UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND IS BEING PUBLICLY RELEASED IN ITS ENTIRETY ON MARCH 3, 2021

MOTION TO DISMISS DENIED: February 23, 2021

CBCA 6477

MISSION SUPPORT ALLIANCE, LLC,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Marisa M. Bavand and Allison L. Murphy of Groff Murphy PLLC, Seattle, WA, counsel for Appellant.

Paul R. Davis and Andrew J. Unsicker, Office of Chief Counsel, Department of Energy, Richland, WA, counsel for Respondent.

Before Board Judges **SOMERS** (Chair), **LESTER**, and **CHADWICK**.

CHADWICK, Board Judge.

The appellant, Mission Support Alliance, LLC (MSA), filed a motion seeking dismissal "for lack of jurisdiction" of two government theories of entitlement to relief that the respondent, Department of Energy (DOE), argues were encompassed in the 2019 contracting officer's decision from which MSA appealed. In later briefing, MSA suggested that we could, alternatively, rule that DOE fails to state a claim for relief. Although we understand the issues that MSA seeks to raise and we suspect they could be susceptible to

resolution on some sort of motion, we deny the present motion because MSA does not actually want us to "dismiss" any portion of its appeal or of the complaint that MSA filed.

Background

We previously described the cost-type contract at issue here in *Mission Support Alliance, LLC v. Department of Energy*, CBCA 6477, 20-1 BCA ¶ 37,657. In February 2019, a DOE contracting officer issued a decision asserting a claim against MSA under the contract and demanding repayment of $15,419,830 in allegedly "unallowable subcontract costs." The decision itemized the DOE claim as including amounts for subcontractor costs questioned in past audits; "[p]rojected unallowable costs to audits not completed [sic]"; and, as the largest quantum element, $10 million for "Other Matters[:] unquantified internal control issues and procedure violations; Five unresolved audits; and Failure to flow down terms and conditions." The parties disagree about whether the decision adequately notified MSA of exactly what costs and audits DOE was referencing.

MSA filed this appeal in May 2019. In June 2019, MSA filed a complaint with six counts, titled, "Improper Disallowance of Costs Despite MSA's Compliance with Contractual Audit Requirements," "Abuse of Discretion," "Statute of Limitation," "Estoppel," "Waiver," and "Acquiescence." In the complaint, MSA described the "Other Matters" category of DOE's claim as "arbitrary and capricious and constitut[ing] an abuse of discretion" because "DOE does not describe how it arrived at the figure of $10,000,000 or specify any particular component amounts." DOE asserted no affirmative defenses in its answer and asked the Board to "enter judgment" in DOE's favor.

In August 2019, MSA served interrogatories and a request for production intended to obtain more information about the "Other Matters" category of DOE's claim. Unsatisfied with DOE's response, MSA filed a motion for summary judgment, which we denied. In October 2020, MSA again sought clarification from DOE as to the "Other Matters" category of the claim. In response, DOE pointed to alleged violations of certain contract clauses by MSA's "pre-select" subcontractors as the basis for that aspect of the claim.

MSA filed the instant motion in December 2020. Asserting that it had been unable to gain an understanding of the "Other Matters" and had received from DOE only "a string of ever-expanding, inscrutable explanations not grounded in relevant law or fact," MSA stated that the dispositive issues presented by its motion were: (1) "Whether DOE's claim alleging violation of [a particular contract clause] by MSA's pre-select subcontractors must be dismissed for lack of jurisdiction because it is beyond the scope of [the contracting officer's decision] which forms the basis of this action"; and (2) "Whether DOE's claim alleging violation of [another contract clause] by pre-select subcontractors and associated

disallowance calculations other than those identified on the face of the [decision] must be dismissed for lack of jurisdiction" for the same reason.[1]

DOE argued in opposing the motion that the two DOE theories identified by MSA "are not new claims, and the applicability of [the two cited contract clauses] to the allowability of subcontract costs was apparent on the face of the contract . . . . Thus, MSA cannot reasonably claim to have had no notice of their limitations on cost allowability." The panel heard oral argument on the motion in February 2021.

Discussion

MSA's jurisdictional motion—which we believe MSA filed with a genuine desire to advance the case by narrowing the issues in dispute—is not the right vehicle to raise the issues that MSA wants the Board to resolve. MSA acknowledged at oral argument that it does not contend that we lack "jurisdiction" to decide the appeal that MSA filed in 2019. MSA does not, in fact, want the Board to throw out or to refuse to rule on any aspect of MSA's timely challenge to the decision that the contracting officer issued in February of that year. *See* 41 U.S.C. § 7105(e)(1)(B) (2018); *Bass Transportation Services, LLC, v. Department of Veterans Affairs*, CBCA 4995, 16-1 BCA ¶ 36,464 ("The Board gains jurisdiction . . . after a claim is presented to the contracting officer and is either decided or deemed denied, and the contractor files a timely appeal.").

We fully understand that MSA wants us to exclude from the case certain issues that MSA perceives to have been raised belatedly by DOE. We agree with MSA, furthermore, that a government claim is like a contractor's claim, in that neither may expand at the Board beyond the scope of the claim decided by the contracting officer. *E.g.*, *Santa Fe Engineers, Inc. v. United States*, 818 F.2d 856, 858 (Fed. Cir. 1987); *Aerovironment, Inc.*, ASBCA 58598, 16-1 BCA ¶ 36,337 (denying leave to amend the answer); *Unconventional Concepts, Inc.*, ASBCA 56065, et al., 10-1 BCA ¶ 34,340 (striking counterclaims from the answer). Our difficulty arises when we try to link MSA's motion to the operative documents before us, which consist of the contracting officer's decision, MSA's notice of appeal, MSA's complaint, and DOE's answer.[2] Even assuming without deciding that we otherwise agreed with MSA's legal analysis, we would not "dismiss" anything in those documents for "lack

---

[1] A third issue raised by MSA, whether DOE had "explain[ed]" its claim "with sufficient particularity" in correspondence with MSA's counsel, is the province of the presiding judge and will be addressed separately from this decision.

[2] We need not speculate as to whether the result might differ if DOE had filed the complaint as Board Rule 6(a) permits for a "respondent asserting a claim."

of jurisdiction." DOE authored only the decision and the answer, and MSA does not point to jurisdictional defects in either document. To the contrary, MSA's position is that DOE is bound jurisdictionally to the scope of the contracting officer's decision.

MSA explained at oral argument that what it wants "dismissed" from the case are certain positions taken by DOE counsel in "letters" regarding the scope of DOE's claim. Again, we understand in principle why litigation correspondence may raise concerns regarding the proper scope of a claim before the Board, and we understand why a party might raise such concerns in good faith. We do not believe, however, that in the current posture of the appeal, MSA has presented a well-formulated "challeng[e to] the Board's [statutory] jurisdiction." Rule 8(b) (48 CFR 6101.8(b) (2019)). If a party asserts among its arguments a claim that was *neither* decided by the contracting officer *nor* set forth in a pleading, the Board has the option of simply not addressing that new claim when resolving the case and need not issue a formal dismissal. *See P.K. Management Group, Inc. v. Department of Housing & Urban Development*, CBCA 6185, 19-1 BCA ¶ 37,417, *aff'd*, No. 2020-1260, 2021 WL 382420 (Fed. Cir. Feb. 4, 2021); *Nassar Group International*, ASBCA 58541, et al., 19-1 BCA ¶ 37,405 (denying the appellant's motion for summary judgment in part because "we do not possess jurisdiction over appellant's [new] impossibility claim").

MSA argued for the first time in its reply that the DOE contracting officer's decision "is insufficient to state a plausible claim of relief on its face" and accordingly "must be dismissed." We acknowledge that Rule 8(e) states literally that "[a] party may move to dismiss all or part of a claim for failure to state grounds on which the Board could grant relief"—not all or part of a *complaint.* Nonetheless, a contracting officer's decision is not a pleading before the Board, and we interpret Rule 8(e) as limited to motions to dismiss claims that are asserted, or at least incorporated, in pleadings. *Cf.* Fed. R. Civ. P. 12(b)(6) (referring to failure to state a claim as a "defense to a claim for relief in [a] pleading"); *RocJoi Medical Imaging, LLC v. Department of Veterans Affairs*, CBCA 6885, 20-1 BCA ¶ 37,746 ("We have liberally construed the complaint [on a motion to dismiss] by drawing on the more detailed allegations in the claim."). Even if the motion were timely made, we would not entertain a motion to "dismiss" the contracting officer's decision itself.

Alternatively, the Board considered treating MSA's motion to dismiss as a motion in limine or, recognizing that granting the motion could have the effect of granting MSA's appeal in part, as a motion for partial summary judgment. We conclude, however, that the prudent course is to deny the motion and for the parties to confer with the presiding judge about further procedures that may be appropriate.

Decision

MSA's motion to dismiss is **DENIED**.

Kyle Chadwick
KYLE CHADWICK
Board Judge

We concur:

Jeri Kaylene Somers
JERI KAYLENE SOMERS
Board Judge

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