Judge.

ORDER

Pursuant to the provisions of Board Rule 8(b), 48 CFR 6101.8(b) (2017), appellant, K.O.O. Construction, Inc. (KOO), has requested that the Board allow it to designate its

certified claim, dated August 25, 2017, and the attachments to that claim as its complaint in this appeal. Because of the length of KOO's nineteen-page, single-spaced claim letter and the nature of the charts and graphs accompanying it, respondent, the Department of Veterans Affairs (VA), has asked for guidance on how to prepare its answer to that complaint. We grant KOO's request to designate its claim as the complaint, and we grant the VA broad discretion in deciding how to respond to that complaint, including the possibility of designating a forthcoming contracting officer's decision as its answer.

Background

On August 25, 2017, KOO submitted a certified claim to the VA contracting officer, alleging that, during performance of its contract for the construction of a mental health programs building in Fresno, California, the VA made drastic changes to the project's original structural steel design, that changes were issued in a tardy and piecemeal fashion beginning in early 2009 and continuing through the fall of 2014, and that the VA caused delays to the project. The claim contains sixteen-and-a-half pages of detailed allegations, generally in chronological order, regarding delays that occurred on the project and changes that the VA allegedly directed, followed by a two-and-a-half-page breakdown of \$4,036,315 in damages that KOO is claiming. Attached to and incorporated into the claim are the various change order proposals that KOO had previously submitted, KOO's as-planned baseline schedule for the project, a summary as-build schedule, a further breakdown of KOO's alleged general and administrative (G&A) home office overhead expenses, and a cost summary of field expenses.

KOO filed an appeal with the Board on March 14, 2018, based upon the VA contracting officer's "deemed denial" of its claim. The Board issued an order directing KOO to file its complaint pursuant to Board Rule 8 no later than April 13, 2018. On March 21, 2018, KOO requested that the Board designate its certified claim and the various exhibits that support it as its complaint. In the document accompanying that request, KOO also indicated that counsel for the VA had represented that the VA contracting officer anticipated issuing a written decision on KOO's claim by April 25, 2018.

In a subsequent telephonic status conference with the parties, held April 4, 2018, counsel for the VA asked the Board to identify the manner in which it would like the VA to answer the complaint, assuming that the Board grants KOO's designation request, given that the claim is not divided into numbered paragraphs and that, in the VA's view, portions of the claim document involve embellishments that are not directly related to factual allegations necessary to support relief.

Discussion

I. KOO's Complaint

The Board's rules permit an appellant to request that the Board "designate the notice of appeal, a claim submission, or any other document as the complaint . . . if such document sufficiently states the factual basis and amount of the claim." Rule 6(b) (48 CFR 6101.6(b)). The rule providing for designation of a document as the complaint, in lieu of a more formal pleading, provides appellants with the type of flexibility that the Board, as a potentially more informal alternative to federal court, was intended to provide. *See Millipore Corp.*, GSBCA 9453, 88-3 BCA ¶ 20,888, at 105,610 ("[T]he notice of appeal . . . sufficiently describes the issues raised in this proceeding, and, given the flexibility of [the rule], could well serve as a complaint in the absence of a more formal pleading."). "No particular form is prescribed for a complaint." Rule 6(b).

Yet, designation is not automatic. An appellant must request the Board's permission to designate a document as the complaint, Rule 6(b), and the Board retains discretion to deny an appellant's request for designation and to order the filing of a more formal complaint if the designated document fails to allege or identify facts establishing the Board's jurisdiction or to articulate clear factual grounds that would support a legal right to relief. *Tom & Tony's Auto Wrecker Service v. General Services Administration*, GSBCA 15698, 2002 WL 89659 (Jan. 17, 2002); *see In re Marino*, 37 F.3d 1354, 1357 (9th Cir. 1994) ("[T]he policy of construing pleadings liberally does not justify the conclusion that any document filed . . . giving some notice of a claim satisfies the requirements of the Federal Rules."). As the Board's rule indicates, designation is appropriate only if the designated document "sufficiently states the factual basis and amount of the claim." Rule 6(b); *see Vega Roofing v. International Boundary & Water Commission*, GSBCA 13576-IBWC, 96-2 BCA ¶ 28,450, at 142,112 (granting request to designate papers filed to date as the complaint because "it is apparent that these documents set forth appellant's claim in simple, concise, and direct terms"); *Jefferson Bank & Trust*, GSBCA 9263, et al., 90-3 BCA ¶ 23,133, at 116,153 (designated complaint "adequately stated what appellant views as the relevant facts and grounds for recovery"); *Allied Research Associates, Inc.*, NASA BCA 272-1, 73-1 BCA ¶ 9795, at 45,757 (1972) (designation is permissible "if the Board considers the issues are sufficiently defined in such document or documents"). Further, regardless of whether the complaint is a formal pleading or a designated document, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face,'" *ThinkGlobal Inc. v. Department of Commerce*, CBCA 4410, 16-1 BCA ¶ 36,489, at 177,792 (quoting *Ashcroft v. Iqbal*, 555 U.S. 662, 678 (2009)), and to "raise a right of relief above the speculative level." *Id.* at 177,793 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 556 (2009)).

The claim that KOO identifies here contains sufficient information to satisfy the pleading requirements for a complaint. The claim letter contains a detailed history of the project and of the changes and delays that KOO alleges the VA caused. We can derive appropriate jurisdictional facts from its date, the passage of time that has occurred since its submission, and the representations in KOO's notice of appeal as indicating a "deemed denial" of its claim. *See Hawk Contracting Group, LLC v. Department of Veterans Affairs*, CBCA 5527, 16-1 BCA ¶ 36,572, at 178,120-21 (discussing process for appeal when contracting officer does not issue a written decision on a claim within the time permitted by statute). The claim letter also contains a breakdown of KOO's claimed damages, supplemented by further breakdowns of specific costs in attachments to the claim letter. We grant KOO's request to designate its claim and its attachments as its complaint.

II. The VA's Answer

We recognize that the format of KOO's claim, with its accompanying graphs and schedules, creates a dilemma for the VA in preparing an answer. In whatever form the answer takes, "a denial must fairly respond to the substance of the allegations." Fed. R. Civ. P. 8(b)(2). "[T]he responding party [must] admit or deny the allegations contained in the complaint in a manner sufficient to place the opposing party 'on notice of the position of its opponent.'" *JR Services, LLC v. Department of Veterans Affairs*, CBCA 4826, 16-1 BCA ¶ 36,238, at 176,807 (quoting *Trident Industrial Products Corp.*, DOT BCA 2833, 96-1 BCA ¶ 28,061, at 140,128 (1995)). Further, "the answer generally 'should apprise the opponent of those allegations in the complaint that stand admitted and will not be in issue at trial and those that are contested and will require proof to be established to enable the [appellant] to prevail.'" *Id.* (quoting 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1261, at 526 (3d ed. 2004)). Yet, just as there is no mandatory form for a complaint, there is no mandatory form for an answer. *Id.*

Unless the VA can deny every factual allegation contained in the complaint, including KOO's allegations about contract formation, a general denial of all allegations would seem inappropriate. *See* 5 Charles Alan Wright & Arthur R. Miller, *supra*, § 1266, at 550 ("Since the responsive pleader does not seek to deny each and every allegation of his opponent's pleading, it technically would be improper to employ a general denial."). Absent a good faith ability to enter a general denial, the respondent "must either specifically deny designated allegations or, generally deny all except those specifically admitted." *JR Services*, 16-1 BCA at 176,807 (quoting Fed. R. Civ. P. 8(b)(3)). Determining how to prepare such an answer in response to a multi-page document containing lengthy allegations, with attachments containing graphics and charts, that was not written in a manner designed for a paragraph-by-paragraph response may require some creativity. Although it might impose additional burdens on the respondent, the VA could number the paragraphs in KOO's claim itself and

file that numbered document along with its answer, allowing the Board to follow the VA's paragraph-by-paragraph response. Alternatively, the VA could attempt to provide a summary response to the claim's salient allegations either on a page-by-page or an overarching basis, although we understand the VA's concerns about possibly admitting an allegation by accidental omission through such an effort. *See* Fed. R. Civ. P. 8(b)(6) ("An allegation – other than one relating to the amount of damages – is admitted if a responsive pleading is required and the allegation is not denied."), *quoted in Mission Support Alliance, LLC v. Department of Energy*, CBCA 4985, 16-1 BCA ¶ 36,210, at 176,683; 5 Charles Alan Wright & Arthur R. Miller, *supra*, § 1266, at 552 ("Care should be exercised . . . in using specific denials and qualified general denials to make certain that the pleader's response to each of the averments in the preceding pleading is clear.").

"The federal pleading rules are meant to be construed liberally in order to do substantial justice." *Bond v. Ecolab, Inc.*, No. 06-15072, 2007 WL 390871, at *1 (E.D. Mich. Jan. 31, 2007); *see* Fed. R. Civ. P. 8(e) ("Pleadings must be construed so as to do justice."). That is particularly true in proceedings before the Board, in which "pleadings and practice are much less formal, by necessity and design, than are those of the federal court system." *Space Age Engineering, Inc.*, ASBCA 25761, et al., 83-2 BCA ¶ 16,789, at 83,439. Even "[t]he Federal Rules of Civil Procedure do not require that a party go through an inordinate effort in crafting an answer." *Trident Industrial*, 96-1 BCA at 140,128, *quoted in Mission Support Alliance*, 16-1 BCA at 176,684. Our rule permitting an appellant to designate one or more documents as its complaint allows the appellant to save time and cost in pursuing its appeal before the Board, but the rule is not intended as a mechanism by which to shift burdens and costs from the appellant to the respondent. The appellant's election to designate a document as its complaint should not result in the respondent having to undertake extraordinary efforts and time to reformat and/or restructure that designated complaint to allow it to respond.

There is no reason that, when an appellant elects to take advantage of the reduced formality in pleading that the Board's rules offer, we cannot similarly offer a reduced formality to the respondent with regard to its responsive pleading. *See* Rule 1(c) (constructing the Board's rules "to secure the just, informal, expeditious and inexpensive resolution of every case"). Where, as here, the appellant has elected to designate its claim as its complaint, it may be appropriate, depending upon the circumstances, to allow the Government to designate the contracting officer's decision as its answer, assuming that the decision addresses the substantive allegations contained in the contractor's claim. *See Mission Support Alliance*, 16-1 BCA at 176,684-85 (discussing the unique nature of the complaint and answer in CDA appeals, with jurisdiction necessarily framed by the claim document). We see no reason to impose unequal burdens on the parties. Although, depending upon the circumstances, the respondent may separately have to list or describe

affirmative defenses that it might want to raise or supplement the decision with additional information, we elect to grant the respondent the right in this appeal, if it so chooses, to designate the contracting officer's decision, which it currently anticipates issuing no later than April 25, 2018, as its answer if it determines that the decision provides the information that its answer should convey. "As long as the answer gives reasonable notice of those allegations sought to be put in issue, the pleading will be effective as a denial," 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1261, at 473 (Supp. 2017), and we will interpret the VA's answer liberally to avoid finding factual admissions except where such admissions are clear. *See Mission Support Alliance*, 16-1 BCA at 176,685, (requirements of Rule 8(b) are satisfied "[a]s long as the opposing party is placed on notice of the position of its opponent").

We leave to the VA's discretion the determination of whether to designate the decision as its answer, to attempt to respond to the designated complaint in narrative form on a page-by-page basis, or to engage in a more detailed paragraph-by-paragraph form of responsive pleading. In any event, we affirmatively eliminate any requirement for the VA to respond to the attachments to KOO's claim letter, as it would be awkward to require a written response to "allegations" set forth in graphs and charts and to actual documents created during contract performance.

Decision

For the foregoing reasons, we grant KOO's request to designate its claim and its attachments as its complaint. The VA is authorized to designate the contracting officer's decision as its answer if, in its discretion, it determines that it is appropriate to do so. The VA shall file its answer to that complaint no later than May 4, 2018.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge