



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: December 5, 2024

CBCA 8187

WEST POINT ENGINEERS,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Douglas L. Patin and Lee-Ann Brown of Bradley Arant Boult Cummings LLP, Washington, DC, counsel for Appellant.

Kathleen Ramos, Office of General Counsel, Department of Veterans Affairs, Arlington, TX, counsel for Respondent.

Before Board Judges **ZISCHKAU**, **O'ROURKE**, and **KANG**.

KANG, Board Judge.

Respondent, the Department of Veterans Affairs (VA), filed a motion to dismiss the appeal of appellant, West Point Engineers (WPE), for three primary reasons: (1) the Board lacks jurisdiction to hear the appeal because the underlying claim lacked a sum certain; (2) the Board lacks jurisdiction to hear the appeal because the complaint raises arguments that were not presented to the contracting officer in the claim; and (3) the appeal fails to state a basis upon which relief could be granted. Appellant did not file a brief in opposition to respondent's motion and instead filed a motion to dismiss the appeal without prejudice. Appellant stated that although it "disagrees with the jurisdictional arguments raised in the VA's Motion, to avoid a jurisdictional dispute, Appellant requests that the Board allow

Appellant to dismiss this Appeal without prejudice so that it may cure the jurisdictional deficiencies claimed by the VA, as well as amend and clarify its claim.” Appellant’s Motion for Voluntary Dismissal Without Prejudice at 1-2. Respondent filed a brief in opposition to appellant’s motion to dismiss the appeal without prejudice and requested that the Board rule on its pending motion to dismiss.

Our Rules do not permit dismissal of an appeal without prejudice where appellant does not move jointly with the respondent. Rule 12(b)(3) (48 CFR 6101.12(b)(3) (2023)). We therefore consider respondent’s motion to dismiss the appeal and conclude that we lack jurisdiction because the appeal raises arguments that were not raised in the underlying claim presented to the contracting officer.

Background

The VA awarded a fixed-price contract to WPE for architect/engineering services for the preparation of the design, drawings, and specifications associated with the demolition and removal of buildings at the VA Medical Center in Manchester, New Hampshire. The solicitation’s statement of work included an estimated construction cost of \$330,000. Respondent’s Statement of Undisputed Material Facts ¶ 4. In December 2023, the VA issued a unilateral modification of the contract that increased the construction cost estimate to \$2,500,000. Appeal File, Exhibit 20 at 003246.¹ Appellant submitted a claim to the contracting officer, which was denied on June 25, 2024. This appeal followed.

Discussion

The Board derives its jurisdiction to decide contract disputes from the Contract Disputes Act (CDA). 41 U.S.C. §§ 7101–7109 (2018). When a contractor seeks the payment of money, the CDA requires both a claim from the contractor and a contracting officer’s decision on the claim prior to an appeal to the Board. 41 U.S.C. §§ 7103(a)(1), 7104(a). An appeal of the denial of a claim brought under the CDA “must be ‘based on the same claim previously presented to and denied by the contracting officer.’” *Qwest Communications Co. v. General Services Administration*, CBCA 3423, 14-1 BCA ¶ 35,655, at 174,564 (quoting *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003)). The appeal “must arise from the same operative facts and claim essentially the same relief.” *Id.*; see *EHR Doctors, Inc. v. Social Security Administration*, CBCA 3522, 14-1 BCA ¶ 35,630, at 174,492. An appeal or part of an appeal that raises different operative facts or claims different relief

¹ All exhibits are found in the appeal file.

than what was presented to the contracting officer, must be dismissed. *MLU Services, Inc. v. Department of Homeland Security*, CBCA 8002, 24-1 BCA ¶ 38,655, at 187,915.

Respondent contends that the claim submitted to the contracting officer relied on different arguments and sought different relief than what is pursued in the appeal. Although appellant generally states that it “disagrees with the jurisdictional arguments raised in the VA’s Motion,” it does not specifically address respondent’s contention that the arguments raised in the appeal were not presented to the contracting officer. Appellant’s Motion for Voluntary Dismissal Without Prejudice at 1.

Appellant’s claim argued that the construction cost estimate for the statement of work had been negligently prepared and requested that the fixed fee rate specified in the contract be increased. Exhibit 26 at 003756-57. In contrast, the appeal raises two different arguments that merited an increase to the value of the contract: (1) the modified scope of work required increased design effort in preparing drawings, and (2) the modified scope of work required a greater number of drawings as compared to what appellant anticipated based on the original cost estimate. Complaint ¶¶ 13-15. On this record, we find that the arguments and relief sought in the claim are different than those in the appeal. We therefore dismiss the appeal for lack of jurisdiction because the arguments were not presented in a claim to the contracting officer.²

Decision

The appeal is **DISMISSED FOR LACK OF JURISDICTION**.

Jonathan L. Kang
JONATHAN L. KANG
Board Judge

² Because we dismiss the appeal based on a lack of jurisdiction in connection with the arguments presented to the contracting officer, we need not address respondent’s other arguments, including that the Board does not have jurisdiction to hear the appeal because the claim lacked a sum certain. We note, however, that the Court of Appeals for the Federal Circuit has explained that the lack of a sum certain in a claim is not a jurisdictional defect. *See ECC International Constructors, LLC v. Secretary of the Army*, 79 F.4th 1364, 1375-77 (Fed. Cir. 2023).

We concur:

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge