UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED; SMALL BUSINESS ADMINISTRATION AUTHORIZED TO PARTICIPATE IN LIMITED MANNER:
May 6, 2024

CBCA 7966

FEDRESULTS, INC.,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

William A. Shook of The Law Offices of William A. Shook PLLC, Washington, DC; and Mary Pat Buckenmeyer of Dunlap Bennett & Ludwig, Vienna, VA, counsel for Appellant.

Brian A. Quint, Office of the Solicitor, Department of the Interior, Washington, DC; and Robert D. Banfield, Office of the Solicitor, Department of the Interior, Vienna, VA, counsel for Respondent.

Meagan K. Guerzon and Daniel Murphy, Office of Procurement Law, Small Business Administration, Washington, DC, counsel for the Small Business Administration.

Before Board Judges **LESTER**, **O'ROURKE**, and **CHADWICK**.

LESTER, Board Judge.

Respondent, the Department of the Interior (Interior or DOI), has filed a motion to dismiss this appeal for failure to state a claim upon which relief can be granted. The first of

DOI's two bases for dismissal is that, in its notice of appeal (which subsequently was designated as the complaint), appellant, FedResults, Inc. (FRI), did not identify the sum certain that it wants the Board to award, even though FRI had previously identified a sum certain in the certified claim underlying this appeal. DOI's second basis for dismissal relies on documents outside the notice of appeal and complaint, and DOI asks us to grant it limited discovery to support its dismissal request. Because FRI included in its certified claim a sum certain that it was demanding to be paid, it has satisfied the Federal Acquisition Regulation (FAR) requirement for identifying a sum certain. Because DOI relies on documents and information from outside FRI's notice of appeal and complaint, DOI cannot prevail on its second basis for dismissal for failure to state a claim and must follow the procedures required for seeking summary judgment. DOI's motion to dismiss is denied.

With regard to a procedural matter, four attorneys have entered notices of appearance as representatives of the respondent: two attorneys from DOI's Office of the Solicitor and two attorneys from the Small Business Administration (SBA). DOI, as the agency that contracted with FRI, is the proper respondent here pursuant to the Board's rules. The SBA attorneys do not represent DOI but seek to participate in this appeal to ensure that the SBA's interests, rather than just DOI's, are being defended. We reject DOI's suggestion that the SBA be allowed to intervene in this appeal, but we will allow the SBA to participate in the appeal on a limited basis, subject to the coordination of its activities with DOI and the continuing management of and control by the presiding judge. DOI remains the party responsible for defending this appeal.

Background

I. FRI's Notice of Appeal and Complaint

FRI filed a notice of appeal with the Board on December 20, 2023, which the Clerk docketed as CBCA 7966. In that notice, FRI alleged that it had two task orders with DOI through which FRI's subcontractor, Granicus, LLC (Granicus), had provided software services (through an arrangement made by DOI) to an office of the SBA. Notice of Appeal ¶ 6. FRI alleged that the software services that the SBA used far exceeded the authorized use under the terms of the task orders and the associated software licensing agreement. *Id.* ¶ 7. It identified the task orders as "Task Orders 140D0421F0121 ('TO 0121') and 140D0422F0146 ('TO 0146') under Blanket Purchase Agreement No. 140D6318A0001 (the 'BPA') awarded under [FRI's] General Services Administration ('GSA') Contract No. GS-35F-0256K." *Id.* ¶ 1. FRI alleged that "[FRI] and its subcontractor Granicus successfully performed and delivered the Software services required by the Contract and Task Orders" and that FRI "has not reasonably been compensated based on the fair and reasonable pricing terms of the Contract." *Id.* ¶¶ 42, 45.

In the notice of appeal's prayer for relief, FRI requested "[t]he establishment of entitlement amounts due for the actual use of the Software system acquired by the SBA under the Contract" but did not there specify the dollar amount that it was seeking. FRI alleged that, on February 23, 2023, it had submitted its certified claim to a contracting officer at DOI seeking payment for these software services and that DOI's contracting officer issued a decision on September 22, 2023, denying the claim. Notice of Appeal ¶¶ 1, 5.

FRI attached to its notice of appeal a copy of its February 23, 2023, certified claim, which showed that FRI had sought payment "in the amount of $5,700,829.51." Notice of Appeal, Attachment 2b. In attaching the contracting officer's final decision on that claim to the notice of appeal, however, FRI made a mistake: it attached the wrong decision. The decision that it attached to the notice was dated January 4, 2023, and related to a different claim (one that FRI had submitted in September 2022, seeking payment of $94,228.02) than the one described in FRI's actual notice of appeal. *Id.,* Attachment 1.

On January 4, 2024, having not yet recognized that it made a mistake when filing its notice of appeal, FRI requested that the Board designate its notice of appeal as its complaint, as permitted by Board Rule 6(c) (48 CFR 6101.6(c) (2023)).

II. The Government's Motion to Dismiss

On February 5, 2024, DOI filed a motion to dismiss this appeal for failure to state a claim. DOI identified two grounds for its motion: (1) that FRI did not in its notice of appeal and complaint allege the sum certain that it is seeking to recover and (2) that FRI's claim is barred under the doctrine discussed in *Severin v. United States*, 99 Ct. Cl. 435 (1943) (the *Severin* doctrine), because "there is no evidence that FRI owes a debt or is liable to its subcontractor Granicus for the alleged overages." Respondent's Motion to Dismiss at 3.

With regard to the sum certain issue, DOI argued that FRI did not, in its notice of appeal, which became its complaint, specify the amount of money that it is seeking in this appeal and that the copy of the contracting officer's final decision that FRI attached to the notice of appeal was not the one that it described in the notice. Respondent's Motion to Dismiss at 5-7. DOI argued that the absence of a specific monetary request in the written portion of its notice of appeal and the confusion created by the documents attached to the notice of appeal made it appear that FRI was seeking a declaratory judgment in this appeal rather than a monetary award. DOI argued that, since FRI could have but failed to set up its appeal as one seeking monetary relief, the Board lacked jurisdiction. *Id.* (citing *HPM Corp. v. Department of Energy*, CBCA 7559, 23-1 BCA ¶ 38,389, and *Duke University v. Department of Health & Human Services*, CBCA 5992, 18-1 BCA ¶ 36,023).

With regard to the *Severin* doctrine, DOI argued that, based on documents in the Rule 4 appeal file that DOI had submitted to the Board but that were not contained or referenced in FRI's notice of appeal, "it appears that FRI and Granicus do not have an overarching agreement that . . . require[s] that FRI . . . pay Granicus for" the costs being sought in this appeal. Respondent's Motion to Dismiss at 3. Nevertheless, to support its *Severin* argument, DOI "request[ed] limited discovery regarding the nature of the relationship between FRI and Granicus." *Id.* at 8.

III. Subsequent Briefing

On February 28, 2024, FRI filed a motion seeking leave to amend its notice of appeal and its complaint. In that motion, FRI represented that, when preparing its response to the Government's motion to dismiss, it realized that it had attached the wrong contracting officer's decision to the notice of appeal and complaint. Although, in its notice of appeal, FRI described a contracting officer's decision dated September 22, 2023, and indicated that the September 22 decision was attached, the actual attachment was a final decision dated January 4, 2023, involving a different claim.

By order dated March 1, 2024, the Board granted FRI's motion and substituted the September 22 final decision for the January 4 decision. In the final decision that now accompanies the corrected version of FRI's notice of appeal and complaint, the contracting officer recognizes that FRI sought a total of $5,700,829.51 in its certified claim.

FRI responded to DOI's motion to dismiss on March 4, 2024. DOI did not file a reply brief.

IV. The Government's Representation in this Appeal

When FRI filed its appeal, the Clerk's Office designated DOI, the agency that executed the two task orders at issue here, as the respondent. Two attorneys from DOI's Office of the Solicitor have entered their appearances as representatives for the respondent. In addition, two attorneys from the SBA's Office of Procurement Law, Meagan K. Guerzon and Daniel Murphy, have filed notices of appearance, stating that they are doing so "for respondent (SBA)" or, alternatively, "on behalf of the Government . . . as co-counsel and in addition to" DOI's attorneys. On April 22, 2024, DOI informed the Board that the SBA attorneys are not authorized to represent or bind DOI but are here to "represent SBA's own unique interests in the matter." Respondent's Representation at 1. The SBA attorneys did not file a motion with the Board seeking permission to participate in the appeal.

DOI has explained its relationship with the SBA on the two task orders at issue as follows. According to DOI, DOI's Federal Consulting Group (DOI-FCG) works with various "federal agencies to improve the services and performance they deliver to or on behalf of the American people." Respondent's Representation at 2 (quoting https://www.doi.gov/fcg). Separately, another part of DOI, the Interior Business Center (DOI-IBC), "operates under a fee-for-service, full cost recovery business model, offering Acquisition . . . systems and services to federal organizations," https://www.doi.gov/ibc/about-us (last visited May 2, 2024), with statutory authority to provide cross-agency support services. Respondent's Representation at 2. IBC provides acquisition support services to FCG. *Id.*

DOI has further represented that DOI-FCG and the SBA's Office of Communication and Public Liaison (SBA-OCPL) entered into an "Intergovernmental Reimbursable, Buy/Sell Agreement" under which DOI-FCG, as the "provider" or "Servicing Agency," was to obtain digital subscription management services for SBA-OCPL, the "customer" or "Requesting Agency." Respondent's Representation at 1-2.[1] Although not a signatory to that intergovernmental agreement, DOI-IBC, in its support role for DOI-FCG, acted through its "Acquisition Service Directorate" (AQD) to issue to FRI the two task orders for the SBA digital subscription services at issue in this appeal. *See* Appeal File, Exhibits 4, 5. In those task orders, the issuing office is identified as "IBC, AQD," but the "FCG End-User" is identified as the "Small Business Administration (SBA) Office of Communication & Public Liaison (OCPL)." Exhibits 4 at 1, 3-4; 5 at 1, 4.

DOI tells us that, under the intergovernmental agreement, SBA-OCPL "is generally responsible for all costs associated with termination, disputes, and protests, including settlement costs, except that [SBA-OCPL] shall not be responsible to [DOI] for costs associated with actions that stem from errors in performing the responsibilities assigned to [DOI]." Respondent's Representation at 3. Further, DOI "must consult with the [SBA-OCPL] before agreeing to a settlement or payments to ensure that [DOI] has adequate time in which to raise or address any fiscal or budgetary concerns arising from the proposed payment or settlement." *Id.* As noted above, DOI-IBC is the issuing agency for the task orders, Exhibits 4, 5, and the DOI contracting officer, rather than the SBA, received FRI's certified claim and issued the decision on appeal.

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[1] The DOI-FGC/SBA-OCPL intergovernmental agreement does not appear to be a part of the record in this appeal. Accordingly, we cannot confirm its contents.

Discussion

I. DOI's Sum Certain Argument

Although the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018), does not expressly require that a contractor seeking monetary relief identify the sum certain that it is seeking, "there is no dispute that the need to state a sum certain in submitting a claim [to the contracting officer] . . . is a mandatory rule provided for in the FAR." *ECC International Constructors, LLC v. Secretary of the Army*, 79 F.4th 1364, 1370 (Fed. Cir. 2023); *see id.* at 1372 (citing FAR 2.101, 52.233-1 (48 CFR 2.101, 52.233-1)). Here, DOI is not complaining about a missing sum certain in FRI's certified claim. It could not since, in its claim, FRI demanded payment from DOI in the sum certain of $5,700,829.51. DOI instead complains that FRI's *notice of appeal*, which FRI has designated as its complaint, is defective (warranting dismissal of this appeal) because FRI did not state in either the appeal notice or the complaint the sum certain that FRI now wants the Board to award it.

To the extent that DOI believes that FRI's initial error in attaching the wrong contracting officer's decision to its notice of appeal created confusion about the claim at issue or its amount, FRI has corrected that error and eliminated that confusion through a motion to amend, which the Board has granted.[2]

To the extent that DOI is complaining because FRI, in the written portion of its notice of appeal, asked the Board to determine the "entitlement amounts due," without expressly stating whether it was still seeking payment of $5,700,829.51, DOI has identified no valid basis for dismissal. The FAR only requires that a contractor include a "sum certain" in its claim to the contracting officer. *Essex Electro Engineers, Inc. v. United States*, 960 F.2d 1576, 1580-81 (Fed. Cir. 1992); FAR 2.101. It does not impose a similar requirement for a notice of appeal. *See Spectrum Leasing Corp. v. General Services Administration*, GSBCA 11977, et al., 93-3 BCA ¶ 26,202, at 130,428 ("We do not agree with respondent's contention that the current FAR definition of 'claim' requires the sum certain to be identified in the

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[2] FRI correctly described the final decision on appeal in the written portion of its notice of appeal, and it attached the correct certified claim on appeal. Its only error was in attaching the wrong contracting officer's final decision. That is not a defect that affects the Board's jurisdiction to entertain this appeal under the CDA. Although the Board's Rules indicate that a proper notice of appeal "should" include "[a] copy of the contracting officer's decision on the claim," Rule 2(a), they do not make the omission of that attachment a defect that precludes an effective filing. The Board and DOI had notice of what claim was being appealed.

contractor's notice of appeal."). Whether a board has authority to entertain an appeal in a CDA case "is determined by the adequacy or sufficiency of the submissions to the contracting officer, and not by the nature of the notice of appeal or complaint submitted to the Board." *Bath Iron Works*, ASBCA 32770, 88-1 BCA ¶ 20,438, at 103,358 (1987).

II. DOI's *Severin* Argument

Under the *Severin* doctrine, a prime contractor submitting a pass-through claim on behalf of its subcontractor can recover from the Government the damages that the subcontractor incurred "only when the prime contractor has reimbursed its subcontractor for the latter's damages or remains liable [to the subcontractor] for such reimbursement in the future. These are the only ways in which the damages of the subcontractor can become, in turn, the damages of the prime contractor, for which recovery may be had against the Government." *J.L. Simmons Co. v. United States*, 304 F.2d 886, 888 (Ct. Cl. 1962). That being said, "[t]he *Severin* doctrine can only bar the prime contractor's pass-through suit against the government if the government first asserts at trial, and then proves, that the prime contractor is not liable to the subcontractor for the costs in suit." *E.R. Mitchell Construction Co. v. Danzig*, 175 F.3d 1369, 1371 (Fed. Cir. 1999).

DOI alleges in its motion to dismiss that "there is no evidence that FRI owes a debt or is liable to its subcontractor Granicus for the alleged overages." Respondent's Motion to Dismiss at 3. Referencing an email in the Rule 4 appeal file that FRI sent to a DOI-IBC representative in February 2023, DOI argues that "it appears that FRI and Granicus do not have an overarching agreement" that would require FRI to pay Granicus for overage uses and that, when DOI previously attempted to obtain more definitive information from FRI about its agreements with Granicus, FRI responded in a manner that DOI interprets as meaning that FRI has no contractual obligation to pay Granicus the damages being sought. *Id.* at 3-4 (citing Exhibit 13). DOI also infers from Granicus's original attempt to submit its claim directly to the DOI contracting officer, rather than through FRI, that Granicus has no subcontractor relationship with FRI. *Id.* at 4.

DOI has identified no basis for dismissal for failure to state a claim. "In deciding such motions, the Board looks to Rule 12(b)(6) of the Federal Rules of Civil Procedure for guidance." Board Rule 8(e). "The Rule 12(b)(6) motion addresses itself solely to the question of whether the complaint fails to state a claim"—that is, it "only tests whether the claim has been adequately stated in the complaint." 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1356, at 369, 372 (3d ed. 2004); *see* 5C Charles Alan Wright & Arthur R. Miller, *supra*, § 1366, at 148 (a Rule 12(b)(6) motion "challenges the pleader's failure to state a claim properly"). In reviewing such a motion, the tribunal's "inquiry essentially is limited to the content of the complaint." 5B Charles Alan Wright &

Arthur R. Miller, *supra*, § 1356, at 372. DOI's motion does not focus on FRI's complaint or its notice of appeal. To the contrary, in seeking to dismiss this appeal, DOI ignores the allegations in FRI's notice of appeal and complaint, in which FRI alleges that Granicus is its subcontractor. Notice of Appeal ¶¶ 6, 33. Instead, to support its dismissal request, DOI asks the Board to consider evidence *outside of* FRI's notice of appeal and complaint, evidence that DOI has included in the Rule 4 appeal file.

"If, on a motion under Rule 12(b)(6) . . . , matters outside the pleadings are presented to and not excluded by the [tribunal], the motion must be treated as one for summary judgment." Fed. R. Civ. P. 12(d). Yet, "[c]onversion of a motion [to dismiss] into one for summary judgment should only occur after the parties have been offered a 'reasonable opportunity' to present pertinent summary judgment materials." *Rubert-Torres v. Hospital San Pablo, Inc.*, 205 F.3d 472, 475 (1st Cir. 2000). "[C]ourts have disfavored conversion when," as in this case, "'the motion comes quickly after the complaint was filed [or] discovery is in its infancy and the nonmovant is limited in obtaining and submitting evidence to counter the motion.'" *Easter v. United States*, 575 F.3d 1332, 1336 (Fed. Cir. 2009) (quoting *Rubert-Torres*, 205 F.3d at 475). Here, the parties have not yet even proposed a discovery schedule in response to the Board's initial procedures order, much less commenced discovery. We deny DOI's motion to dismiss, without prejudice to its right to raise its *Severin* concerns in a summary judgment motion (accompanied by proposed findings of uncontroverted fact) if, following discovery, it believes that its *Severin* concerns are factually and legally supportable.

III. The SBA's Participation in this Appeal

DOI is the proper respondent in this appeal. The two task orders at issue here are between FRI and DOI; FRI submitted its certified claim to the DOI contracting officer; and the DOI contracting officer issued the final decision on that claim, which is now on appeal. The contracting officer's final decision provides the jurisdictional basis for a CDA appeal, *Case, Inc. v. United States*, 88 F.3d 1004, 1008-09 (Fed. Cir. 1996), and Board Rule 1(b) designates "the government agency whose decision, action, or inaction" provides that jurisdictional basis as the "respondent" in the appeal. *See Raj K. Patel v. Executive Office of the President*, CBCA 7419, 22-1 BCA ¶ 38,150, at 185,288 (applying Rule 1(b) to identify appropriate respondent), *aff'd*, No. 2022-1962, 2022 WL 3711886 (Fed. Cir. Aug. 29, 2022). In this case, in accordance with standard practice, two attorneys from DOI have entered appearances to represent DOI in this appeal.

In addition to the attorneys from DOI, two attorneys for the SBA filed a notice of appearance in which they identified themselves as counsel "for respondent (SBA)" or, alternatively, "the Government." The SBA's reference to "respondent (SBA)" is incorrect

because, pursuant to Board Rule 1(b), DOI is the sole respondent here. *See CSI Aviation, Inc. v. General Services Administration*, CBCA 6543, 20-1 BCA ¶ 37,542, at 182,308 (denying motion from Immigration and Customs Enforcement to intervene in an appeal as a second respondent where the decision on appeal was made by the General Services Administration (GSA)). FRI's claim was submitted to DOI, not the SBA, and there is no SBA contracting officer's decision on appeal. Further, DOI has informed us that the SBA attorneys have no authority to bind DOI and are not representing DOI's interests in this appeal, making it clear that the SBA attorneys do not and realistically cannot represent the actual "respondent."

Nevertheless, from a practical standpoint, it will assist the development of this appeal to have SBA representatives involved in it. Other boards, including at least one of our predecessor boards, have in the past exercised their discretion to allow attorneys from a non-respondent agency to appear, in a limited manner, in appeals in which their agencies might have a pecuniary interest. *See, e.g.*, *Heritage Reporting Corp.*, GSBCA 10396, 92-1 BCA ¶ 24,677, at 123,121 (1991) (Department of Justice attorneys appearing on behalf of several non-respondent agencies, separately from respondent GSA attorneys); *Do-Well Machine Shop, Inc.*, ASBCA 34565, et al., 99-1 BCA ¶ 30,320, at 149,938 (attorney for the SBA appearing separately from respondent Department of the Air Force). We exercise our discretion to allow the SBA attorneys to "participate in the proceedings, but not with the status of a party intervenor," with the SBA's participation to be "conducted in conjunction with the party in privity." *S. Powell Construction Co.*, AGBCA 2004-122-1, 04-2 BCA ¶ 32,725, at 161,888. DOI, as "[t]he party in privity, however, remains ultimately responsible for . . . defending . . . the claim." *Id.* "The details regarding the participation, and any limitations thereon, will fall within the reasonable discretion of the presiding judge, who is tasked with managing the appeal." *Id.*

In the future, we anticipate that the SBA, to the extent that it wishes to participate in an appeal before the Board in which it is not the respondent, will file a motion with the Board seeking leave to participate rather than simply filing its attorneys' notices of appearance.

Decision

For the foregoing reasons, DOI's motion to dismiss this appeal for failure to state a claim is **DENIED**. The SBA will be allowed to participate in this appeal through its representatives and receive notice of filings in the appeal but must coordinate its activities

with DOI and remains subject to the presiding judge's continuing management of its involvement in the appeal.

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

We concur:

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

Kyle Chadwick
KYLE CHADWICK
Board Judge